

**ARBITRATION  
AWARD**

Arbitrator: A Andrews  
Case Reference No.: WCRFBC 21 302  
Date of award: 01/03/2013

In the arbitration between:

**SATAWU ON BEHALF OF BATATA AND YINGWA** (“THE EMPLOYEES”)

\_\_\_\_\_ Union/Employee party

and

**CARGOWORKS (PTY) LTD** (“THE EMPLOYER”)

\_\_\_\_\_ Employer party

Union/Employee’s representative: Mr Cyril MFOKOFI

Union/Employee’s address: 16<sup>th</sup> Floor Plein Park Building Cape Town

Telephone: 021 461 9410

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Employer’s representative: Mr Germishuys

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**DETAILS OF HEARING AND REPRESENTATION:**

The employees were represented by Mr Mfokofi of SATAWU (the Union) . The employer was represented by Mr Germishuys. The hearing took place at the premises of the Bargaining Council in Cape Town.

**ISSUE IN DISPUTE:**

Whether the dismissals were substantively and procedurally fair

## **BACKGROUND OF THE DISPUTE:**

The employer alleged that he had caught the employees in the act of trying to sell company property in the form of wooden pallets and that they had received written warnings prior thereto, for dishonesty in that they attempted to sell company pallets without permission. These pallets are wooden objects used in the loading and offloading of heavy goods by the employer. The employee denied the claims and that the pallets were company property. The employee's representative stated that the hearing preceding their dismissal was unfair because they, together with their shop stewards were not given an opportunity to defend themselves, ask questions or testify and that hearsay evidence was presented against them. Further that they requested that one Patrick and Mr van der Merwe of Budget Pallets, whom the employer alleged had made incriminating representations be called as witnesses but they were not, and when they asked about these potential witnesses they were informed that they were dismissed.

## **SURVEY OF ARGUMENTS & EVIDENCE:**

### **EMPLOYER'S EVIDENCE**

#### **The employer called three witnesses**

##### **1. Mr van den Berg**

The following is a summary of his evidence. He testified that he was the presiding officer at the hearing concerning the employees' alleged misconduct and that the employees had walked out of the hearing rather than participating. They were charged with dishonesty and theft qualified by the words "Attempted to sell pallets without permission". A final written warning had been issued to both employees in March 2012 for the same offence and they had been notified in a letter thereafter that the **pallets on the employer's trucks** were company property and that the disposal thereof without permission was not permitted. These letters were signed by the employees. The employer had a problem of theft of its pallets. All goods on the truck were regarded as company property including pallets. After the alleged misconduct arose the witness arranged for a consultation with the Union to discuss the proposed disciplinary hearing. He argued that this approach indicated their commitment to procedural fairness in the hearing. At the disciplinary hearing a shop steward Mr Simiti represented them, but did not participate in the hearing. In his view the hearing was fair as everyone was given a chance to state their case. The employees were

found guilty on the strength of the evidence of Mr Germishuys whose evidence was not challenged and they were then dismissed, for “Dishonesty: attempting to sell pallets without permission.” He averred that the employees and their representative said nothing in the hearing and he warned them that if they did not challenge the version of the employer’s witness, he would have to accept it as unchallenged. The employees then walked out of the hearing. He referred to this statement as being recorded by him in his minutes of the disciplinary enquiry. As for the incriminating letters from Budget Pallets he stated that they were not put at the hearing nor did not consider them in making his finding. Mr Batata asked Mr Germishuys to call Patrick, who was the alleged author of one of the letters as a witness but was advised that he had no right to insist on Germishuys calling a witness and that the employees were at liberty to call him themselves. He decided not to have reference to further information as Germishuys’ evidence was unchallenged. They were given the right to appeal and did not appeal. He stated that the employees did not deny being at the premises of Budget Pallets on the date of the alleged misconduct. The employee’s records show a final written warning 13<sup>th</sup> March 2012 issued on behalf of the company by himself acting as a consultant.

## **2. Mr Germishuys**

The witness testified that he is a branch manager at the employer that there had been complaints about some of their employees selling pallets. He received a tipoff on the 28<sup>th</sup> May 2012 and went to a company known as Budget Pallets to investigate. While he was there one of the employer’s trucks pulled in to Budget Pallets, which was not a client of the employer. He filmed the movement of the truck on a video. He then followed them to their next destination. Thereafter he returned a while later to Budget Pallets again and found the truck parked outside the premises. He approached the driver and asked where the two assistants, the employees, were. The driver looked nervous and told him that they had gone to look for a toilet. He went into the premises of Budget Pallets and found the two employees there and they looked uncomfortable and were speaking to a person by the name of Patrick. He asked Mr Batata what he was doing there to which he replied that he had come to see his cousin Patrick. He then tried to speak to Patrick with whom Mr Batata was speaking. He asked Mr Batata to keep quiet and to please leave the place as he wanted to speak to Patrick. The owner of the business came out to find out what was going on and Germishuys explained why he was there. He asked the employees to leave and continue with the work. Then he went to speak to the owner and Patrick again and they pointed out the pile of pallets that the employees had tried to sell them. He concluded that the employees had got a fright when they saw him arrive and had abandoned the pallets there. A photograph of a pile of pallets was presented by him at the arbitration.

His further evidence was that there had been a history of theft of pallets at the employer and the two applicants had been served with final written warnings attempt to sell pallets, as well having been given letter explaining that goods on the employer's trucks belonged to the employer and they were forbidden from disposing of them, less than three weeks prior thereto. The pallets were either bought or given to the company by customers and were essential for moving heavy items around that the company transports. He testified that the employees were informed of a hearing to be held in regard to the allegations of theft and prior thereto the Union was informed thereof and two letters were shown to them from Budget Pallets incriminating the employees. A pre hearing consultation was held with the Union's representative Mr Mfokofi. Before the hearing the employees asked for the two Budget Pallet employees to be called to testify but the employer said it did not have to do so. A hearing was held in his view where a fair procedure was followed and everyone was afforded the opportunity to state their case, but the applicants refused to participate therein and excused themselves from the hearing after he gave his evidence. They were warned that this might prejudice them but refused to take part. They were found guilty of the charges and dismissed.

He testified that according to the disciplinary code dishonesty is a dismissible offence. The code is on the notice board at the workplace. Employees were also given the code of conduct which they sign for when they are employed. This was introduced after the employees were employed and they refused to sign for the relevant documents. He stated that he had taken a video of one of its trucks entering the premises of Budget Pallets 28 May 2012. The video purporting to reflect this incident indicates that it was created on 29 May. The witness referred to this as a "system date" but he could not explain the discrepancy. An inspection *in loco* was held from which it was clear that the video depicted a vehicle with the words Cargo Works on the side entering a premises where pallets were stacked. The parties agreed that this premises was located between two other premises where the employer had done deliveries but the applicants did not admit to having done deliveries there on 28 May 2012 and put the employer to the proof thereof.

### **3. Mr Leonard van der Merwe**

The witness gave evidence that he worked for Budget Pallets, an enterprise that buys and sells pallets, the bulk of which are purchased from delivery trucks. On 28 May 2012 he heard a commotion in the yard at the premises of Budget Pallets and stepped out of his office to be told by one of his employees, known as Patrick, that Mr Germishuys was investigating the sale of pallets by one of his employees to Budget Pallets. Mr Germishuys showed him a pile of four pallets and Germishuys then photographed them, and Patrick advised that he saw the pallets being carried into the yard. Two other men were also

present, and he referred to them as Germishuys' employees. At the arbitration he stated that he could not identify whether they were the applicants or not. The four pallets in question were totally separate from all the other stock of pallets in the yard, which he testified could number between 2000 and 6000 pieces at any time. Patrick informed him that the pallets had come from the employer's truck which was outside the entrance to the premises. There were no other trucks there at the time. The witness concluded that the four pallets must have come from the employer's truck parked outside the premises. He had seen one of the employer's trucks on his premises previously on more than one occasion. It was the same size as the truck in question on 20 May 2012, which bore the employers logo. He had no relationship with the employer, only a relationship with the truck driver. He did not as a rule enquire about the source of pallets sold to him, unless there was a complaint.

#### **4. Ms J Windt**

The witness testified in relation to a letter submitted by the employees bearing the employers letter head which purported to be a copy of a letter that stated that it expunged previous disciplinary records of the employees. She was responsible for writing letters at the employer on its behalf, and had previously sent letters to the Union signed by herself. She denied that the letter emanated from the employer and though it bore her signature she denied that she had signed it. The original was not presented. She pointed out that the letter used fonts that she did not use and that it looked skew and unprofessional and she would never have written a letter that looked like that. The letter was dated after the date of the dismissal of the employees.

### **EMPLOYEE'S EVIDENCE**

#### **1. Mr Simiti**

The witness testified that he was a shop steward representing the employees at the hearing before their dismissal. He claimed the hearing was unfair because Mr Batata had received two incriminating letters from Budget Pallets but when he asked for the authors to be called by the employer, they refuse to do so. He was also not given an opportunity to call witnesses. He confirmed that the disciplinary code of the employer was posted on a notice board but said that it had not been explained to the employees. He did not deny that he defended employees on disciplinary charges based on the code. He stated that Mr Batata did have witnesses but they were not present at the hearing and he was not given an opportunity to call them. He stated that the employees were not notified that they could appeal the decision of the disciplinary enquiry.

Mr Simiti did not state in his evidence in chief that Mr Batata had not been given a chance to cross examine the witnesses. Under cross examination he stated that Mr Germishuys had said that the case was over and the dismissal was given without notice, and so the employees saw no reason to stay in the hearing. He did not remember Batata walking out before the hearing was over. Later in his evidence he stated that Mr Batata was given a paper to sign and he refused. The employees were then told to go and wait outside whereafter they received a letter. When asked why no objection was raised to Mr Batata not being allowed to ask questions of the witness he replied that it was usual in a hearing with Mr van den Berg that if you asked a lot of questions he would say you are not a lawyer, don't be clever.

## **2. Mr Batata**

The witness, a shop steward testified he went to pick up goods at two premises in the vicinity of Budget Pallets, which he stated is not a customer of the employer, but he could not remember the date. He denied that there was a company policy that employees were not entitled to receive gifts from clients and referred to the fact that on one occasion they had received caps from a client. He admitted that he could read the letter which informed the employees of the rule relevant in this case save for some words eg excessive. He testified that he had received warnings in the past but they had been expunged in a letter presented in the arbitration to that effect purporting to come from the employer. He denied that he had sold any pallets at Budget Pallets or had been caught on their premises on the day in question. When asked about the video recording he stated that he did not remember selling pallets on the 28<sup>th</sup> May 2012 and did not see himself in the video. He stated that he never asked to call witnesses at the disciplinary hearing. Under cross examination he stated that this was because he was never given a chance to call witnesses.

### **ANALYSIS OF ARGUMENTS & EVIDENCE:**

1. I found the employer's witness Mr Germishuys to be a credible witness, and his version very probable and his evidence was largely uncontested. The version of the employee Mr Batata, who denied that he went to the premises of Budget Pallets on 28 May 2012 was not put to him, nor set out in the opening statement of the applicants and therefore Mr Germishuys's evidence was not tested against this version. Mr Batata in under cross examination denied that the video was of the same place as Budget Pallets and that he had ever been there. However he failed to put to Mr Germishuys that he was not one of the persons in the video and that he never went to Budget Pallets that day. Therefore the evidence of Mr Germishuys, which was inherently probable was largely uncontested.

2. The evidence of Mr Germishuys was corroborated in material respects by the evidence of the owner of Budget Pallets Mr van der Merwe, whom I also found to be a reliable witness and whose evidence was also not tested against the version of employee Mr Batata. The second applicant did not give evidence and his version was not put to these witnesses either.
3. Mr Van der Merwe's evidence corroborated the evidence of Mr Germishuys that the employer's vehicle was parked outside the premises of Budget Pallets on the 28<sup>th</sup> May 2012 and that two of its employees were inside the premises where there was a discussion or altercation under way between Germishuys and these two persons, when he walked out of his office and entered the scene. Nearby were four pallets completely separate from the rest of the pallets that were then photographed by Mr Germishuys.
4. An inspection *in loco* was held at the premises of Budget pallets that confirmed that the entrance to this premises is depicted on a video presented by the employer as evidence in the arbitration. The video depicts a large truck bearing a Cargo Works logo entering and leaving the premises. The date of the video was disputed by the applicants. The premises of Budget Pallets appeared on inspection to be a large open space between buildings with a small office at one end. Inside the premises were a large number of pallets stacked against the sides of the open space, surrounded by walls and buildings. A large truck could drive into the open space and load and offload pallets.
5. I found the employee a less than impressive witness, who relied on lack of memory and evasion to deal with the questions put to him. His representative did not put his version to the employer's witnesses. He claimed he could not remember if he drove in the vehicle in question on the 28<sup>th</sup> May 2012, the day allegedly depicted in the video. Elsewhere in his evidence he stated that he could remember delivering goods to two premises, HSM and Uniroll which were established in the inspection *in loco* to be located next to or diagonally opposite the premises of Budget Pallets. He initially admitted that Mr Germishuys had arrived when he and his fellow workers were making deliveries to Uniroll but denied that Germishuys spoke to him. Then he stated that he did not dispute that Mr Germishuys spoke to him but he was not sure of the date, and that Mr Germishuys had asked him what he had been doing at "that place" which is presumably a reference to Budget Pallets. He admitted that Mr Germishuys had spoken to him when he was at Uniroll but denied that he had seen him at Budget Pallets. When confronted with the trip sheet that stated that he had done deliveries to these places on the 28<sup>th</sup> May he stated that he could not dispute it as it was written by the employer. The trip sheet was disputed by the employees. He claimed he had never seen Budget Pallets but he stated that he knew that they

were not a client of the employer. He stated that he could not remember selling pallets on that day, and he did not see himself in the video, suggesting that he might have sold pallets on another occasion.

6. All the evidence in this matter has been considered although not all of it is referred to in this award. On the basis of the evidence, and the inspection *in loco* I find version of the employer to be the more probable, and inherently probable, whereas I find Mr Batata's denial or failure to remember the events inconsistent and implausible, in the face of the corroborated evidence of the employer. The version of the employer plausibly demonstrates that a Cargo Works truck had been into the premises of Budget Pallets, a business that trades in wooden pallets at some time prior to the incident that led to the employees' dismissal and that Mr Germishuys came to the premises of Budget Pallets on 28<sup>th</sup> May 2012 where he found the employer's truck parked outside and two employees within the premises. He had an altercation with them told them to leave the premises whereafter he took photos of four pallets that had been pointed out to him by staff of Budget Pallets. These photographs were presented at the arbitration. I accept his evidence as plausible that he found them behaving suspiciously within the precincts of Budget Pallets and for this reason, he investigated the matter further. Mr Batata's evidence that the employees had been to deliver goods in close proximity to Budget Pallets leaves little room to speculate that the persons in the premises of Budget Pallets on that day were anyone other than the applicants.
7. The only reasonable inference that can be drawn from the above findings is that the employees were found at the premises of Budget Pallets on 28<sup>th</sup> May 2012 behaving suspiciously because they were there with the purpose of trading in pallets. The open pallet filled space where Germishuys found the employees does not suggest that anything other than the trading in pallets took place there, and it is part of the business premises of Budget Pallets which does just that. The space contains nothing but a storage area for pallets and the employees did not put forward a suggestion that they were there for any other reason. They merely denied being there at all, a version which I find implausible. The activity engaged in could either have been the buying or selling of pallets. Budget Pallets is not a client of the employer. The former explanation is the least likely since on the employee's version, pallets are freely available at the employer and are not the employer's property. There would have been no need to buy them. The most reasonable inference from these facts is that they were at budget pallets to sell pallets, from the employer's vehicle. It is common cause that the employer used pallets in its deliveries and transported them on its trucks. Selling pallets which are contained in the trucks is regarded by the employer as conduct that is contrary to the employer's



rules and the employees had been notified of this fact in a letter and had received a previous final written warning.

8. The versions of these two witnesses for the employer constitute circumstantial evidence creating a *prima facie* case that the employees were present at the premises of Budget Pallets on 28 May 2012 without good reason and for the purposes of selling pallets. Having established a *prima facie* case of misconduct the onus shifted to the employees to explain why they were at Budget Pallets during their working hours and whilst they were making their rounds in a company vehicle, and to provide an explanation which would make their conduct not culpable. They failed to do so. The version of Mr Batata was a bare denial of being there, and was not put to the witnesses. Mr Yingwa did not give evidence. In the absence of any other explanation the only reasonable inference to draw from these facts is that the employees were at Budget Pallets with the purpose of selling pallets which is conduct that is in conflict with the disciplinary code and for which they had both previously received warnings.
9. Procedural fairness: I found the evidence of the presiding officer at the hearing, Mr van der Berg to be consistent and plausible and the suggestion that the employees were not allowed to present their versions implausible. His evidence regarding the procedural issues of the hearing was also consistent with that of Mr Germishuys. Prior to the hearing the employees were consulted with in the presence of their union representative and shown incriminating letters that allegedly emanated from Budget pallets. In his evidence however Mr van den Berg stated that the letters did not form part of the hearing and were not considered in the finding. This evidence was not disputed. Given that this evidence was not presented in the hearing the fact that the employer decided not to call the authors of the letters does not result in a procedural irregularity. As regards the claim that he was not allowed to call witnesses Mr Batata stated under cross examination that he never asked if he could call any witnesses apart from the Budget Pallet employees who had written the incriminating letters, given to him before the hearing. Later in his evidence he stated that this was because he was never given a chance to call witnesses. His representative Mr Simiti stated that he had witnesses but they were not present at the hearing. Mr Simiti stated that Mr Batata had not been given an opportunity to question the witness whereas Mr Batata stated that his representative had not been given this opportunity. Mr Simiti's evidence of how the hearing ended was also inconsistent, stating that they walked out, but later stating that Mr Batata was asked to sign a document which he refused and then they were asked to wait outside.

Both Mr van den Berg and Mr Germishuys testified that the employees walked out of the hearing and were warned that if they did not challenge the evidence presented by the employer they could be prejudiced. A note of this was made by Mr van den Berg on his minutes of the enquiry. In my view neither Mr Batata or Mr Simiti, made out a credible or consistent case that employee had been refused an opportunity to cross examine the witnesses and to call his own witnesses. On the balance of probabilities, and taking into account the plausible evidence of Mr van den Berg I find that the hearing was conducted in a procedurally fair manner. Documentation informing the employees of the hearing, and the consultation beforehand indicate that the employer made a concerted effort to conduct the hearing in a procedurally fair manner. Previous warnings were followed up with a notice informing the employees of their right to appeal. In the circumstances, and in the light of the fact that the employees are shop stewards, it appears that they had adequate notice that they would have a right to appeal disciplinary steps taken against them but did not do so. Mr Germishuys' evidence was that the employees were informed of their dismissal in a notice and at the same time they were informed of their right of appeal, and I have found the version of Mr Germishuys to be probable. The claim that the hearing was procedurally unfair because the employees were not told of their right of appeal is without merit.

10. As regards the existence of a rule that was transgressed by the employees both Mr Batata and his representative were shop stewards. Both confirmed that the disciplinary code of the employer was posted on a notice board but said that it had not been explained to the employees. Both did not deny that they defended employees on disciplinary charges based on the code. I consider it somewhat ingenuous for Mr Batata and his representative to claim that they acted in this capacity but did not know the employer's rules as they had not been explained to him. I am satisfied that the employees knew the rule regarding the unauthorised disposal of pallets by the time he had received a final written warning and a letter that stated in clear terms that disposing of the company's property without permission was an offence. Mr Batata confirmed that he could read this letter and by this I gather he could understand it, save for a few words.
11. The employees claim that their previous disciplinary records had been expunged of warnings is not credible. The letter to this effect was denied to be the product of the employer through its witness Ms Windt, a thoroughly credible witness. It has all the hall marks of a forgery, the use of different and inconsistent fonts, no indication that it could have been faxed, or the original tendered in evidence, and it was in some

respects lopsided, that suggests that it was a photocopy of a previously received letter that had been tampered with.

12. In the circumstances the disciplinary records, the nature of the transgressions and the extent of potential loss caused by the unlawful sale of pallets which is evidence that was not disputed by the employees lead me to the conclusion that corrective discipline has been applied in this case to no avail and that the only reasonable measure to prevent further loss would be dismissal. The dismissal was substantively fair in the circumstances and no credible evidence has been led to contest the employer's plausible version that the hearing was conducted in a fair manner.
13. The dismissals are upheld.
14. I wish to record that this matter was conducted in a thoroughly vexatious manner by the representative of the Union, Mr Mfokofi, who showed several instances of serious disrespect for the hearing, witnesses and the arbitrator. Should this conduct be repeated in other arbitrations there is every likelihood that an adverse costs order against the representative union would be a reasonable measure. Therefore it is intended that this award serves to advise the Union of the risk of such conduct in hearings of this nature.

## **ARBITRATOR**

### **AWARD:**

The dismissals are upheld.

**Signed and dated at DATED AT CAPE TOWN THIS 28th DAY OF February 2013**

**ARBITRATION**

**AWARD**

**Arbitrator: A Andrews  
Case Reference No.:WCRFBC 21 302  
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**Union/Employee’s representative: Mr Cyril MFOKOFI**

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**ISSUE IN DISPUTE:**

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**BACKGROUND OF THE DISPUTE:**

The employer alleged that he had caught the employees in the act of trying to sell company property in the form of wooden pallets and that they had received written warnings prior thereto, for dishonesty in that they attempted to sell company pallets without permission. These pallets are wooden objects used in the loading and offloading of heavy goods by the employer. The employee

denied the claims and that the pallets were company property. The employee's representative stated that the hearing preceding their dismissal was unfair because they, together with their shop stewards were not given an opportunity to defend themselves, ask questions or testify and that hearsay evidence was presented against them. Further that they requested that one Patrick and Mr van der Merwe of Budget Pallets, whom the employer alleged had made incriminating representations be called as witnesses but they were not, and when they asked about these potential witnesses they were informed that they were dismissed.

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witness but was advised that he had no right to insist on Germishuys calling a witness and that the employees were at liberty to call him themselves. He decided not to have reference to further information as Germishuys' evidence was unchallenged. They were given the right to appeal and did not appeal. He stated that the employees did not deny being at the premises of Budget Pallets on the date of the alleged misconduct. The employee's records show a final written warning 13<sup>th</sup> March 2012 issued on behalf of the company by himself acting as a consultant.

## **6. Mr Germishuys**

The witness testified that he is a branch manager at the employer that there had been complaints about some of their employees selling pallets. He received a tipoff on the 28<sup>th</sup> May 2012 and went to a company known as Budget Pallets to investigate. While he was there one of the employer's trucks pulled in to Budget Pallets, which was not a client of the employer. He filmed the movement of the truck on a video. He then followed them to their next destination. Thereafter he returned a while later to Budget Pallets again and found the truck parked outside the premises. He approached the driver and asked where the two assistants, the employees, were. The driver looked nervous and told him that they had gone to look for a toilet. He went into the premises of Budget Pallets and found the two employees there and they looked uncomfortable and were speaking to a person by the name of Patrick. He asked Mr Batata what he was doing there to which he replied that he had come to see his cousin Patrick. He then tried to speak to Patrick with whom Mr Batata was speaking. He asked Mr Batata to keep quiet and to please leave the place as he wanted to speak to Patrick. The owner of the business came out to find out what was going on and Germishuys explained why he was there. He asked the employees to leave and continue with the work. Then he went to speak to the owner and Patrick again and they pointed out the pile of pallets that the employees had tried to sell them. He concluded that the employees had got a fright when they saw him arrive and had abandoned the pallets there. A photograph of a pile of pallets was presented by him at the arbitration.

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Union's representative Mr Mfokofi. Before the hearing the employees asked for the two Budget Pallet employees to be called to testify but the employer said it did not have to do so. A hearing was held in his view where a fair procedure was followed and everyone was afforded the opportunity to state their case, but the applicants refused to participate therein and excused themselves from the hearing after he gave his evidence. They were warned that this might prejudice them but refused to take part. They were found guilty of the charges and dismissed.

He testified that according to the disciplinary code dishonesty is a dismissible offence. The code is on the notice board at the workplace. Employees were also given the code of conduct which they sign for when they are employed. This was introduced after the employees were employed and they refused to sign for the relevant documents. He stated that he had taken a video of one of its trucks entering the premises of Budget Pallets 28 May 2012. The video purporting to reflect this incident indicates that it was created on 29 May. The witness referred to this as a "system date" but he could not explain the discrepancy. An inspection *in loco* was held from which it was clear that the video depicted a vehicle with the words Cargo Works on the side entering a premises where pallets were stacked. The parties agreed that this premises was located between two other premises where the employer had done deliveries but the applicants did not admit to having done deliveries there on 28 May 2012 and put the employer to the proof thereof.

#### **7. Mr Leonard van der Merwe**

The witness gave evidence that he worked for Budget Pallets, an enterprise that buys and sells pallets, the bulk of which are purchased from delivery trucks. On 28 May 2012 he heard a commotion in the yard at the premises of Budget Pallets and stepped out of his office to be told by one of his employees, known as Patrick, that Mr Germishuys was investigating the sale of pallets by one of his employees to Budget Pallets. Mr Germishuys showed him a pile of four pallets and Germishuys then photographed them, and Patrick advised that he saw the pallets being carried into the yard. Two other men were also present, and he referred to them as Germishuys' employees. At the arbitration he stated that he could not identify whether they were the applicants or not. The four pallets in question were totally separate from all the other stock of pallets in the yard, which he testified could number between 2000 and 6000 pieces at any time. Patrick informed him that the pallets had come from the employer's truck which was outside the entrance to the premises. There were no other trucks there at the time. The witness concluded that the four pallets must have come from the employer's truck parked outside the premises. He had seen one of the employer's trucks on his premises previously on more than one occasion. It was the same size as the truck in question on 20 May 2012, which bore the

employers logo. He had no relationship with the employer, only a relationship with the truck driver. He did not as a rule enquire about the source of pallets sold to him, unless there was a complaint.

#### **8. Ms J Windt**

The witness testified in relation to a letter submitted by the employees bearing the employers letter head which purported to be a copy of a letter that stated that it expunged previous disciplinary records of the employees. She was responsible for writing letters at the employer on its behalf, and had previously sent letters to the Union signed by herself. She denied that the letter emanated from the employer and though it bore her signature she denied that she had signed it. The original was not presented. She pointed out that the letter used fonts that she did not use and that it looked skew and unprofessional and she would never have written a letter that looked like that. The letter was dated after the date of the dismissal of the employees.

### **EMPLOYEE'S EVIDENCE**

#### **3. Mr Simiti**

The witness testified that he was a shop steward representing the employees at the hearing before their dismissal. He claimed the hearing was unfair because Mr Batata had received two incriminating letters from Budget Pallets but when he asked for the authors to be called by the employer, they refuse to do so. He was also not given an opportunity to call witnesses. He confirmed that the disciplinary code of the employer was posted on a notice board but said that it had not been explained to the employees. He did not deny that he defended employees on disciplinary charges based on the code. He stated that Mr Batata did have witnesses but they were not present at the hearing and he was not given an opportunity to call them. He stated that the employees were not notified that they could appeal the decision of the disciplinary enquiry.

Mr Simiti did not state in his evidence in chief that Mr Batata had not been given a chance to cross examine the witnesses. Under cross examination he stated that Mr Germishuys had said that the case was over and the dismissal was given without notice, and so the employees saw no reason to stay in the hearing. He did not remember Batata walking out before the hearing was over. Later in his evidence he stated that Mr Batata was given a paper to sign and he refused. The employees were then told to go and wait outside whereafter they received a letter. When asked why no objection was raised to Mr Batata not being allowed to ask questions of the witness he replied that it was usual in a hearing with Mr van den Berg that if you asked a lot of questions he would say you are not a lawyer, don't be clever.



#### **4. Mr Batata**

The witness, a shop steward testified he went to pick up goods at two premises in the vicinity of Budget Pallets, which he stated is not a customer of the employer, but he could not remember the date. He denied that there was a company policy that employees were not entitled to receive gifts from clients and referred to the fact that on one occasion they had received caps from a client. He admitted that he could read the letter which informed the employees of the rule relevant in this case save for some words eg excessive. He testified that he had received warnings in the past but they had been expunged in a letter presented in the arbitration to that effect purporting to come from the employer. He denied that he had sold any pallets at Budget Pallets or had been caught on their premises on the day in question. When asked about the video recording he stated that he did not remember selling pallets on the 28<sup>th</sup> May 2012 and did not see himself in the video. He stated that he never asked to call witnesses at the disciplinary hearing. Under cross examination he stated that this was because he was never given a chance to call witnesses.

#### **ANALYSIS OF ARGUMENTS & EVIDENCE:**

15. I found the employer's witness Mr Germishuys to be a credible witness, and his version very probable and his evidence was largely uncontested. The version of the employee Mr Batata, who denied that he went to the premises of Budget Pallets on 28 May 2012 was not put to him, nor set out in the opening statement of the applicants and therefore Mr Germishuys's evidence was not tested against this version. Mr Batata in under cross examination denied that the video was of the same place as Budget Pallets and that he had ever been there. However he failed to put to Mr Germishuys that he was not one of the persons in the video and that he never went to Budget Pallets that day. Therefore the evidence of Mr Germishuys, which was inherently probable was largely uncontested.
16. The evidence of Mr Germishuys was corroborated in material respects by the evidence of the owner of Budget Pallets Mr van der Merwe, whom I also found to be a reliable witness and whose evidence was also not tested against the version of employee Mr Batata. The second applicant did not give evidence and his version was not put to these witnesses either.
17. Mr Van der Merwe's evidence corroborated the evidence of Mr Germishuys that the employer's vehicle was parked outside the premises of Budget Pallets on the 28<sup>th</sup> May 2012 and that two of its employees were inside the premises where there was a discussion or altercation under way between Germishuys and these two persons, when he walked out of his office and entered the scene. Nearby were four pallets

completely separate from the rest of the pallets that were then photographed by Mr Germishuys.

18. An inspection *in loco* was held at the premises of Budget pallets that confirmed that the entrance to this premises is depicted on a video presented by the employer as evidence in the arbitration. The video depicts a large truck bearing a Cargo Works logo entering and leaving the premises. The date of the video was disputed by the applicants. The premises of Budget Pallets appeared on inspection to be a large open space between buildings with a small office at one end. Inside the premises were a large number of pallets stacked against the sides of the open space, surrounded by walls and buildings. A large truck could drive into the open space and load and offload pallets.
19. I found the employee a less than impressive witness, who relied on lack of memory and evasion to deal with the questions put to him. His representative did not put his version to the employer's witnesses. He claimed he could not remember if he drove in the vehicle in question on the 28<sup>th</sup> May 2012, the day allegedly depicted in the video. Elsewhere in his evidence he stated that he could remember delivering goods to two premises, HSM and Uniroll which were established in the inspection *in loco* to be located next to or diagonally opposite the premises of Budget Pallets. He initially admitted that Mr Germishuys had arrived when he and his fellow workers were making deliveries to Uniroll but denied that Germishuys spoke to him. Then he stated that he did not dispute that Mr Germishuys spoke to him but he was not sure of the date, and that Mr Germishuys had asked him what he had been doing at "that place" which is presumably a reference to Budget Pallets. He admitted that Mr Germishuys had spoken to him when he was at Uniroll but denied that he had seen him at Budget Pallets. When confronted with the trip sheet that stated that he had done deliveries to these places on the 28<sup>th</sup> May he stated that he could not dispute it as it was written by the employer. The trip sheet was disputed by the employees. He claimed he had never seen Budget Pallets but he stated that he knew that they were not a client of the employer. He stated that he could not remember selling pallets on that day, and he did not see himself in the video, suggesting that he might have sold pallets on another occasion.
20. All the evidence in this matter has been considered although not all of it is referred to in this award. On the basis of the evidence, and the inspection *in loco* I find version of the employer to be the more probable, and inherently probable, whereas I find Mr Batata's denial or failure to remember the events inconsistent and implausible, in the face of the corroborated evidence of the employer. The version of the employer plausibly demonstrates that a Cargo Works truck had been into the premises of Budget Pallets, a business that trades in wooden pallets at some time

prior to the incident that lead to the employees' dismissal and that Mr Germishuys came to the premises of Budget Pallets on 28<sup>th</sup> May 2012 where he found the employer's truck parked outside and two employees within the premises. He had an altercation with them told them to leave the premises whereafter he took photos of four pallets that had been pointed out to him by staff of Budget Pallets. These photographs were presented at the arbitration. I accept his evidence as plausible that he found them behaving suspiciously within the precincts of Budget Pallets and for this reason, he investigated the matter further. Mr Batata's evidence that the employees had been to deliver goods in close proximity to Budget Pallets leaves little room to speculate that the persons in the premises of Budget Pallets on that day were anyone other than the applicants.

21. The only reasonable inference that can be drawn from the above findings is that the employees were found at the premises of Budget Pallets on 28<sup>th</sup> May 2012 behaving suspiciously because they were there with the purpose of trading in pallets. The open pallet filled space where Germishuys found the employees does not suggest that anything other than the trading in pallets took place there, and it is part of the business premises of Budget Pallets which does just that. The space contains nothing but a storage area for pallets and the employees did not put forward a suggestion that they were there for any other reason. They merely denied being there at all, a version which I find implausible. The activity engaged in could either have been the buying or selling of pallets. Budget Pallets is not a client of the employer. The former explanation is the least likely since on the employee's version, pallets are freely available at the employer and are not the employer's property. There would have been no need to buy them. The most reasonable inference from these facts is that they were at budget pallets to sell pallets, from the employer's vehicle. It is common cause that the employer used pallets in its deliveries and transported them on its trucks. Selling pallets which are contained in the trucks is regarded by the employer as conduct that is contrary to the employer's rules and the employees had been notified of this fact in a letter and had received a previous final written warning.
22. The versions of these two witnesses for the employer constitute circumstantial evidence creating a *prima facie* case that the employees were present at the premises of Budget Pallets on 28 May 2012 without good reason and for the purposes of selling pallets. Having established a *prima facie* case of misconduct the onus shifted to the employees to explain why they were at Budget Pallets during their working hours and whilst they were making their rounds in a company vehicle, and to provide an explanation which would make their conduct not culpable. They failed to do so. The version of Mr Batata was a bare denial of being there, and was

not put to the witnesses. Mr Yingwa did not give evidence. In the absence of any other explanation the only reasonable inference to draw from these facts is that the employees were at Budget Pallets with the purpose of selling pallets which is conduct that is in conflict with the disciplinary code and for which they had both previously received warnings.

23. Procedural fairness: I found the evidence of the presiding officer at the hearing, Mr van der Berg to be consistent and plausible and the suggestion that the employees were not allowed to present their versions implausible. His evidence regarding the procedural issues of the hearing was also consistent with that of Mr Germishuys. Prior to the hearing the employees were consulted with in the presence of their union representative and shown incriminating letters that allegedly emanated from Budget pallets. In his evidence however Mr van den Berg stated that the letters did not form part of the hearing and were not considered in the finding. This evidence was not disputed. Given that this evidence was not presented in the hearing the fact that the employer decided not to call the authors of the letters does not result in a procedural irregularity. As regards the claim that he was not allowed to call witnesses Mr Batata stated under cross examination that he never asked if he could call any witnesses apart from the Budget Pallet employees who had written the incriminating letters, given to him before the hearing. Later in his evidence he stated that this was because he was never given a chance to call witnesses. His representative Mr Simiti stated that he had witnesses but they were not present at the hearing. Mr Simiti stated that Mr Batata had not been given an opportunity to question the witness whereas Mr Batata stated that his representative had not been given this opportunity. Mr Simiti's evidence of how the hearing ended was also inconsistent, stating that they walked out, but later stating that Mr Batata was asked to sign a document which he refused and then they were asked to wait outside.

Both Mr van den Berg and Mr Germishuys testified that the employees walked out of the hearing and were warned that if they did not challenge the evidence presented by the employer they could be prejudiced. A note of this was made by Mr van den Berg on his minutes of the enquiry. In my view neither Mr Batata or Mr Simiti, made out a credible or consistent case that employee had been refused an opportunity to cross examine the witnesses and to call his own witnesses. On the balance of probabilities, and taking into account the plausible evidence of Mr van den Berg I find that the hearing was conducted in a procedurally fair manner. Documentation informing the employees of the hearing, and the consultation beforehand indicate that the employer made a concerted effort to conduct the

hearing in a procedurally fair manner. Previous warnings were followed up with a notice informing the employees of their right to appeal. In the circumstances, and in the light of the fact that the employees are shop stewards, it appears that they had adequate notice that they would have a right to appeal disciplinary steps taken against them but did not do so. Mr Germishuys' evidence was that the employees were informed of their dismissal in a notice and at the same time they were informed of their right of appeal, and I have found the version of Mr Germishuys to be probable. The claim that the hearing was procedurally unfair because the employees were not told of their right of appeal is without merit.

24. As regards the existence of a rule that was transgressed by the employees both Mr Batata and his representative were shop stewards. Both confirmed that the disciplinary code of the employer was posted on a notice board but said that it had not been explained to the employees. Both did not deny that they defended employees on disciplinary charges based on the code. I consider it somewhat ingenuous for Mr Batata and his representative to claim that they acted in this capacity but did not know the employer's rules as they had not been explained to him. I am satisfied that the employees knew the rule regarding the unauthorised disposal of pallets by the time he had received a final written warning and a letter that stated in clear terms that disposing of the company's property without permission was an offence. Mr Batata confirmed that he could read this letter and by this I gather he could understand it, save for a few words.
25. The employees claim that their previous disciplinary records had been expunged of warnings is not credible. The letter to this effect was denied to be the product of the employer through its witness Ms Windt, a thoroughly credible witness. It has all the hall marks of a forgery, the use of different and inconsistent fonts, no indication that it could have been faxed, or the original tendered in evidence, and it was in some respects lopsided, that suggests that it was a photocopy of a previously received letter that had been tampered with.
26. In the circumstances the disciplinary records, the nature of the transgressions and the extent of potential loss caused by the unlawful sale of pallets which is evidence that was not disputed by the employees lead me to the conclusion that corrective discipline has been applied in this case to no avail and that the only reasonable measure to prevent further loss would be dismissal. The dismissal was substantively fair in the circumstances and no credible evidence has been led to contest the employer's plausible version that the hearing was conducted in a fair manner.

27. The dismissals are upheld.

28. I wish to record that this matter was conducted in a thoroughly vexatious manner by the representative of the Union, Mr Mfokofi, who showed several instances of serious disrespect for the hearing, witnesses and the arbitrator. Should this conduct be repeated in other arbitrations there is every likelihood that an adverse costs order against the representative union would be a reasonable measure. Therefore it is intended that this award serves to advise the Union of the risk of such conduct in hearings of this nature.

**ARBITRATOR**

**AWARD:**

The dismissals are upheld.

**Signed and dated at DATED AT CAPE TOWN THIS 28th DAY OF February 2013**