Lack of written rules can rock the labour law tightrope

Section 188 of the Labour Relations Act (LRA) renders a dismissal unfair if the employer is unable to prove that it was fair. *This means, in a case of misconduct, that* the employer must be able to prove that it followed a fair disciplinary process and that its reason for firing the employee was fair. ***One of the key things that the employer must prove is that the employee has known the rule that he was fired for breaking.***

Far too many employers spend a lot of time and effort on formulating complex and extremely wordy charges but fatally fail to back them up with proof. As I have been unable to find a suitable dictionary definition of 'proof' I submit that 'proof' is 'relevant and legally permissible evidence that is backed up by other independent evidence'. Independent evidence is that which emanates from an entirely different source to that of the initial evidence.

It is most surprising that some large and well-established employers have failed to appreciate the need to submit solid proof in order to justify dismissals. This invariably results in very costly losses suffered by the employer.

A case in point is that of Glencore Operations SA vs Taala (Lex Info 27 March 2025. Labour Appeal Court case number JA 52/24). ***The employee, a rigger, was dismissed for negligence after a crane, in the process of lifting a drill mast, toppled over, costing the company R5.6 million.*** The crane operator had selected the wrong counterweight and the rigger was blamed for the loss because, allegedly, it was his duty to verify the crane operator's selection of the counterweight to be used.

The CCMA arbitrator found the dismissal to be unfair and ordered reinstatement without loss of benefits. This was because the employer had conceded that it had no written proof that it had been the rigger's duty to verify the crane operator's selection of the counterweight to be used.

The employer lost its review case and appealed the decision. In the Labour Appeal Court, the employer was still unable to point to proof of its contention that it had been the rigger's duty to verify the crane operator's selection of the counterweight to be used. The case report does not even contain an allegation by the employer that there was an unwritten rule imposing this duty on the rigger. As a result, the employer's appeal was dismissed.

It is understandable that the R5.6 million loss motivated the employer to fire somebody. However, based on the evidence, it appears that somebody other than the rigger was to blame, and that the rigger may have been scapegoated. It is puzzling that the crane operator who made the initial error had not been disciplined. And it is even more puzzling that the person in management who was responsible for making the crane safety rules had not been disciplined for designing inadequate rules.

Such costly errors can be avoided if management is trained in the creation and communication of rules and in the legal requirements for proving that dismissals are fair.