

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JR 1207/17

In the matter between:

**PREMIUM TRUCKING CC**

**Applicant**

and

**NBCRFLI**

**First Respondent**

**MR P. D SEOPELA N. O**

**Second Respondent**

**TASWU OBO PETROS BALOYI**

**Third Respondents**

**Heard: 26 June 2019**

**Delivered: 28 June 2019**

**Summary: An opposed review application – The outcome is one that a reasonable decision maker can arrive at. Held (1): The application is dismissed. (2): Each party to pay its own costs.**

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**JUDGMENT**

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**MOSHOANA, J**

Introduction

[1] This is an application seeking to review and set aside an award issued by the second respondent in terms of which, it was found that the dismissal of Mr Petros Baloyi (Baloyi) was substantively unfair. The second respondent further ordered the reinstatement of Petros Baloyi and payment of six months' salary backpay. The applicant contends that the award is tainted with defects and thus reviewable under the

provisions of section 145 of the Labour Relations Act<sup>1</sup> (LRA). The application is opposed by the third respondent.

### Background facts

- [2] The applicant is a transport and logistic business operating out of the town of Tzaneen in the Limpopo province. Baloyi was employed as a truck driver effective September 2009. He drove a refrigeration truck (known as a “reefer truck”). On or about 19 October 2016, Baloyi was instructed to offload a client’s merchandise at Morgan Cargo, situated at OR Tambo Airport in Gauteng province. On his arrival at OR Tambo Airport, it was raining. In order to offload in those conditions, Baloyi reversed the truck towards the offloading point.
- [3] To offload the merchandise, a forklift was used. The offloading was conducted by the manager of Morgan Cargo and Baloyi remained in the cab of the truck. During the offloading process, the forklift damaged the rear end door of the truck. Baloyi was summoned by the manager of Morgan Cargo and shown the damage. Owing to the damage, the truck was decommissioned for a period of three days when repairs were conducted to the damaged door.
- [4] On 25 October 2016, Baloyi was issued with a notice to attend a disciplinary hearing in order to face allegations of gross negligence and insubordination. On the negligence aspect, it was alleged that he caused the damage which saddled the applicant with R70 000 worth of financial loss. On the insubordination aspect, it was alleged that he failed to report for duty on 24 October 2016 as instructed. A disciplinary hearing was held on 28 October 2016. Allegedly, Baloyi pleaded guilty to the negligence charge and not guilty to the insubordination charge.
- [5] Baloyi was found guilty of the other charge and was dismissed. Aggrieved by his dismissal, he, through the trade union referred a dispute alleging unfair dismissal. At arbitration, the charge of

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<sup>1</sup> Act 66 of 1995, as amended.

insubordination was abandoned. There was no challenge on the procedural fairness of the dismissal. After hearing evidence, on 5 May 2017, the second respondent issued the impugned award. Aggrieved by the award, the applicant launched the present application.

### Grounds of Review

- [6] The applicant alleges that the second respondent exceeded his powers, alternatively committed a gross irregularity, alternatively misconduct. He misdirected himself and/or completely misunderstood the facts of the case. It was contended that but for the negligence of Baloyi by failing to fully open and secure the rear end doors of the trailer, the damage to the rear door would not have happened. The second respondent ignored the evidence of the applicant's witnesses.

### Evaluation

- [7] By now it is trite what the test for review in this court is. It is that the decision must be one that a reasonable decision maker may arrive at<sup>2</sup>. Proper consideration of the applicant's grounds reveals that the applicant is seeking to appeal, which powers this Court does not have over an arbitration award. The nub of charge 1 is that the negligence of Baloyi caused damage. On the evidence before the second respondent, Baloyi did not break the seal for the doors to open. The damage was caused by the forklift on the 23<sup>rd</sup> pallet's offloading.
- [8] Regard had to the charge and the lack of eye testimony, it cannot be gainsaid that Baloyi did not damage the rear door as alleged. The finding that the dismissal of Baloyi was substantively unfair cannot be faulted. This Court disagrees with a contention that the second respondent misunderstood the facts of this case. Mr Kirsten for the applicant submitted that the dispute was about the failure to secure the doors. In other words, had the Baloyi secured the doors as it was his duty to do so, the damage would not have happened. This submission ignores the fact

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<sup>2</sup> See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2008) 27 ILJ 2405 (CC).

that Baloyi was charged for having damaged the doors and that was the reason he was dismissed. An employer cannot justify a dismissal on allegations that did not lead to a dismissal.<sup>3</sup>

- [9] On the evidence presented to the second respondent, the report compiled by Du Toit reflected the following:

“When they were busy to remove the last pallet, the airbags of the freezer suddenly lost pressure. The fridge lowered and the doors jammed on the loading bay.”

- [10] The above, accounts for how the damage happened. That being the case, Baloyi did not cause the damage to the doors. The evidence of Ms Heckroodt in fact testified to the following effect:

MS NELSON: On page 31 the allegation was made that the airbags suddenly lost pressure and on page 32 the Applicant indicated that he proceeded to inflate the airbags. Can you respond thereto?

MS HECKROODT: If there was a problem with the airbags for like he stated it lost pressure, it could have been...It burst normally...”

- [11] Reading of the second respondent’s entire award does not reflect any misunderstanding. The decision he arrived at is one that a reasonable decision maker can arrive at faced with similar evidence. He did not commit any misconduct or an irregularity. In order to prove the charge against Baloyi, the applicant needed to prove on the balance of probabilities that Baloyi caused the damage. This “*but for*” test that the applicant seeks to employ in this matter is unhelpful. The second respondent was, in my view, correct when he concluded that: “*The issue is not about the improper opening of doors as the doors were opened hence the Forklift Driver offloaded 22 pallets without damaging the hinges of the doors and only damaged them on the last pallet. It cannot*

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<sup>3</sup> ABSA Brokers (Pty) Ltd v Moshwana N.O and others [2005] 10 BLLR 939 (LAC).

*therefore be said that the damage was occasioned by the negligence of the applicant”.*

[12] This finding fits with the evidence presented like a glove. There can be no suggestion that this finding is inconsistent with the evidence presented before him. Thus, this application is bound to fail.

[13] In summary, the second respondent did not commit any irregularity nor misconduct. His findings fall within the bounds of reasonableness. The award is free of any defect thus not reviewable in law.

[14] Regarding costs, I am of a view that an appropriate order to make is for each party to bear its own costs.

[15] In the results I make the following order:

Order

1. The application is dismissed.
2. Each Party to pay its own costs.

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GN Moshoana

Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: Advocate P H Kirstein

Instructed by: Thomas & Swanepoel Inc, Tzaneen.

For the 3<sup>rd</sup> Respondent: Mr C Bensch of Higgs Attorneys, Johannesburg.