National Bargaining Council for the Road Freight Industry
NBCRFI

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In the arbitration between:

Case No. : GPRFBC 11610

Date of Award 25/2/2011

Herman Aphane & 1 Other **Union/Employee Party**

and

Heneways Freight Services **Employer Party**

Union/Employee's Representative: None

Union/Employee's Address: **57 3rd Avenue**
Alexandra Township
Bergvlei 2029
Telephone: 072 243 4970 Fax:

Employer's Representative: **Ms T Buchel**

Employer's Address: **P O Box 185**
Edenvale
1610
Telephone: 011 879 5400 Fax: 011 453 8440

1. DETAILS OF HEARING AND REPRESENTATION

1.1 This matter was set-down for arbitration on 22 September 2010. It was concluded on 6 December 2010. Heads of argument were received on 2 February 2011, and an extension was granted for submission of this award to 4 March 2011.

1.2 The applicants represented themselves during the proceedings, and the respondent was represented by Ms T Buchel.

1.3 The respondent submitted a bundle of documentary evidence comprising some 126 pages. The applicants indicated that they would rely on the documentary evidence submitted by the respondent.

2. ISSUE IN DISPUTE

2.1 I was required to determine whether or not the dismissal of the applicants was procedurally and substantively unfair. Procedural fairness was challenged on the ground that the applicants were not afforded a reasonable time to prepare for the disciplinary enquiry, and that the respondent had not conducted an investigation prior to deciding to take disciplinary action against the applicants.

3. BACKGROUND TO THE DISPUTE

3.1 The dispute arose after the applicants were dismissed for theft.

4. SURVEY OF EVIDENCE AND ARGUMENTS

4.1 Evidence of the Respondent

4.1.1 The respondent's first witness, Mr Larry Dave, an attorney, chaired the disciplinary enquiry which led to the subsequent dismissal of the applicants. He testified that he had made use of a checklist to ensure that all the

requirements for procedural fairness were complied with. He was satisfied that the applicants had received timeous notification of the enquiry, and neither applicant nor their union representative had made any objection to commencing with the enquiry. Both applicants had confirmed that they had had enough time to prepare and were ready to proceed, see p 41. Neither had the applicants raised the issue of the prior investigation.

4.1.2 During cross-examination Dave explained that p 23 of the bundle was a statement made by Aphane and this was used by the respondent during the enquiry. Aphane had not objected to its use. The witness was asked why, at the conclusion of the hearing, he had not told the applicants they were being dismissed. He stated that he had explained to the applicants that he needed time to make a decision. The written decision was eventually sent to UPUSA at the union's request. He also stated that he had only been required to recommend a course of action to the respondent, he had not dismissed them, and neither had he been told what decision to make.

4.1.3 The respondent's second witness, Mr Paul Hulley, the respondent's warehouse manager, testified that he had been employed by the respondent to turn the warehouse around and to introduce policies and procedures to deal with the theft problem experienced by the company. Hulley dealt in detail with inventory and order procedures, and made extensive use of pp 1-18 in the bundle. He was satisfied that the policies and procedures had led to a situation where no human error could occur during processing of orders. He attested that pp 13 to 17 consisted of a 'goods issue voucher', a delivery note, delivery voucher, a despatch book which showed that Aphane had signed for the receipt of 49 boxes. Page 18 was an inventory stock list.

4.1.4 Hulley went on to say that the documents show that 'picking' was done and the goods sent through to despatch where Aphane had signed for receipt of these goods. He had signed for the receipt of 49 boxes. Page 24 of the bundle was a vehicle 'trip sheet' which has to be completed by the driver of the vehicle. Item 6 on the trip sheet shows the customer, IFF. The km’s taken to complete the trip are also recorded.

4.1.5 Hulley turned to p 29, a 'movement' report sheet dated 17 February 2010. This report, which was generated by an automatic tracking system fitted in Aphane's vehicle, shows all the movements for his vehicle that day. On the day in question Aphane had made one or two unscheduled stops, these had not been recorded, however the satellite picture, see p 25A, shows his vehicle stopped at the fresh produce market at City Deep. Page 26 shows that Aphane had not completed all the stops on his tally sheet. He had not been scheduled to go to the fresh produce market and he had not recorded it on his sheet. On 19 February he again stopped at City Deep.

4.1.6 Hulley referred to p 33, a 'Daily Movement Report', which showed that Aphane had gone to the Mynhardt Street branch of Max T Tyres. Aphane had submitted an invoice for tyres dated 23 February 2010 from Supa Quick in Edenvale.

4.1.7 The witness testified that when the customer had contacted the respondent regarding the missing box he had immediately commenced an investigation.

4.1.8 When Hulley was cross-examined it was put to him that Aphane had not loaded 49 boxes, they had already been loaded. Hulley replied that Aphane had signed for 49 boxes and he had then assumed responsibility for them.

4.1.9 It was put to the witness that Aphane had not signed the delivery note on p 15. Hulley responded that it bore Aphane's signature.

4.1.10 Hulley was asked how a box could have been removed when the entire consignment of 49 boxes had been shrink wrapped. Hulley replied that the shrink wrapping is simply to prevent the consignment from falling over. The photograph on p 20B of the bundle shows nine boxes on the top row of the consignment.

4.1.11 Aphane asked Hulley where he (Aphane) had stopped on 17 February. Hulley explained that p 29 lists all the additional stops which were not on his trip sheet. The stop at the fresh produce market had not been recorded on his trip-sheet and neither had his stops after 13h19 on that day.

4.1.12 The respondent's next witness, Mr David Wilkinson, a warehouse controller, attested that he was responsible for receiving and despatching orders for McCallum & Associates. He described the sequence of events on 17 February 2010. Page 11 of the bundle showed all the cargo being held for McCallum on 17 February, he attested that he had personally counted this stock. There were 519 boxes. Page 12 was the order placed by McCallum for 49 boxes to be delivered to IFF in Isando. Page 13 was the 'goods issue voucher' which was given to the FLT operator in order for him to collect 49 boxes. He noted that it had not been signed by the picker albeit that it should have been. Page 15 is a delivery note completed by the witness.

4.1.13 Wilkinson attested that IFF had only received 48 boxes despite the fact that he had counted 49 boxes, and 49 had been despatched. He stated that the picker could not have made a mistake because he had himself counted 49 boxes. Initially there had been insufficient wrapping round the cargo and he had given extra shrink wrap to Aphane.

4.1.14 At this stage in the proceedings video footage which was recorded on 17 February was viewed. The video footage clearly showed 5 rows of boxes, with 9 boxes on the top row. At 08h20 an employee was recorded shrink wrapping the consignment.

4.1.15 Wilkinson was cross-examined. He conceded that the picker had not signed the invoice; he did not know why.

4.1.16 Finally, Mr Albert Sithole, an assistant checker, described the procedure for despatching goods. He attested that after a picker has 'picked' the cargo a controller will bring the necessary paperwork to the transport office from where documents are given to the drivers. He stated that 'systems checkers' check cargo against documents, and that he would conduct the final check before cargo is given over to the drivers. He attested that the document on p 16, a delivery voucher, bore his signature. He had counted 49 boxes and Aphane had signed for them. Wilkinson had also counted 49 boxes, in all, four people had counted these boxes at different times. He stated that Aphane had also counted these boxes.

4.1.17 Under cross-examination he confirmed that he had counted 49 boxes, and he had also watched Aphane count, and he, Aphane, had signed the appropriate documentation. It was put to him that Aphane had not signed the document and the boxes had been loaded in Aphane's absence. The witness denied this, he had witnessed Aphane counting the boxes in the consignment.

4.1.18 At this stage in the proceedings the hearing was adjourned; it recommenced on 6 December 2010 when the applicants testified. Prior to the arbitration continuing I had to make a ruling on legal representation as the second applicant sought, even at this late stage, to be legally represented. The application was rejected and a written ruling given to the applicants.

4.2 Evidence of the Applicants

4.2.1 The first applicant, Mr Herman Aphane, testified. He stated that on 17 February 2010 he had been given a delivery to make. A "pile" of boxes had been on his truck, he had not counted them as he had asked Bheki to do so. The person who had received the parcels at the customer's premises, together with Bheki, counted the parcels. One was missing. Aphane had then 'phoned the respondent to advise them that the consignment was short of one box. Upon his return to the respondent's premises he had explained, when questioned about the missing box, that he had recently returned 20 boxes which had been over the amount required, why would he steal one box. He informed the respondent that the missing box had not been loaded. In answer to a question from the arbitrator he stated that the box could not have fallen off during the journey as the cargo had been wrapped.

4.2.2 Under cross-examination it was put to Aphane that during the disciplinary enquiry he had been represented by an UPUSA official, neither of them had raised the issue of insufficient notice. He replied that this was the first hearing he had attended.

4.2.3 Next, it was put to him that prior to the 49 boxes being packed, 519 boxes had been counted. The 49 boxes were then taken to receiving where they were counted, by five people in all including himself. It was put to him that he had counted 49 boxes and he had signed for them. He replied that he had not been present when the boxes were counted, neither had he signed for them. When he was questioned about the daily despatch sheet, see p 17, he stated that it might be his sheet but he had not signed it. He had not signed it because he had been "told to go and deliver".

4.2.4 Aphane was cross-examined on the video evidence and p 15A. He agreed that p 15A bore his name however he had not signed this document. Bheki had had this document, however he, Aphane, had signed it because it was short of one box. He was asked to compare the signatures on various documents, he replied that "anyone can write my name".

4.2.5 It was put to him that he had seen the opportunity to steal a box and he had driven to the fresh produce market to sell it. The box contained spices. He denied this and said that he had gone to the market to purchase vegetables.

4.2.6 Aphane was questioned on p 24. He agreed that this document was a trip sheet and that it bore his name, however he sometimes gave these documents to Bheki for him to sign.

4.2.7 Finally, it was put to him that two people had testified during these proceedings and he had not disputed their evidence. He stated that they had both lied.

4.2.8 The second applicant, Mr Bheki Sishi, testified that on 17 February 2010 the FLT driver had brought a pallet and he had placed it next to the truck. It had only been partially wrapped and Aphane instructed him to wrap it completely. The consignment had then been loaded onto the truck. Some other goods had also been loaded for delivery to the airport. When they had arrived at IFF the shrink-wrap had been removed by an IFF employee, the boxes were counted as they were being transferred to another pallet. Only 48 boxes had been counted. Aphane had then reported that one box was missing.

4.2.9 Sishi testified that he had attended the disciplinary enquiry where he had explained everything. He had asked for the IFF employee to be called; this request had been refused. He also attested that he had not been allowed to finish his testimony as the chairperson had been in a hurry.

4.2.10 Sishi was cross-examined. He was asked what had happened to the missing box. Sishi stated that he was unable to say as he had not counted them. It was put to him that Aphane had testified that he had counted the boxes. He denied this. He was asked whether he was accusing Aphane of having lied. His response was that he had not counted the boxes. It was put to him that the evidence of the company's witnesses was that 49 boxes had been loaded on their vehicle; this evidence had been supported by the video footage.

4.2.11 Finally, it was put to him that his accusations about the chairperson had not been put to Dave when he was cross-examined. He stated that he had not been allowed to cross-examine and Aphane had probably forgotten to ask these questions.

4.3 Respondent's Argument

4.3.1 The respondent submitted detailed heads, consisting of a concise summary of all the evidence led during the arbitration hearing and the appropriateness of the sanction of dismissal.

4.3.2 As to procedural fairness the respondent argued that all the requirements for a procedurally fair dismissal had been met. The applicants had been notified of the allegations in writing and had been represented by an official of UPUSA. Both applicants had indicated that they were ready to proceed and no preliminary points had been raised either by the applicants or the trade union official. The applicants were also given the opportunity to state a case during the disciplinary enquiry. The union had also submitted mitigating factors on behalf of the applicants. The allegation that the chairperson had left the enquiry prior to its conclusion had not been put to the chairperson during cross-examination.

4.3.3 The respondent argued that 49 boxes had been counted on various occasions and 49 boxes had left the respondent's premises on the vehicle driven by the first applicant. Both applicants had been together throughout the journey and that it would have been impossible for one of them to have stolen a box without the other's involvement or knowledge. On the test of a balance of probabilities both applicants were guilty. The respondent made the point that employers are not required to prove charges of theft with the rigour expected of the state in criminal prosecutions - proof on a balance of probabilities suffices, see *Leonard Dingler (Pty) Ltd v Ngwenya* (1999) 20 ILJ 1171 (LAC); *Early Bird Farms (Pty) Ltd v Malambo* (1997) 5 BLLR 541 (LAC); *Administrative & Technical Association of SA & Another v Free State Consolidated Gold Mines (Operations) Ltd* (1987) 11 BLLR 1397 (LAC).

4.4 Applicant's Argument

4.4.1 The applicants made much of the fact that the union official from UPUSA was 'barred' from representing them during the arbitration hearing; they implied that this rendered the proceedings unfair. The applicants also raised the issue that the legal representative retained by Sishi to represent him on the final day of the arbitration proceedings was not allowed to represent him because "the matter had already proceeded to closure of the Respondent's case".

4.4.2 The second applicant also argued that the arbitration proceedings were defective as the arbitrator had ruled that the first applicant should conduct cross-examination of the respondent's witnesses.

4.4.3 The essence of the applicants' argument is that only 48 boxes left the respondent's premises and if they are guilty of anything they are guilty of negligence in not ensuring that the correct number of boxes were packed. The respondent's entire case rests on circumstantial evidence.

4.4.4 The applicants also argued that the arbitrator had ruled the video evidence inadmissible.

4.5 Respondent's Reply to the Applicants' Heads

4.5.1 The respondent reiterated that the failure to conclude the disciplinary enquiry was not put to the witness during cross-examination.

4.5.2 The respondent has rejected the applicants contention that the video evidence was ruled inadmissible.

4.5.3 As to presentation of the case the respondent argued that the arbitrator had advised the applicants that one of them should present the case, but had allowed the 2nd applicant to ask questions.

4.5.4 The applicants were unable to refute that four other employees had counted 49 boxes.

4.5.5 Finally, the respondent dealt with the issue of representation during the arbitration. The applicants were not represented during the arbitration hearing as UPUSA has been deregistered and were not allowed to represent the applicants.

5. ANALYSIS OF EVIDENCE AND ARGUMENTS

5.1 The applicants' argument that the applicants' case rests on circumstantial evidence is well founded. No direct evidence exists which would implicate either of the applicants in theft. One must make a clear distinction between circumstantial evidence and direct evidence, and the approach of arbitrators to circumstantial evidence differs from that of the criminal courts. The difference in approach is because the standard of proof in arbitrations and civil cases is based on a balance of probability and not 'beyond reasonable doubt' which is the test applied by the criminal courts. When circumstantial evidence is considered a case will be proven when the inference to be drawn from the evidence is the most plausible inference, and that the inference is consistent with the facts.

5.2 The evidence that 49 boxes left the respondent's premises is compelling and the evidence led by the respondent's witnesses leaves me in no doubt that this was the case and that only 48 boxes reached their intended destination. The footage supports the oral evidence tendered by the

respondent's witnesses, all of whom gave clear and consistent evidence which was not demolished under cross-examination. Evidence was also led that the number of boxes left in stock was consistent with 49 boxes having been drawn.

5.3 The applicants, in their heads, stated that the video evidence had been ruled inadmissible. At no stage during the arbitration hearing was this evidence challenged in any way by the respondents and it was not ruled inadmissible.

5.4 Video evidence is generally admissible in arbitration hearings if it is relevant and its authenticity has not been placed in dispute. In this matter the video footage was relevant as it provided clear identification of the consignment of boxes, the application of wrapping to the sides of the consignment of boxes on the pallet; no shrink wrapping appears on top of the load, and the personnel involved in the different operations involved in preparing and loading this cargo prior to delivery.

5.5 The credibility of the documentary evidence which showed that the first applicant made unauthorised stops was not seriously challenged.

5.6 No direct evidence was led that the applicants stole the missing box, however the circumstantial evidence is compelling. Forty-nine boxes were taken from stock and loaded on a pallet. At least four employees counted 49 boxes at one time or another even if Aphane's version that he had not counted the boxes is correct. When the consignment was finally delivered to the customer, after a number of unauthorised stops and deviations from the direct route were made, the consignment was short of one box. Documentary evidence was used by the respondent to prove that Aphane signed for receipt of 49 boxes. Aphane dismissed all the documentary evidence which was purported to contain his signature on the ground that his signature had apparently been forged. He also repeatedly attempted to blame the second accused. For the most part his evidence consisted of bare denials and accusations against the respondent.

5.7 I have been given no compelling reasons to believe that the respondent's witnesses were not telling the truth or that they had fabricated their evidence in order to implicate the applicants in wrongdoing. Neither do I find the first applicant’s allegation that his signature was forged credible.

5.8 Suspicion and circumstantial evidence plays a cardinal role in this matter and in deciding how much weight should be attached to this evidence. I have been guided by the decision of the Labour Court in *Freshmark (Pty) Ltd v S A Commercial Catering and Allied Workers Union and Others* (2009) 30 ILJ 341 (LC). In this matter the court dealt with a similar set of conditions involving suspicious circumstances. The Court, after an arbitrator found that dismissal was not justified, had the following to say:

> "[8] I find it impossible to agree with the assessment of the arbitrator that suspicion plays no part .... *Sidumo* makes it plain that all the relevant factors have to be taken into account. This includes the events giving rise to the suspicion and it follows that the misconduct has to be judged in context to decide whether it can fairly be said that it was such to destroy the element of trust essential for the employment relationship to continue. I consider that what occurred was not simply a deviation from the route, a joyride .... it was a day when the deviation from the route carried with it sinister connotations. Like any form of dishonest conduct, if in the particular context it has an impact on the employment relationship that is greater than it might have been had circumstances been different, the guilty employee can hardly claim it is unfair for him to have to bear those consequences. Misconduct carries with it consequences and if one such consequence is the actual and reasonable destruction of trust then dismissal is the appropriate sanction."

5.9 It seems to me that the deviation and unauthorised stop at the fresh product market and the circumstance that a box of spices was found to be missing after Aphane had made this stop has 'sinister' connotations. It is not unreasonable for the respondent to conclude that the visit to the fresh produce market and the missing box are linked.

5.10 Aphane undoubtedly made an unauthorised stop at the fresh produce market and he is guilty of this particular charge. Sishi is complicit in this offence in that he chose not to report his colleague or was involved in the actual theft of the box.

5.11 As to the charge of theft, it seems to me that the circumstantial evidence is sufficient to prove on a balance of probabilities that the applicants are guilty. Although it is the respondent who was required to discharge the burden of proof the applicants were under an obligation to put a credible alternative version of what transpired. The evidence of the applicants was entirely unsatisfactory ranging from a simple denial of any wrongdoing to, on Aphane's part, accusations that the respondent's witnesses had all lied under oath and that someone had forged his signature. The version put to me by the respondent was sufficient to discharge the burden of proof, whereas the applicants' versions were not credible.

5.12 The applicants were also charged with an "Irrevocable breach of the trust relationship and duty of good faith". This properly speaking is not an offence, it is the inevitable outcome when an employee has been found guilty of a charge involving some form of serious dishonesty. In my view the applicants should not have been charged with this alleged 'offence'.

5.13 A substantial portion of the applicants' closing argument dealt with the lack of representation during the arbitration. I was left with no option but to rule that UPUSA had no right to represent the applicants.

5.14 On 22 September 2010 the applicants sought a postponement to enable them to obtain alternative representation. I ruled as follows:

> "The applicants have sought a postponement of today's arbitration proceedings on the grounds that UPUSA are no longer allowed to represent them, that they are not familiar with arbitration proceedings and they now need time to seek alternative representation.
>
> According to the applicants they were only advised by UPUSA on 21 September 2010 that the union would not be able to represent them today.
>
> The respondent opposed the application. The respondent argued that an application should be made on affidavit in accordance with the Council's rules if no agreement has been reached by the parties to the dispute. Furthermore, the respondent and UPUSA met at a pre-arbitration meeting on

10 August 2010. UPUSA were aware on 27 July 2010 of the declaratory order issued by the Labour Court and should have addressed the issue of a postponement at this meeting. Neither applicant attended this meeting.

The respondent argued that UPUSA had behaved in an unreasonable way and that the applicants may not rely on the negligence of their union to obtain a postponement on the day of the arbitration.

The case is not complicated and both applicants were made aware of the reasons for their dismissal during the disciplinary enquiry.

Finally, the respondent will suffer financial prejudice should the matter be postponed - especially as the applicants are in no position to pay costs.

In reply, the applicants reiterated that they do not understand arbitration proceedings.

"Ruling

Postponements are not a right, they are an indulgence granted by the court or an arbitrator. In *SEF Vorster v CCMA & Others* Ngcamu A J held that in the CCMA postponements are not to be easily granted. Arbitration proceedings should only be postponed under exceptional circumstances, as under the LRA disputes are to be dealt with fairly and quickly.

This matter is not complex. The fact that the applicants do not have any knowledge of arbitration hearings is not in my view sufficient reason to grant a postponement. I have an obligation to explain the proceedings to the applicants and to assist them in terms of process and procedure.

The application for postponement is denied".

5.15 As to legal representation. The applicants' argument that legal representation was denied on the last day of the hearing because the respondent had closed its case, this was only one of the reasons, and a minor reason at that. I ruled as follows:

> "As regards the questions of law raised by this dispute and the issue of public interest in the matter, Mr Sishi's attorney conceded that I am not required to consider these two factors.
>
> The attorney for Mr Sishi argued that the matter is complex because the applicants' cases should have been separated.
>
> As to comparative ability, it was argued that Mr Sishi is an unschooled labourer who is disadvantaged in being opposed by Ms Buchel.
>
> Ms Buchel opposed the application. She dismissed the argument that the two cases should have been heard separately on two grounds i) that both applicants were dismissed for the same offence; and ii) that UPUSA had seen fit to refer the matter as one dispute.
>
> As to comparative ability, Ms Buchel stated that she has had no legal training - her employment involves recruitment and training - and this is the first time that she has attended an arbitration hearing.
>
> The correct test for deciding whether to allow legal representation at arbitration proceedings was set out in *Vaal Toyota (Nigel) v Motor Industry Bargaining Council & Others* (2002) 10 BLLR 936 (LAC).
>
> The LAC held that the test is whether it would be unreasonable to expect a party to a dispute to deal with the issues alone.
>
> As to complexity - I do not believe that this matter is at all complex, and certainly no more complex than the majority of cases that fall to be decided at arbitration.

As to the issue of comparative ability - the respondent's representative has little knowledge of legal matters and has no prior experience in representing a party at arbitration. Any slight advantage she might enjoy because of her experience as a manager can be remedied by the arbitrator who has an obligation to assist an unrepresented party in respect of the process.

Ruling

This matter before me is not complex and given that both applicants had acquitted themselves well during the full day of this hearing on 22/9/10, I see no reason why legal representation is necessary. The comparative ability of the respective parties is not so divergent as to warrant legal representation.

Allowing legal representation to the respondent at this stage of the proceedings would not be of any assistance to it as all the company's witnesses have led evidence and have also been cross-examined by the applicants.

Accordingly, for the reasons set out above the application for legal representation is declined".

5.16 At the commencement of the proceedings I proposed that one of the applicants should conduct cross-examination. Aphane chose to do this, however during the course of the hearing Sishi also asked questions of the respondent's witnesses.

5.17 As to procedural fairness the respondent has discharged the burden of proving that the requirements for procedural fairness were complied with. No evidence was adduced that the chairperson cut short the proceedings. Indeed, Sishi attested that during the enquiry he had "explained everything", and only later on in the proceedings did he claim that he had not been allowed to finish his testimony because the chairperson had been in a hurry. These two versions contradict each other.

5.18 The main thrust of the applicants' attack on procedural fairness, that the respondent failed to investigate the matter, and that they were not afforded sufficient time to prepare for the enquiry lacks substance. The detailed evidence led by the respondent's witnesses suggest a fairly thorough investigation, and the time given to the applicants was adequate. It is telling that the union official did not dispute these two issues at the

start of the enquiry. Dave also attested that the applicants had confirmed that they had been given sufficient time.

6. AWARD

6.1 I accordingly find that the dismissal of the applicants was fair because the respondent did prove on a balance of probabilities that the reason for dismissals were for a fair reason related to the applicants' conduct, and because the dismissals were affected in accordance with a fair procedure.

6.2 No cost order is made.

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J C SHARDLOW

NBCRFI PANELLIST