

**National  
Bargaining Council  
for the  
Road Freight Industry**



**NBCRFI**

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Case ref: GPRFBC10561

In the matter between:

SETSHINYI LETTRICK MATSHUBENI Employee/Applicant

and

FAST 'n FRESH TRANSPORT (PTY) LTD Employer/Respondent

Employee: In person

Employee's address: 338 Tshepo Section  
Tembisa  
1632

Employee's cell no: 072 852 8950

Employer's representative: Mr T Mphela, Respondent's HR Manager

Employer's address: Private Bag X170  
Centurion, 0046

Fax no. of Mr Mphela: 012 621 7602

Telephone no. of Mr Mphela: 012 621 7600

## REPRESENTATION AND PROCEEDINGS

- [1] The Applicant appeared in person, and the Respondent was represented by its HR Manager, Mr T Mphela, at the arbitration that took place on 2010-03-31 at the offices of the National Bargaining Council of the Road Freight Industry, 401, Provisus Building, 523 Church Street, Pretoria.
- [2] The Respondent called three witnesses, Mr S Nonyane, a Contract Manager of the Respondent to whom the Applicant reported, Mr V Makhane, a Shop Steward who represented the Applicant at the disciplinary hearing, and Mr F Pretorius, a Risk Officer who investigated an allegation of theft involving the Applicant.
- [3] The Applicant gave evidence. No further witnesses were called.
- [4] During his investigation Mr Pretorius took statements from various persons, including the Applicant. During the cross-examination of Mr Pretorius the Applicant was referred to each of the 10 paragraphs of his statement, and the Applicant stated that each of the 10 paragraphs setting out his version of events was recorded correctly by Mr Pretorius, and that they were true and correct. The statement of the Applicant reads as follows:

"1.

On 05-10-2009 I was collecting a load from Chubby Chick, Potchefstroom. I was driving Combination H682/TDM53. I arrived at Chubby Chick at ±20:10. By that time there was another Fast 'n Fresh truck busy loading, the driver of whom was Jerry Letaoana. I had to wait for Jerry's truck to be removed. I parked my truck in front of Jerry's truck.

2.

Jerry and I stood outside, talking and waiting for the loading to be done. By that time I saw someone inside the cab of my truck on the passenger's side. By that time I was approximately 30 metres from my truck. I thought he was an employee from Chubby Chick.

3.

After a while I went to my truck to get ready to put it on bay. By that time I didn't find anything irregular in my truck.

4.

Then they started loading my truck. After loading was done, I pulled forward to the security gate and the controllers came to seal my trailer.

5.

The security came to body search me and then the security officer went around and got into the cab on the passenger's side to search the interior. The officer found one (1) packet of chicken inside the cab. He raised it so I could see it.

6.

I then jumped into the cab and patted the officer on his shoulder and asked him where he found the meat. He said that he found it beneath the driver's seat. The officer reported it to the other security officers at the gate.

7.

I told the security that earlier I saw somebody inside the cab. He asked if I knew that person; I said no, but I would be able to point him out. The security then called all the employees who were around. I pointed out the guy. The security asked him what he was doing inside my truck and he said that he was calling the driver (me) to come and reverse the truck onto bay.

8.

The security said I must not drive out of the premises, I must just wait. I suspected that they were calling the police. I radioed to our control room to alert them about the incident.

9.

After a while the police arrived and questioned me as well as the guy that I pointed out. They took me to the police station where I laid down a statement. I was detained and was released on bail on the next day.

10.

I had nothing to do with the meat that was found inside the cab and I do not know who was responsible for it."

- [5] Respondent introduced a bundle of documents, the "Bundle", consisting of 81 pages.
- [6] During his evidence, the Applicant produced a document received at Court indicating that his last appearance in the Criminal Court on a charge of theft which forms the subject matter of his dismissal, was on 2010-02-24, when the charge was withdrawn.

**BACKGROUND TO THE DISPUTE:**

- [7] The Applicant was a driver employed by the Respondent's transport company since 2004-02-01, having been a driver for 20 years.
- [8] On 2009-10-05 he was the driver of the truck and had to collect a load of chickens from Chubby Chick at Potchefstroom for delivery to Woolworths.
- [9] Fresh Chicken wrapped in Woolworth's wrappings that had to be delivered to Woolworths, was found inside the cab of the Applicant's truck, underneath the driver's seat.
- [10] The following two allegations were raised against the Applicant at a disciplinary hearing:

"Charge 1

You are charged with misconduct relating to (2.4) lying and act of dishonesty in that on 09 October 2009 while driving the truck number H682/TDM 53, you deliberately lied and showed elements of dishonesty when asked by the security guard at Chubby Chick, regarding the chicken that was alleged to be found in your possession.

Charge 2

You are charged with misconduct relating to (3.6) unauthorised possession property of the customer without authority in that on 09 October 2009 while driving the truck number H682/TDM 53, when a security guard did his day pass control, you were found with a the chicken that was removed from the premises of the customer without authority."

[11] The references "2.4" and "3.6" are references to paragraphs in Annexure "A" to the Respondent's Disciplinary Code and Procedures, dealing with the possible sanctions to be imposed in cases of lying / dishonesty.

[12] The Applicant was found guilty and dismissed on 2009-12-08.

### **THE ISSUES TO BE DECIDED**

[13] The Applicant denies that he is guilty, i.e. he avers that the dismissal was substantively unfair.

[14] As far as the procedural fairness of the dismissal is concerned, the Applicant stated at the arbitration hearing that he tried to explain that there was somebody in the truck. This is an issue concerning the substantive fairness of the dismissal, i.e. that his explanation was not accepted, and the Applicant did not raise any other procedural unfair issues at the commencement of the arbitration hearing. The Applicant was represented at the disciplinary hearing by a shop steward, and according to the minutes of the disciplinary hearing that were placed before me, forming part of the bundle, a full scale hearing was held where the parties were given an opportunity to present their version. During the arbitration hearing a ground of procedural unfairness relating to the plea of guilt on the second allegation came to the fore. This will be referred to below.

[15] The Applicant asked to be reinstated.

[16] I will therefore have to decide whether the Respondent has proved the allegations raised against the Applicant on a balance of probabilities, and depending on my decision, I may have to decide whether the Applicant should be reinstated or compensated.

[17] I will also have to decide whether the Respondent has proved the procedural fairness of the dismissal.

[18] It was common cause that the Applicant's monthly gross salary at the time of the dismissal was R4 895,00.

**THE EVIDENCE OF MR S NONYANE:**

- [19] The witness is the Respondent's contract manager, Local Distribution, at Centurion, the depot from which the Applicant worked as driver. He is the Applicant's Line Manager and when he appointed the Applicant, after an interview, the Applicant was issued with the Pension Fund documentation, his Employment Contract, the Respondent's Operational Code for Drivers, as well as the Respondent's Disciplinary Code and Procedures. All these documents are given to drivers to ensure that they know how rules to operate and what rules to adhere to. The Applicant was also given his job description setting out his duties as a driver, and the Applicant signed that he accepted his job description is set out in the document.
- [20] The Applicant was charged with an offence of "unauthorised possession, or theft of company property, property in transit or property of another employee or visitor / customer / contractor etc", referred to in paragraph 3.6 of Annexure "A" to the Respondent's Code of Conduct, indicating that the offence is classified as a major offence (gross misconduct) for which a sanction of dismissal may be imposed for a first offence.
- [21] Referring to p33 of the Bundle, a trip sheet showing the movements of the Applicant on 2009-10-05, the date of the alleged offence, (not 2009-10-09) as stated in the two allegations, the witness stated that the name of the Applicant on the trip sheet was cancelled after Chubby Chick at Potchefstroom had informed the Respondent that the Applicant had been arrested and that they should fetch the truck.
- [22] The witness referred to a copy of the Police docket in the bundle, indicating that the property involved was a 1 x 8 portion braaipack valued at R51,97.
- [23] The witness acted as initiator at the disciplinary hearing. The Applicant pleaded not guilty to the first charge and guilty to the second charge.
- [24] After the Applicant was found guilty and dismissed, he did not appeal, because he did not have trust in the appeal procedures of the Respondent; the Applicant said so at the disciplinary hearing.

- [25] The witness stated further that it was fair to dismiss the Applicant as he was guilty of gross misconduct; it cannot be allowed that drivers steal the property of a client, it may result in the Respondent losing contracts, they may all lose their jobs.
- [26] Under cross-examination of the witness, the Applicant indicated that he did not plead guilty to the second charge at the disciplinary hearing, and the witness stated that he did, referring to the minutes of the disciplinary hearing where it is minuted that the Applicant pleaded guilty to the second charge. Asked by the Commissioner, the witness pointed out that the minutes were signed by himself and the Chairperson, and stated that the minutes were correct, also that the Applicant was represented at the disciplinary hearing and that the Applicant spoke at the disciplinary hearing.
- [27] During cross-examination of the witness the Applicant stated that he did say at the disciplinary hearing that he had no confidence in the appeal procedures.

#### **THE EVIDENCE OF MR V MAKHANE:**

- [28] The second witness called by the Respondent was Mr V Makhane, a shop steward who represented the Applicant at the disciplinary hearing. When asked how the Applicant pleaded at the disciplinary hearing, he stated that he was not quite sure, that he did not recall. When referred to the minutes of the disciplinary hearing where it is recorded that the Applicant pleaded guilty to charge 2, the witness stated that it is true that the Applicant pleaded guilty to one of the charges, that he was not sure to which charge the Applicant had pleaded guilty.
- [29] Asked whether the Applicant appealed, the witness stated that he did not, but that he was given an appeal form. The witness could not remember whether they discussed it, but he did advise the Applicant to appeal.
- [30] Under cross-examination it was put to the witness that the Applicant did not plead guilty. The witness's first response was that the Applicant pleaded guilty because there was somebody in the truck and he did not report this to his superiors, adding that the Applicant had agreed to all statements read to them on the day, and that the Applicant agreed to one of the charges that he was guilty.

- [31] Asked by the Commissioner, the witness stated that the charges were read out to the Applicant at the commencement of the disciplinary hearing. The charge of theft was not discussed fully, that it why the witness thought that the Applicant should appeal. At this stage the Applicant stated (at the arbitration hearing) that the witness did tell him that he should appeal, but that he did not agree.
- [32] Under cross-examination the witness stated that the penalty was too severe, he should have been given a final warning.
- [33] Asked in re-examination about the sanction and the meaning of paragraph 3.6 of Annexure "A" to the Disciplinary Code and Procedures, the witness was vague and could at first not state what it meant, stating later that the "D" stands for dismissal, the sanction for a first offence, but that he was not sure.

#### **THE EVIDENCE OF MR F PRETORIUS:**

- [34] The Respondent's last witness was Mr F Pretorius, the Risk Officer who investigated the incident. He interviewed 4 persons, including the Applicant, and took statements from them. He stated that he had been investigating these matters for a number of years.
- [35] During cross-examination of Mr Pretorius, the Applicant's statement, referred to in paragraph 7 above, was read into the record, the Applicant indicating that it was correct in every respect.
- [36] The Applicant asked Mr Pretorius why Mr Maqeba, the person whom the Applicant had seen in his truck, was not arrested, and Mr Pretorius stated that he (Mr Pretorius) was not there when the arrest was made, he investigated the incident after the Applicant had been arrested and the four statements were taken after the arrest had been made.

#### **THE APPLICANT'S EVIDENCE:**

- [37] Giving evidence about his personal circumstances, the Applicant stated that he is 49 years old, with dependents. He has not found another job, he is receiving UIF money. He has not looked for another job as the case against him was withdrawn on 2010-02-24, and thereafter he was



afraid that the Court would ask him to come again. He passed St. 6 and has been a driver for 20 years.

[38] It was common cause that the Applicant's version of events was contained in his statement taken by Mr Pretorius and read into the record.

[39] The Applicant asked to be reinstated.

[40] Questioned about his statement (paragraph 3) the Applicant agreed that after he had seen the person leaving his truck, he searched the truck and did not find anything irregular in the truck.

[41] It was put to the Applicant referring to paragraph 5 of his statement and p40 of the Bundle (a schematic sketch of the two trucks at the loading bay) whether the trucks are 2 metres high and the Applicant stated that he did not know.

[42] It was put to the Applicant that he could not see inside the truck because he was one metre below, and the Applicant stated that he could see what was inside the truck.

[43] Questioned about the Applicant's statement at the disciplinary hearing that he did not trust the Respondent's appeal procedure, the Applicant was referred to another case where an employee of the Respondent had been found guilty and dismissed at a disciplinary hearing but reinstated on appeal to the Respondent's internal appeal body, and the Applicant said that he had no knowledge of that case.

[44] Referred to the stipulation in the Respondent's Operational Code of Conduct that the driver shall at all times "lock the doors should the vehicle be out of sight", the Applicant stated that he did not comply with this rule, adding that the vehicle was out of his sight.

[45] Referred to the requirement in the Applicant's job description that the driver "...will be responsible for your vehicle for the duration of your shift", the Applicant agreed that he was responsible, stating that he did not think that the person who went into his truck would do anything to the truck, agreeing also that he abandoned his truck.

[46] Asked about the sanction, the Applicant stated that the Respondent was harsh in dismissing him. When pressed to state what an appropriate sanction would have been, the Applicant hesitated to answer; when the interpreter stated that the Applicant was not answering the question, the Applicant said that the Respondent's representative was pushing him to shoot himself in the foot.

[47] Asked by the Commissioner, the Applicant stated that he was alone in his truck, the truck had been loaded at the stage when the chicken was found underneath the driver's seat; the chicken found on his truck came from Chubby Chick; he did not know where they pack it, they (i.e. drivers from the Respondent) do not go inside.

[48] Asked further by the Commissioner that someone must have put the chicken in the truck to get him into trouble, the Applicant stated he just saw the person who was inside the truck.

#### **ANALYSIS OF EVIDENCE AND ARGUMENTS:**

[49] The Respondent bears the onus to prove on a balance of probabilities, not beyond a reasonable doubt as stated in the documentation forming part of the minutes of the disciplinary enquiry, the allegations raised against the Applicant.

[50] This has to be done by means of evidence put before me at a de novo arbitration hearing. I cannot rely on evidence given at the disciplinary hearing that was not led before me, nor can I rely on hearsay statements of witnesses not called as witnesses at the arbitration hearing.

[51] Not one of the witnesses called by the Respondent had any first hand knowledge of the events at the premises of Chubby Chick as they were not present. The Respondent had statements from 3 persons who were directly involved, but they were not called as witnesses.

[52] The Respondent relied mostly on the statement by the Applicant and his alleged plea of guilt on the second allegation at the disciplinary hearing to prove its case.

[53] As far as the plea of guilty is concerned, I have not been persuaded that the Applicant had entered a plea of guilty. His approach had been all along that he was not guilty and it seems that what was meant by the plea of guilty on the second charge was, in the words of the

Applicant's representative at the hearing as minuted in the minutes of the disciplinary hearing: "Where we said we are guilty, that is where LM never went through the truck, getting into the truck, LM never searched the truck, so looking into the seriousness of the case, we are pleading to be lenient on our side". "LM" is a reference to the Applicant, and where it is stated that the Applicant never searched the truck, the representative probably referred to his guilt (as admitted by the Applicant at the arbitration hearing) not to have locked the doors when the vehicle was out of his sight and/or for not accepting responsibility for the vehicle during his shift. The evidence of the Applicant's representative, led by the Respondent, confirms this impression, when he was hesitant and unsure of what had been pleaded. At first I thought that he was possibly untruthful or dumb, but his uneasiness stemmed from his inability to appreciate what the plea entailed as appears from his statement at the disciplinary hearing as minuted. The Chairperson should at that stage have queried the standing of the plea of guilt on the second charge, but he did not, and it has been established that the dismissal was procedurally unfair, despite the fact that the Applicant did not challenge the procedural unfairness of the dismissal on this ground.

[54] In deciding whether the Respondent has proved the substantive fairness of the dismissal I am largely reliant on the statement of the Applicant made to Mr Pretorius, as confirmed by the Applicant to be a correct version of events. The Applicant could not say how it happened that the chicken was found under the driver's seat, he could not say who put it there, but referred to a person he had not known, but whom he would be able to point as the person he had seen inside the cab. This person, according to Mr Pretorius, was one of the 4 persons from whom he took statements, Mr Maqeba. But Mr Maqeba did not give evidence and it appears from paragraph 4 of the Applicant's statement that Mr Maqeba had no right to be in the truck.

[55] The Applicant had nothing to do with the packing of the meat in the truck, and there is no evidence that the Applicant put the meat under his seat. It may be that the Applicant and Mr Maqeba were in cahoots, but there is no evidence to this effect.

[56] The fact that the Applicant did not follow procedures in that he did not take full responsibility of his truck while he should have done so and that he did not lock the doors of the truck when it was out of his sight, as he should have done, do not contribute to an answer of the pertinent question in the dispute: Who put the meat under the driver's seat? And the fact that the police

questioned both the Applicant and Mr Maseba, but arrested the Applicant and not Mr Maseba, also does not take the matter any further; in any event the case was eventually withdrawn.

[57] Reference was also made to the fact that the trucks were 2 metres high, but there is no evidence to that effect, the Applicant could not say how high the trucks were. But in any event, the height of the trucks does not take the matter much further. There was someone else in the truck who could possibly have placed the chicken in the truck. But even if this person did not, it is still not known who put the chicken in the truck or whether the Applicant had anything to do with it.

[58] Mr Mphela, the Respondent's representative, filed written closing argument. He referred to the fact that the Applicant had acknowledged in writing that there was nothing in the truck that should not have been there. This begs the question: if he did not know of the chicken in his truck, a statement that there was nothing does not indicate that he had knowledge about it. This applies also to the requirement that the Applicant should have kept the doors of his truck locked: he did not but that does not mean that he stole the chicken. Inferences to be drawn from the Applicant's non-adherence to the rules, do not constitute proof on a balance of probabilities that he stole the chicken.

[59] The Respondent has failed to prove on a balance of probabilities that the Applicant had anything to do with the placing of the chicken under the driver's seat, or that he lied to anyone about the chicken that was found under the driver's seat, i.e. the dismissal was substantively unfair.

[60] It also emerged that the dismissal was procedurally unfair in that the plea in respect of allegations 2 was incorrectly taken to have been a plea of guilty, whereas it was a plea of not having followed all procedures, an aspect not covered by the allegations raised against the Applicant.

[61] Section 193(2) of the Labour Relations Act 66 of 1995, dealing inter alia with the remedies for unfair dismissal, requires that where it has been found that a dismissal has been unfair, an arbitrator must require the employer to reinstate or re-employ the employee unless –

“(a) the employee does not wish to be reinstated or re-employed;

- (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
- (c) It is not reasonably practicable for the employer to reinstate or re-employ the employee; or
- (d) the dismissal is unfair only because the employer did not follow a fair procedure.”

[62] The Applicant wishes to be reinstated. Mr Nonyane said that the Applicant's gross misconduct consisting of dishonesty, read together with the Respondent's Disciplinary Code (paragraph 3.6) means that the Respondent can no longer employ the Applicant. This statement is based on the Applicant's guilt of the allegations raised against him, and the basis for the lack of trust referred to by Mr Nonyane falls away, as he has been found not guilty. No reasons were advanced why it is not reasonably practicable for the Respondent to reinstate the Applicant. Under these circumstances the Applicant will be reinstated without loss of benefits and with payment of salary lost during the period of his dismissal.

**AWARD:**

[63] As the dismissal of the Applicant was substantively and procedurally unfair, the Respondent, Fast 'n Fresh Transport (Pty) Ltd, is ordered to reinstate the Applicant, Setshinyi Lettrick Matshubeni, in his previous position as driver from the date of his dismissal on 2009-12-08 on the same terms and conditions that applied to him prior to his dismissal;

[64] The Applicant is to report for duty on 2010-05-10 at the offices of the Respondent at Centurion or on another date, and time, as may be agreed between the parties, in which event the remuneration payable by the Respondent in terms of paragraph 66 of this award be adjusted accordingly;

[65] Respondent is ordered to restore the leave and other benefits of the Applicant as if he had not been dismissed, and his services must be regarded as unbroken;

[66] The Respondent, Fast 'n Fresh Transport (Pty) Ltd is ordered to pay the Applicant, Setshinyi Lettrick Matshubeni, the remuneration he would have been paid from 2009-12-09 to 2010-5-9, amounting to R24 475,00 (R4 895,00 x 5), less applicable taxation and statutory deductions, not later than 15 days after receipt of this award.

SIGNED AND DATED AT PRETORIA ON THIS 12<sup>TH</sup> DAY OF APRIL 2010.

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ADV. J LE F PIENAAR

NBCRFI PANELLIST:

ARBITRATOR