THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PR207/16

In the matter between:

RHINO PLASTICS (PTY) LTD	**Applicant**
and	
NTOMBEKHAYA SESANI *N.O.*	**First Respondent**
THE METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL	**Second Respondent**
NUMSA o b o M MAGADU	**Third Respondent**

Heard: **12 October 2017**

Delivered: **25 January 2018**

JUDGMENT

MAMOSEBO; AJ

Introduction

[1] This is a review application in terms of s 145 and/or 158(1)(g) of the Labour Relations Act[1] (the LRA). The applicant, Rhino Plastics (Pty) Ltd (employer) seeks an order substantially in the following terms: Reviewing and setting aside

[1] Act 66 of 1995 as amended.

the arbitration award by the first respondent, Ms Ntobekhaya Sesani (arbitrator) under the auspices of the second respondent, the Metal and Engineering Industries Bargaining Council (MEIBC) under Case Number MEPE2364 dated 13 September 2016; Substituting that arbitration award with an order that the dismissal of the employee was substantively fair; alternatively, reviewing and setting aside the arbitration award and referring the application to the MEIBC for determination afresh by an arbitrator other than Ms Sesani; and costs of the application. The employee is opposing the relief sought by the employer.

[2] The arbitrator was steeped in the atmosphere of the hearing. She heard the evidence of two witnesses who testified on behalf of the employer and the evidence of the dismissed employee as the applicant in the arbitration proceedings. A brief background to those facts follows.

[3] The employee was employed by the applicant as a Driver Assistant since 03 March 2008. He denied being a regular forklift driver and confirmed being a driver's assistant. Although he was only issued a forklift driver's licence he denied having been formerly trained to drive a forklift. He was, nevertheless, able to move pallets from one place to the other when he occasionally received requests to perform the functions of a forklift driver. On 07 December 2015 he was requested to move a generator using a forklift. He had to drive over a ramp. It is common cause that he approached the ramp facing forward and did not reverse into the ramp and the generator fell. The employer suffered damages of an estimated R21 000. The employer dismissed him on 19 January 2016 for being grossly negligent. The employer alleged that because he has used the forklift before and therefore knew how to use it; he was a qualified forklift driver and must have known how to drive up and down the ramp; he ought to have known that when he had a load he should move in reverse and his failure to do so deviated from the required standard making him grossly negligent.

[4] The arbitrator heard the matter on 31 August 2016 to determine the fairness of the dismissal. She found that the employee was negligent in driving the "hyster" (forklift) forward which constituted an act of misconduct. The question considered by the arbitrator was whether the misconduct committed was sufficiently gross to justify a dismissal. Having considered what is required to constitute gross negligence the arbitrator found that the conduct of the employee did not qualify as such. The employer was ordered to reinstate the applicant to his previous position and to pay him an amount of R26 499.60 before 30 September 2016. The employee was to return to work by 30 September 2016. The arbitrator did not make any order in respect of costs.

[5] The employer raised two grounds of review, alleging firstly: that the arbitrator failed to properly apply his mind and misconstrued the evidence hence arriving at a conclusion entirely disconnected from the evidence. Secondly, the order of reinstatement is unreasonable under the circumstances.

[6] The test laid down by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd*[2] is trite:

> "…..Section 145 is now suffused by the Constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: Is the decision reached by the Commissioner one that a reasonable decision-maker could not reach?"

[7] The courts have always warned against consideration of cases by adjudicators on a piecemeal basis. In *Goldfields Mining South Africa v CCMA & Others* [3] the Labour Appeal Court pronounced:

> "This piecemeal approach of dealing with the arbitrator's award is improper as the review court must necessarily consider the totality of the evidence and then

[2] (2007) 12 BLLR 1097 (CC) at para 110.
[3] at para 18

> decide whether the decision by the arbitrator is one that a reasonable decision-maker could make".

[8] Mr Posthuma, appearing for the employer, sought to convince me that the arbitrator's decision was unreasonable and not one that a reasonable decision-maker could reach. A careful reading of the award and the transcribed record of proceedings does not support the submission made. The following is stated in the founding affidavit by the employer:

> "the arbitrator concludes [at] para 24 that Mr Magadu was not an inexperienced driver and that he was negligent in the execution of [his] duties but then concludes [at] para 28 of the award that there was no evidence to suggest that the applicant failed to act in a manner in which a reasonable person would have acted."

The afore-mentioned is the basis on which the employer alleges that the finding by the arbitrator is disjointed from the objective evidence. I disagree. If one reads paras 24, 25, 26, 27, 28 and 29 of the award in sequence it becomes logical that the phrase "….suggests that he might not have been an inexperienced driver" was a typing error. A careful reading shows that the word "not" appearing before "inexperienced" was an error. I say so informed by the sentence at para 25 "despite his inexperience in driving the hyster…." and at para 28 "because of his inexperience." As well as at para 29 "…caused by inexperience…" demonstrates that the arbitrator had accepted that the employee lacked experience in driving the forklift.

[9] Having considered the nature of the offence and finding it to have been ordinary negligence and not gross negligence as found by the employer, coupled with the fact that the employee was a first offender and his period of service the arbitrator found that the dismissal was not an appropriate sanction. The employer's submission is that this finding is unreasonable. This Court has already pronounced in numerous cases that in the absence of material error of fact the findings of a commissioner are to be respected by the court even if the court was

to find that the dispute may be resolved one way rather than another.[4] The arbitrator has made factual findings in arriving at her conclusion which I find to have been reasonable.

[10] The arbitrator has, in my view, considered the matter before her reasonably. I have not found any misconduct, gross-irregularity or abuse of power on her part. She has shown how she reached the outcome in the light of all issues and evidence placed before her.

[11] I am satisfied that the arbitrator's award constitutes a decision which a reasonable decision maker could have reached, on the evidence presented before her. The review application must therefore fail.

[12] In the result, the following order is made:

Order

1. The application is dismissed with costs.

MC Mamosebo

Acting Judge of the Labour Court of South Africa

[4] see: *Prowalco (Pty) Ltd v CCMA & Others (2011) JOL 27209 (LC),* Fidelity Cash Management Services CCMA & Others (2008) 29 ILJ 964 (LAC).

Appearances

For the applicant:	Mr A Posthuma
Instructed by:	Snyman Attorneys
For the respondents:	Advocate E van Staden
Instructed by:	Justice Centre, Port Elizabeth