



ARBITRATION AWARD

Arbitrator: V Smith
Case Reference No.: WCRFBC 10254
Date of award: 10 June 2010

In the arbitration between:

SATAWU obo A Links **Union/Employee party**

and

Enviroserve Waste Management **Employer party**

Union/Employee's representative: Mr C Maketsie

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DETAILS OF HEARING AND REPRESENTATION:

In terms of Section 191 (5)(a) of the Labour Relations Act (the LRA) arbitration was held at the regional offices of the Road Freight Bargaining Council in Parow on 22 February 2010, 5 March 2010 and 20 May 2010.

Mr Carl Maketsi an official of SATAWU represented the employee Abraham Links, the employee. Mr M Mrubata the human resources manager represented Enviroserve also previously known as Wasteman. The employer handed up a bundle of documents, pages 1 to H7.

There were many witnesses. For the employer there was Mr Armand Lourens fleet officer and initiator, Mr Clive Verhoog a driver, Mr Hadji Joshua, a diesel mechanic, Ms Cathy Hendricks acting manager operations, Messrs Michael Memani and Benedict Sobend shop stewards, Mr Anthony Simmers, and Mr Andries November.

Application was made to deliver this award after the 14 day time limit.

ISSUE IN DISPUTE:

I am required to decide whether the dismissal of the employee on 26 November 2009 for misconduct was fair.

I have considered all the evidence and argument, but because the Labour Relations Act, 66 of 1995, requires brief reasons (section 138(7)), I have only referred to the evidence and argument that I regard as necessary to substantiate my findings and the determination of the dispute.

BACKGROUND OF THE DISPUTE:

The employer is a waste removal company with a depot in Bellville South. It is common cause that the employee was a Roro driver who requested management to place him on night shift so that he could spend time with his school going son during the day. The employee had been employed for 20 years. It is also common cause that the night shift was short of personnel. Amongst them a controller was on an Apple Tree training course, and the wash bay driver was off ill. As a result Cathy Hendricks was acting ops manager. She had been employed for 15 years. It was her second night on duty. The employee was scheduled to be at the wash bay driver on Friday night 13 November 2009. An incident occurred that night between the employee and a new driver Verhoog. It was said that the two men pointed fingers at each other and argued loudly. It was claimed that Links punched Verhoog's face and put his finger into his face. Hendricks came out of the office when she heard the shouting. She attempted to defuse the situation. After a disciplinary hearing took place, which the employee did not attend, he was dismissed *in absentia*. He did not appeal. The charges against him were: **"1. Assault (Physical attack) 2. Verbal abuse, disrespect, insubordination"**.

SURVEY OF ARGUMENTS & EVIDENCE:

Employer's Evidence

Witnesses said that Links had been his usual self and Links and Joshua were in the workshop talking about schooling for their children. Verhoog came up to Links in the workshop and said that some of the staff were ready to go home and asked Links if he would take some home, as both he and Links were the only personnel with their own vehicles. Joshua was adamant that Verhoog did not instruct Links, but told him some of the employees were ready to go home.

Links said No. Words, which became heated, were exchanged between them. Fingers were pointed at each other. They both raised their voices and were shouting. Joshua could not understand Links' reaction to Verhoog's request, as the wash bay driver always took the staff home. He knew it was his job. Joshua said as some night shift employees showered, a driver or even an assistant to a driver would tell the wash bay driver when the employees were ready to go home.

Verhoog decided that there was no point speaking to Links, and he was on his way to Hendricks' office to ask if he could use the employer's bakkie to take employees home. Links was not in control of himself. Verhoog on walking away felt Links come up to him from behind and punched him in the face. Links stabbed Verhoog in the face with his forefinger while shouting at him. Joshua witnessed it.

Verhoog denied that he instructed Links to take employees home. He often phoned Links to ask him directions on where to deliver. That night Hendricks asked him if he would be prepared to take employees home and told him there would be two trips. Verhoog asked Links if he would take the first trip or the second. Verhoog could not think what got into Links. They never had an argument before. Links said No. Verhoog thought the only thing that got Links started was because Verhoog told Links he did not care for the employees. Links exploded, he was in a rage and shouted that he and Cathy Hendricks had been talking behind his back. Verhoog denied he pointed at Links when asking him if he would help him. Verhoog pointed his finger at Links only after Links hit him. Joshua said he tried to intervene and told Verhoog not to fight. Witnesses said that Links told Verhoog several times that he was not going to take instructions from him.

Hendricks heard shouting. She leant backwards in her chair, looked out the window and saw Links pointing his finger at someone. She was recently in a meeting, which included Verhoog. She had asked him if he would be prepared to take home employees because they would finish early that night. Hendricks walked out of her office and into the workshop. She stood between them and said "*Wow, gentlemen, stop it there!*" Links retorted, "*Don't wow me!*"

From shouting at Verhoog Links then shouted and pointed his finger at Hendricks. He accused her of sitting on her butt in the office. He further shouted that previously there were two lions in that office, and "*we chased them away*", and that she too would be chased away. The reference to the two lions was the managers Badenhorst and Bronkhorst who previously were the controllers. Links shouted at her, told her she was two faced, and referred to her body in a derogatory manner. Links told her she prayed to Badenhorst and Bronkhorst as though they were God. Joshua said

Verhoog had been the wash bay driver the night before. Links was heard over the radio to say that some people got all the easy jobs. He could only have meant Verhoog. Joshua thought that Links had a grudge against Verhoog. Verhoog was getting more overtime than Links, but this was because Verhoog would always do the overtime.

Hendricks said she had an open door policy. Employees knew they could come to her, put their problems on the table, and they would discuss it. Hendricks had a few meetings with Links in the past and problems were sorted out. A year ago Links had an outburst with Bronkhorst who was the logistics manager. Two years ago Links had an outburst and swore at Badenhorst. Hendricks did not know if Links was disciplined. She heard Links say to the manager the manager could do what he wanted. During his shouting Links told Hendricks that the gate was open and that she could leave. She replied that he did the same thing to Badenhorst and Bronkhorst. Links was part of a petition to get rid of Badenhorst. Links told her he would be part of why she would leave. She felt threatened.

Links told her she was two faced and discussed him with the other drivers. He told her that she would see what would happen to her. Links shouted in the workshop and said, "Tell daai vrou I'm not taking people home". He left and got into his vehicle. As he drove past he pointed at her and threatened her.

Hendricks said if Links were re-instated she would accept him, to a certain extent. But if he still had a rage it might arise again. She knew he had no problems with her. It was normal to have disagreements, but not outbursts. She was disappointed, heartbroken and shocked. She could not understand what the problem was. His reaction to her was unacceptable.

Hendricks said the following week she told the shop stewards if Links apologised or showed remorse the matter could be put behind them. The incident occurred on 13 November and the disciplinary hearing occurred on 26 November. She had an open relationship with both the shopstewards, and normally she would sit with them and explain the problem in an attempt to find a solution.

Under cross-examination Hendricks said if Verhoog instructed Links the day before the incident and the employee was aggrieved, Links knew to come and speak to her. Links knew her. She did not send messages. She would speak to him directly. Verhoog was not given any message from her for Links. It was possible that they wanted to go home earlier and in that case they could make their own arrangement.

Hendricks as the aggrieved person was at the disciplinary hearing all the time. Lourens told Hendricks that he tried to give Links the notification for the disciplinary hearing but that the employee refused to take it. The notification was then served on shop steward Benedict. At the disciplinary enquiry Benedict asked the chairperson if he could bring another shop steward. This was agreed to. The chairperson asked where the employee was. No one knew. A shop steward was asked to phone him. Lourens tried to get hold of him. The chairperson noted that the employee was well aware of the hearing and the charges against him. He decided to proceed without the employee, as there was no phone call from him and that he knew if he did not attend, the hearing would go on in his absence. After the decision to dismiss was reached the shop steward was given a notice of dismissal to give to Links when he arrived for

work. Links worked night shift and normally would come in at 16h00 when the dayshift handed over. There were two nights where Links arrived late and Benedict could not wait any longer, and left.

Hendricks spoke to the shop stewards after the hearing. They never said Links wanted to appeal. They said as Links went to the union the case was in the official's hands. The case was therefore closed to the shop stewards. It was thought that the employee would attend the hearing. He was aware if he did not attend the hearing it would go on without him.

Benedict said Lourens asked him to meet with Links. Lourens called them into his office. Links would not sign the notification of the hearing. Benedict refused to sign it. He did not read it because Lourens did not give him the opportunity to read it. Links was there when Lourens told Benedict the date and the time of the hearing. It was for 13h00. There would be another hearing before Links' case was heard. Links heard the hearing was for 13h00 as Benedict made a note of it.

On the day of the hearing both Benedict and Memani asked Lourens to postpone the hearing. He said no, he wanted to finish the hearing that day. Benedict did not have a written letter to confirm the employee's dismissal. He had to tell him when Links arrived for work. This was the first time in Benedict's two years' experience that an accused employee was absent from a disciplinary hearing. This was the reason Benedict called for Memani to be his shop steward. Benedict agreed due to the employee's length of service Links would be aware of the employer's procedures and know he could appeal. But if this was the first time he was to go to a disciplinary hearing then Links would not know he could appeal.

Simmers said he was walking back from tea together with Links. They had known each other for 13 years. Others were in the workshop. As he and Links entered Verhoog came up to Links and gave him an instruction. He told him that as he, Verhoog, had worked late the night before, and again tonight, and because he had to take employees home, Links should take people in that direction and Verhoog would take the others in a bakkie in the other direction. Verhoog had volunteered to work two nights late. An argument started with both employees pointing fingers. Simmers saw Hendricks approaching and he left the scene through a side door. There had been no scuffle, no fighting, nothing.

Simmers said the day after the incident Verhoog told him that if Links had hit him, he as an ex-policemen, would have still stood still. Under cross-examination Simmers said Links did not accept the instruction. For one driver to give another driver an instruction like, "Mr Links, You must take a crew home" was unacceptable. Verhoog said it like he was in charge. Simmers had been present the night before when Verhoog spoke to him. The incident on 13 November was cropping up.

Simmers denied he ran away. He denied he provoked Links. He had been a shop steward and agreed a duty was to help resolve issues. But when he saw Hendricks arriving she was more senior than him, so he left. Simmers was present when Verhoog spoke to Links. No one told Simmers to give a statement. If Joshua said Joshua, Verhoog, and Links were alone, that was not true.

Lourens said he is a fleet officer, a first line manager for the drivers. They should come to him and it was his task to assist to resolve problems. He was not on duty that night. He had been on the Apple Tree training course, the same course that Links had attended. He was tasked to investigate the incident. He spoke to Verhoog, Hendricks, November, Joshua, Mohammed and Moses Joubert. Lourens met with the employee and Benedict. He told him that he was investigating the incident and there might be a disciplinary hearing. He told him that Verhoog and Hendricks both laid a complaint. Lourens asked Links if he wanted to write a statement. The employee said no. The employee's attitude was very negative. He told Lourens he must do as he liked. He pushed back his chair and put his hands outwards.

The decision was made that there would be a disciplinary hearing. The charges were drawn up. The disciplinary hearing was for 13h00. Lourens felt this was reasonable given that Links would finish work at 22h30 and not 01h30. There was more than one attempt to hand the notification to the employee. Benedict stayed late (after 16h00) to be present when Lourens gave the employee the notification. On two afternoons Links was late for work. On the one occasion Links came to Lourens at 04h20 after they waited for Benedict. Links told Lourens he did not have time to waste and he left. Both employees knew it was about the notification for the hearing.

Lourens met with the employee and Benedict. He told Links that charges had been laid. He explained all the employee's rights and explained that there was a second notification (to include charges related to the employee's remarks to Hendricks). Both Links and Benedict said they understood. Lourens gave Links the notification. Links refused to sign acknowledgement for it. Lourens asked Benedict to sign. Benedict refused. Under cross-examination Lourens agreed there was no witness' signature to confirm he served the notification on the employee. He offered to make copies. Benedict said keep the notifications until the disciplinary hearing. Lourens read the entire notification. He was comfortable in that he informed the employee of the contents of the notification. Benedict knew. There was a lot of negativity, a complete lack of interest, and riotous behaviour from the employees.

A half hour before the hearing Lourens looked for Benedict, as Links had not arrived. Benedict tried to phone the employee. Lourens tried. Lourens felt that Benedict was out of his depth. He called the chief shop steward Memani to the hearing. There were then two shop stewards to speak on Links' behalf. The chairperson enquired about the notification. Lourens explained. Benedict gave the chairperson permission to go ahead. The chairperson decided to go ahead. He dismissed the employee and gave Benedict the notice of dismissal.

Lourens said Links arrived at work at 16h00. He sent Benedict to tell him of the dismissal.

Employee's Evidence

Links said he had never seen the notifications for the disciplinary hearing. They were not explained to him, and he never received a notice to say he was dismissed. The latter he saw at the union offices. On his return to work he was told he was dismissed because of the problems he caused. He never had a chance to defend himself or explain at the hearing.

The incident with him and Verhoog started the night before. This was the first night Hendricks worked. Verhoog told Links that he, Links, should take a bakkie and he would take another. Links always took home employees, but never on an instruction from him. Links asked Verhoog to go home as he was not needed. Verhoog argued and told Links that he Links wouldn't help. Verhoog walked off. Links spoke to Verhoog and tried to calm him down, and made sure he understood. Verhoog had been there less than two weeks. Links explained how things were done there.

On the night of 13 November Links received his documents for the night. He was to work in the wash bay and move trucks in and out. That was all. The usual wash bay employee Stofile was on leave. Stofile would normally take employees home. The night shift controller would ask him and Stofile, because Links had a car, to take employees home. At 02h00 it was very dangerous to go into the suburbs. The employer had a few bakkies hijacked. It was for this reason a request or instruction to take employees home at the end of the night shift had to come from someone in charge. That person would come personally and ask you. Links was not forced to do it. Hendricks did not ask Links on 12 or 13 November.

Links and Simmers were walking back from tea. They walked past the control room and joked and laughed with Hendricks. Simmers and Links stood in the doorway of the workshop. Links had not been given an instruction to take employees home. The employer's bakkie stood in front of the office. Verhoog stood next to the bakkie and told Links that he must take home employees and Verhoog would take the bakkie. Links told him that he could not take instruction from him. Verhoog came and pointed his finger at Links and told him he didn't want to help. Again Links told him that he could not take instruction from him. Verhoog pointed his finger and said he expected Links to help. Links also pointed at Verhoog. He denied he hit him. Verhoog approached Links and there were loud words between them. If Joshua claimed that Links hit Verhoog Joshua was not there. When Joshua heard the row he came like everyone else.

While they were arguing Hendricks came out of the controller's office. She could not have seen them before that, only if she put her head out of the window. Hendricks came and told Links that he was wrong. Links wanted to know if she sent Verhoog to give him an instruction. He was sure she did not know what the normal arrangements were. Hendricks was biased. She took Verhoog by the shoulder and pushed him out of the workshop. She then told Links she was not Badenhorst or Percy (Bronkhorst).

If Hendricks claimed that Links verbally abused her he was sorry to say it. It was said he called her "vetgat". This was denied. Hendricks had not given him an instruction so how could he be disrespectful. He agreed there was an argument. If the employer said he had been insubordinate Links denied it. He said he had never refused to carry out an instruction. He knew if he was given an instruction he had to carry it out.

Links could not remember whether in 20 years he had been to a disciplinary hearing. If he was told to go to a disciplinary hearing he would attend. He would have to make arrangements to pick up his child at 14h00. If he had been notified he would have asked to go home early from the shift to rest and then return for the hearing.

Under cross-examination Links agreed he had experience of how the company operated and of how employees should behave. Links said he and Simmers had

been talking about their personal problems. He could not agree to take home employees when Verhoog instructed him. Links reminded Verhoog of their discussion the night before. He reminded him that instructions do not come from Verhoog. Verhoog had no right to take a company bakkie. Immediately after Verhoog gave Links the instruction he pointed at Links. He did not give Links a chance to explain. They argued and then Hendricks came in.

In the absence of the Intakom a controller would approach Links and discuss taking home employees. When Verhoog instructed him Verhoog did not say that a controller wanted to speak to him. Links therefore understood that it was Verhoog who instructed him. Hendricks never asked Links to take home employees. Since a senior person did not instruct him to take home employees he did not. Links did not reply when it was put to him that he did not want to report the incident of the night before or Verhoog's so-called instruction because Links wanted to hit him.

Links said it was Verhoog who first pointed his finger. If Simmers asked Links why was Links taking an instruction from Verhoog and that's when Links went towards Verhoog it was denied. Links said he did nothing. Verhoog came to him and gave him an instruction. If Hendricks tried to intervene it was not Links who approached her, but Hendricks approached them. Hendricks told him he was wrong. He asked her over and over who was this man (Verhoog) who gave him an instruction.

If the employer said that Links had done the same to Badenhorst and Bronkhorst and Badenhorst had a problem with Links then the question was why Badenhorst did not take action against him? The employer's response was that a case was made against the employee but he countered it with a grievance.

Links said Hendricks had something against him.

Links said that Lourens met with him and a shop steward and told him that a case would be made against him. Lourens could not say when. Lourens called Links again and Links attended with Benedict. Lourens told him that the case will come. Benedict asked what about the other charges. There was an argument. Lourens said they had to sign for the notification, but Lourens held onto them. He did not give Links a copy. Links and Benedict walked out.

Links said if Benedict in his testimony said that the disciplinary hearing was arranged for Links, then Links could not speak for Benedict. Links did not attend the hearing because he did not know the date and time. He worked until 02h00, and went home to rest. He did not appeal against the dismissal because he did not know what the charges were, or who was at the hearing. Links denied that everything he did was to manipulate and intentionally sabotage the disciplinary hearing. He denied it if Benedict told him he had a choice.

Employer's Arguments

It was argued that the employer strives for excellence and employees are required to take ownership of their actions. The employer regarded assault as serious when an employee assaults a manager. Drivers who are on strike and hit other drivers are dismissed. The employee was employed for 20 years. He knew exactly how employees should behave. He knows how to approach management for assistance,

and he has done it in the past. There was evidence that people were respectful in their dealing with Links. But the employee did not want to resolve the issue. He had no remorse.

The employee's witnesses were totally discredited. Simmers as an ex shop steward did not want to try and resolve the argument. Links decided to provoke Verhoog and if Simmers did not want to be there this suited the employee. Links was a good manipulator of the rules. He has done this to ensure he is untouchable.

If the employee had problems with taking employees home due to the risk or danger he should have taken this up with management.

Links mentioned that Hendricks had never worked night shift. He should have spoken to her. Instead he went over her head.

The trust and confidence in the employee has been broken. The employee has been on leadership courses. Others looked up to him to resolve problems. He knew exactly how the company operates. He knew that finger pointing was unacceptable. Another example was that he knew he could take another shop steward with him, and in fact changed his shop steward three times.

The employee was a very difficult person and manipulated for his own gain. Management find it difficult to work with him, and employees find him untouchable. What he did cannot be condoned. It has the effect of destabilising the workforce.

It was argued that the employer followed the procedures. At no time did he raise his arguments with management. On the merits the arbitrator must find the dismissal fair, as the employee did not contribute to allow the company go forward. If **Sidumo** is argued by the employee party it should be noted that the merits of **Sidumo** are totally different from this case. This is a case of where the employee is an aggressive employee, who is untouchable, who knows the rules and procedures, who has manipulated for his own gain, and sabotaged the disciplinary hearing. His witnesses were very clear about how he discredited the company for his personal gain.

Employee's Arguments

It was argued that the documents handed up do not prove that the "procedure" adopted by the employer to dismiss was fair. It could not be fair as the employer failed to prove the employee was informed of the hearing. The chairperson's checklist is marked with a tick indicating that the employee was present, when he was not. The ticks show that the chairperson was biased.

Lourens gave evidence that he gave the notification about the assault to the employee. He led no evidence of giving the second notification to the employee. Hendricks did not mention the second notification. If the employee did not know why he was dismissed he could not appeal.

The shop stewards led evidence on how they pleaded with the chairperson not to proceed in the absence of the employee. They asked for a postponement. It was refused.

It was argued that the employer failed to prove that Hendricks was abused or that Verhoog was assaulted. Links' evidence is that he and Simmers were in the works shop. The employer introduced Joshua as being present. If Links spoke to Verhoog at the back of the workshop this was not supported by any evidence.

Hendricks saw fingers pointing. Verhoog did not follow this up with a grievance, because he did the same. Hendricks came out of the office and was biased by telling Links he was wrong. Hendricks never testified that she gave Verhoog an instruction for Links. When Hendricks said she was not Badenhorst or Bronkhorst she provoked the employee. Verhoog who had been in the company two weeks tells Links with 20 years service what to do. This was provocation. Then the employee did it again.

It was hoped and prayed that the arbitrator would find in the employee's favour and reinstate him as a Roro driver. His salary was R6 483.57 per month.

ANALYSIS OF ARGUMENTS & EVIDENCE:

In terms of S192 (2) of the Labour Relations Act (the LRA) I am required on the basis of the evidence presented to me to decide whether the dismissal of the employee was fair. The standard of proof is that of a balance of probabilities. If, in this analysis, certain evidence is not referred to, this does not imply it had not been considered.

At the outset of the arbitration I reminded the parties of their duty to put their versions in cross-examination. Hoffman & Zeffert state the following in the South African Law of Evidence, Fourth Edition at pages 461 and 462, with regards to failure to cross-examine:

"If a party wishes to lead evidence to contradict an opposing witness, he should first cross-examine him upon the facts which he intends to prove in contradiction, so as to give the witness an opportunity for explanation. Similarly if the court is to be asked to believe a witness, he should be cross-examined upon the matter, which it will be alleged make his evidence unworthy of credit".

Failure to cross-examine may therefore prevent a party from later disputing the truth of the witness's evidence. But it must be stressed that judicial officers have a duty to assist illiterate, simple, and undefended persons in putting their evidence during cross-examination.

Mr Maketsie, who represented Mr Links, is an experienced union official of a well-established union, and cannot be said to be illiterate, simple, or an uneducated person. One of his main duties is to represent his members in arbitration proceedings. He does this frequently. He therefore knows he should put his members' version to the employer, and he did, on several aspects. However, his member's main defence was that he was provoked by Verhoog into shouting and pointing his finger at Verhoog. His defence with regard to Hendricks and insubordination, abusive and derogatory language he denied on the basis that he would not be disrespectful since she did not give him an instruction.

Mr Maketsie knew that he was obliged to put this version of his member's defence to the employer's witnesses and failed to do so. This leaves me in a position where I

have not heard the employer's response and therefore I cannot consider the defences of the employee.

The employer tended to rely on the goal of excellence and that all employees, including shop stewards had a very good relationship with management. I accept that there are logistic problems of meetings between day shift management and night shift staff. I heard that Lourens had difficulty in serving the notification of the disciplinary hearing on the employee. He and Benedict waited for Links on at least two consecutive evenings. Links arrived late at work and the notification could not be served. Eventually when Lourens met with Links and his shop steward he met negativity and "riotous behaviour". He did not elaborate on the latter. According to him the employer's policy allows a notification of a hearing to be given to the employee's representative. Benedict clearly knew the hearing would take place. On his evidence it was discussed in front of the employee. Benedict and Memani appeared for the hearing at the right time and day. They obviously knew when the hearing was to take place.

The employee's defence that he did not know of the hearing is rejected. He had already met with Lourens who told him as a result of the incident that occurred on 13 November a disciplinary hearing might be held. Lourens told the employee that Hendricks as well as Verhoog had "*laid complaints against the employee*". Therefore the employee knew what the hearing would be about. The employee party argued that only one notification for a hearing with the charge of assault was available. The other notification with charges arising out of the employee's behaviour toward Hendricks, it was argued, was not mentioned. This is not true. Lourens in his evidence-in-chief said "*I went through all the rights, and explained, and explained the second notification. They agreed to understanding, but refused to sign*". The employee's representative did not challenge the above in cross-examination. I therefore draw the conclusion that the employee was fully apprised of the charges.

On the day of serving the notification Lourens was adamant that he read the charges and explained the employees' rights, but it was not put to him that there was only one charge discussed. Benedict gave evidence at arbitration. If he had been asked this question he might have been able to support the employee's version. He was not asked. In the absence of cross-examination of this issue I only have Lourens' version to consider. I am satisfied that there were two charge sheets. I find that the employee was made aware of the date, the time, venue and the charges against him, verbally, "*in a manner that he could understand*".

It was argued that both shop stewards pleaded with the chairperson to postpone the hearing. The record shows that only Memani claimed he did. Benedict asked Lourens to postpone but he could not agree. Lourens said that Benedict told the chairperson to proceed. The employee's representative put it to Hendricks that the shop stewards pleaded for a postponement. Her response was that the chairperson decided to proceed on the basis that the employee knew. I therefore accept that requests were made to the chairperson to postpone. It is reported that the chairperson was supposed to have said the employee knew of the time of the hearing and knew it would proceed in his absence. In my view, if there is doubt as to whether an employee knew to attend a hearing it would be good practice to postpone the hearing. However, given the background where I found the employee knew the charges, knew the date and time of his hearing, and considering the several attempts to serve the

notification on Links, to get Links to meet with Lourens, and of Links' negativity, the decision not to postpone was probably the right one. I am satisfied that the employee with his experience in the company and knowledge of policies and procedures would have known he could internally appeal or approach the union and then the Council.

The employee had a choice. He elected not to attend. As he did not attend he could not put his case forward. The chairperson could only come to a decision based on the evidence before him. I therefore find in terms of Schedule 8 item 4 of the LRA that the procedure followed by the employer prior to dismissal was not unfair.

Schedule 8 Item 7 of the LRA sets out guidelines for a person who is deciding whether a dismissal is unfair. The first charge was that of assault. The employer is by law required to provide a safe work environment for all employees. Assault can seriously disturb the working relationships. Assault is a severe breach of one's contract. The employer's code of conduct indicates that assault can attract the sanction of dismissal. But in any alleged case of assault one has to look at all the circumstances. The employee alleged he had been provoked by Verhoog who gave him an instruction.

In considering this Joshua said he was talking to Links about their kids and schooling, when Verhoog came up to Links. He was emphatic that Verhoog did not give Links an instruction. Verhoog told Links that some of the employees had finished work early and were ready to go home, and he suggested that Links take one group in his vehicle while Verhoog would take the other. It was common practice Joshua said for another driver to be the "messenger" and advise the wash bay driver that employees were ready to go home. The outburst and rage was unexpected. Joshua said he was shocked. Joshua was clear in his evidence. He said Links pointed his finger at Verhoog while shouting at him. He walked up to Verhoog and put his finger into Verhoog's face and grabbed him by the front of his shirt and hit him with his fist. The employee agreed he pointed his finger and put his finger into Verhoog's face, but denied he hit Verhoog.

The nature of the provocation is considered. Links asked who Verhoog was to give him instructions when he had been employed for two weeks and Links had been employed for 20 years. Links said Verhoog was not his supervisor. The employee knew the duties of a wash bay driver were to take home employees after work. He also said because of the danger of driving into the suburbs to drop off employees at 02h00 such a request or instruction had to come from management. This latter issue was never put to any of the employer's witnesses in cross-examination and I must reject it as a red herring.

No one else saw the finger pushed into Verhoog's face or the assault with the fist. Simmers came as a witness. Simmers saw nothing. He obviously heard the shouting, just as Hendricks did. This was not normal behaviour. If he was such a good friend of 13 years standing one asks the question why did Simmers disappear through a side door in haste when he saw Hendricks arrive? Why did he not stand by to support his friend who was obviously distressed? The question was put to him in cross-examination that he had provoked Links and challenged Links as to why he was taking instructions from Verhoog. His reaction is typical of those who have something to hide. He said, "*Who? Me?*"

Simmers was brought to back up the employee's claim that Links had warned Verhoog the night before that Verhoog not to give him instructions. This claim was critical to the success of the employee's defence but it also was not put to Verhoog in cross-examination, and once again, I have no response to consider.

On the other hand, I heard another explanation. Joshua said he had heard that Links the night before had spoken over the radio and complained about employees who got the "cushy" jobs (my words) of wash bay driver. He could only have referred to Verhoog as Verhoog was the wash bay driver that night. As a result of this complaint Links was assigned the job of wash bay driver on the night in question. Joshua said Links in his shouting and scolding indicated that he was unhappy with Verhoog being Cathy Hendricks' favourite driver. Joshua added he thought that Links had a grudge against Verhoog because Verhoog got more overtime because he always agreed to work overtime.

On the evidence, the employee's reaction to the "provocation" was out of proportion to the provocation.

On the second charge the employee was found guilty of "*verbal abuse, disrespect, insubordination*". The employee's defence was that Hendricks did not give him an instruction and therefore he could not have been disrespectful. The hallmark of employee relations is that of respect. Hendricks' written report of the incident and her conclusions in the bundle were not challenged. Links' tirade directed at Hendricks was uncalled for. In this case Links cannot claim he was provoked. It was highly personalised and grossly insulting to her. It was disrespectful. It was also in front of other employees. Added to this the employee threatened Hendricks by implying he would get rid of her. This was a direct challenge to her authority and is regarded as insubordination. Hendricks said she felt threatened. Every employee is entitled to expect that her employer would safeguard her person.

The employee argued that mitigation of 20 years service and a clean record should have been taken into account. A long service record is usually relevant where the assault is not serious. In cases of insubordination, even a single incident could lead to dismissal. However, it was not disputed that Links had two previous "outbursts" in the last three years, also against his superiors. Hendricks reaction was that she was concerned that if Links returned to work his rage might not have been sorted out. She would insist he attend an anger management course.

In considering mitigation and aggravating circumstances the employee was seen as a senior driver who knew the culture in the company, who knew the policies and procedures, and who would have been invaluable in showing new recruits the ropes. I also heard that the employee had been on the Apple Tree training course which, amongst other things, taught that one should avoid conflict, and where there was conflict he/she should try to diffuse the conflict by giving a person space. The employee agreed he had pointed his finger. Hendricks had seen only Links pointing his finger. This could explain her remarks of "*Mr Links, you are wrong*". She would have known he had been on training, and also knew that with Verhoog's short service Verhoog had not. The employee's reactions on 13 November do not assist his pleas of mitigation, but on the contrary, with his service and his training, he should have known better that he could not shout disparaging and threatening remarks at his

superior, could not point fingers, push his finger into someone's face or assault a fellow employee.

I find that the employee has transgressed the rules that are relevant to the workplace, that the rules are valid and reasonable, and that the employee was aware or could reasonably be expected to be aware of the rules or standards. No evidence has been led of the employer's inconsistency in applying the rules.

Throughout this Analysis I have taken into consideration the principles flowing from Sidumo. I have considered the harm caused by the employee's misconduct. As above, where he has threatened a manager, and hit an employee, these actions seriously disturb the employment relationships. It had the potential to destabilise the workplace. The employee's misconduct undermined the employer's values and standards. Neither the employer nor Verhoog would be comfortable with Links around, as they would fear another outburst of rage. The employer could not take the risk of keeping the employee on when his behaviour was unpredictable. Where he was regarded as unpredictable, the employer could not find him reliable. If he were unreliable he could not be trusted.

I have also considered whether additional training or instruction or an alternative to dismissal may result in the employee not repeating the misconduct. The employee had not shown any remorse. Remorse is a strong indication that a person understands the severity of his wrongdoing, deeply regrets it, and has learnt that the rule or standard must be upheld. A lack of remorse normally indicates an absence of one or more of these aspects. Where the employee did not understand that to threaten a manager and hit an employee was totally unacceptable and is in conflict with the employment environment the employer strived for, then there is no possibility that the parties could share the same values. This lack of remorse persuaded me that corrective action such as training or a warning would not be helpful in bringing about a change in his behaviour. Such conduct is serious and it makes the continued employment relationship intolerable.

I find that in terms of S192 (2) of the LRA the employer has been able on a balance of probabilities to prove that the dismissal of Mr Abraham Links, was fair, both procedurally and substantively.

AWARD:

1. The dismissal of the employee was fair.
2. The employee's claims are dismissed.
3. There is no order as to costs.

Signed and dated at Parow on 10 June 2009.

A handwritten signature in blue ink on a light-colored rectangular background. The signature reads "V Smith" in a cursive style, with a long horizontal line extending from the end of the word "Smith".

NBCRFCI Arbitrator: V Smith