IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN CASE NO : D550/2006

In the matter between:

FRESHMARK (PTY) LIMITED	Applicant
and	
SACCAWU	First Respondent
FRANCIS SEEKOEI	Second Respondent
COMMISSION FOR CONCILIATION MEDIATION & ARBITRATION	Third Respondent
COMMISSIONER ANTHONY OSLER	Fourth Respondent

JUDGMENT

PILLEMER, AJ:

[1] The Applicant in this review application employed the Second Respondent as a driver for its fresh produce distribution business. Applicant supplied fresh produce to supermarkets from a central warehouse. One of its smaller trucks was driven by the Second Respondent. The incident that gave rise to the Second Respondent's dismissal began when a manager of the Applicant, a Mr Booysen, noticed that the truck to be driven by the Second Respondent appeared to have a full load. He knew that only eight pallets

ought to have been loaded on the truck that takes ten pallets. It should not have looked fully loaded and, suspecting that there was something sinister afoot, instead of investigating at that stage, Booysen decided to let events play themselves out. He made contact with the Chief of Security, a Mr Van Rensburg, and together the two of them decided to follow the truck to see whether the suspicion that produce was being misappropriated was justified. With Booysen and van Rensburg on his tail, but blissfully unaware that he was being followed, Second Respondent deviated from his set route and drove the truck into a local township. He passed a fruit and vegetable stall that was selling produce in crates that bore the Applicant's logo and which it used in its business and never sold. Second Respondent was seen in what appeared to be an attempt to reverse his truck into the driveway of a little brown house, change his mind and then approach the brown house from the other side. The Chief of Security had come armed with his camera and captured some of this on film. The two in the following car did not want to stop at the stall or near the truck for fear that this would draw attention to themselves so they drove past the stall and around the block. They must have been noticed and identified because, when they came

around the corner, the fruit and vegetables in the crates magically disappeared and someone was running away. All that remained was a pallet and an empty cardboard box that had once contained pineapples. The box had attached to it a piece of reddish plastic that was easily identified as being of the kind used by the Applicant as part of a colour code to identify the destination of its loads. A photograph was taken of the empty lonely box and its piece of plastic. Second Respondent and his truck did not linger either and after a short stop the truck went on its way. Questions posed to bystanders by Booysen and Van Rensburg did not elicit any helpful response and so they decided to go and meet the truck at its first legitimate destination, a Shoprite store in Maitland. The truck had beaten them to it and before any goods were removed they were able to inspect the contents, discovering that Booysen's assessment had been correct namely that extra produce had been loaded onto the truck. The second scheduled delivery was effected with the car following behind the truck and on the return of the convoy to the warehouse the extra produce was receipted. Second Respondent denied that he had any knowledge of the extra produce on his truck, contending, as is common cause, that it was not his job to load the truck. He did not however

dispute the evidence that it is not unusual for a driver to assist in loading the truck and on this occasion he had been seen doing so. He said that he thought that ten pallets had to be delivered and it is not his job to check. He gave a reason for the deviation from his scheduled route. He wanted to enquire about the progress of a repair to a CD or DVD machine and decided to do that on route, which is what he said he did at the house where his truck stopped. He denied any connection with the stallholder who later when Second Respondent testified he claimed to have identified as someone with the name of Gift and someone he said who had regularly purchased returned merchandise from the Applicant and sold it in the township.

[2] Not surprisingly after the day's events Second Respondent found himself on the wrong side of a disciplinary hearing. He was found guilty of "allegedly misappropriating product and/or deviating from his route" and dismissed. He contended that the dismissal was unfair and referred a dispute to the CCMA. It was eventually arbitrated by the Fourth Respondent, who found that the misconduct of "allegedly misappropriating product" which he understood to be misappropriation or attempted misappropriation not to

have been proved on the evidence before him. He found that the Second Respondent was guilty of misconduct in having deviated from his route, found that this carried with it an element of dishonesty but found that this kind of misconduct did not in itself justify dismissal. In the result Fourth Respondent found dismissal inappropriate as a sanction, rendering the dismissal substantively unfair. He reinstated the Second Respondent without backpay.

[3] The arbitration was conducted over a single day. Booysen testified and the events described above were not put in issue. The defence in essence was that the Second Respondent had not attempted to misappropriate and was not involved in the misappropriation of produce because he had no idea extra goods had been loaded on the truck. He claimed to have deviated from his route to ask about the repair to his CD player and then gone on to the scheduled destination. Nothing had been misappropriated because the extra produce was returned. Second Respondent called the repairman to testify to corroborate his reason for deviating and relied on the evidence of a picker to prove that it was not a driver's job to load the truck.

[4] The Fourth Respondent's award deals with the two counts separately. In relation to the first count he says the following

> "The employee was charged firstly with misappropriation of company property on 10 February 2006. The employer's case was essentially that the detour of the employee plus the suspicious events in the township rendered misappropriation probable.
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> I have looked at the evidence closely….There are certainly some suspicious aspects of the employee's case, such as the deviation itself, the extra stock and the incidents at the corner stall. On the other hand the evidence as to the link between this and the alleged misappropriation is tenuous. For instance the connection between the employee and the behaviour of the persons at the corner stall can be interpreted in various ways; the evidence of Mr Ishmael the repair man was – despite certain questionable aspects – not shown to be untruthful; it has not been adequately established who should be held responsible for the extra items packed in the packing house before leaving the premises; and there was no proof of stock losses or broken seals on the truck. Each of the incidents which led to the suspicions of the employer were dealt with by the union – the stall on the street corner was explained, the stop on the road at a private house was explained and there were no other pieces of evidence to establish convincingly any dishonesty by the employee with regard to the employer's property."

[5] Ms Nel, who appeared for the Applicant, contended that the award of the Fourth Respondent had fallen short of what is required of a reasonable arbitrator because he had

misdirected himself in relation to the way he assessed the evidence before him and for that reason incorrectly found that the Second Respondent was not guilty on the first count of misappropriation of property. She submitted that at the moment the truck left the premises the theft occurred and that is the finding that ought to have been made on the evidence before the arbitrator. She submitted that the award reveals that the arbitrator weighed the evidence of Booysen against the evidence of Second Respondent even though much of Second Respondent' version had not been put to Booysen when he was cross examined. She pointed out that this was not the correct approach. The arbitrator also examined each element piecemeal and tested each against the explanation, but did not examine the evidence as a whole to assess the overall probabilities and, in particular, misdirected himself in failing to have regard to the improbability of the sequence of coincidences that pointed to guilt with the result, she argued, his approach fell short of what was expected of a reasonable arbitrator. Mr Grobier for the Second Respondent on the other hand submitted that the misconduct that had formed the basis of the first charge was "misappropriation of the produce" and on the evidence misappropriation as such had not been proven. The finding

that the Second Respondent was not guilty of the first count was accordingly in his submission the correct finding and one to which a reasonable arbitrator could have come. Relying on the *Sidumo* test (Sidumo & another v Rustenberg Platinum Mines Ltd & aontother [2007] 12 BLLR 1097 (CC) at paragraph [110] – "Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?") he contended that there is no basis for upsetting the award on the first count because the Applicant's own evidence showed that there had been no misappropriation. I agree with Ms Nel that the arbitrator did not approach the evidence correctly in looking at it piecemeal and ignoring the impact of the improbability of the combination of coincidences of a deviation taking place on the very day when the truck had excess stock and the alleged CD repairman having a house that was adjacent to a market stall that was displaying the Applicant's products in its crates that it does not sell and who reacted like criminals in breaking up the stall and disappearing when the Applicant's management arrived. However even with that misdirection, I am not satisfied that the evidence goes far enough to establish an actual misappropriation, which is the charge Second Respondent faced. There is a reasonable

suspicion that no appropriation took place because Second Respondent realised that the game was up before he could give effect to the plan, but misappropriation was the charge the Second Respondent faced and the finding that he was not shown to be guilty of misappropriation, in my view, cannot be upset on review.

[6] The arbitrator found Second Respondent guilty on the second count of deviation from his route. He assessed what this meant in relation to the fairness of the sanction of dismissal. He deal with it thus in his award;

> "Despite the lingering suspicion there is no proof that the employee acted dishonestly in the normal sense of appropriating or attempting to appropriate his employer's property; his misconduct consists in taking his employers truck on an unauthorised joyride to attend to his personal business. Although this is dishonest to a certain extent, I do not believe that such misconduct justifies dismissal in the absence of any loss to the employer and in the absence of any relevant previous disciplinary record."

[7] Ms Nel, relied heavily on the passage in Sidumo that emphasises the duty of a commissioner to take into account the totality of circumstances to decide whether the decision

to dismiss was fair. She stressed that the commissioner has to consider all relevant circumstances (paragraphs [78] and[79] of Sidumo). She pointed out that the arbitrator did not take into account the nature of the business and the effect on the trust necessary in the employment relationship, having regard to the Second Respondent's duties, of the reasonable suspicion that had been generated by the events of the day which meant, in this context, that the trust relationship had been totally and utterly destroyed by Second Respondent's decision to dishonestly deviate from the designated route. She also emphasised that there had been dishonesty not only in diverting from the route but also in the way in which the Second Respondent had denied when he testified that he had known that he was not permitted to deviate from his route without prior permission. The arbitrator described this untruthful evidence as nonsensical in his award. In essence what she argued was that the arbitrator had to ask himself was whether the dismissal was fair having regard to the destruction of the trust relationship that followed the deviation from the route on the day in question. She contended that he had erred in not asking this question and finding instead that he had to "look afresh at the question of sanction" which is precisely

what the judgment in Sidumo said an arbitrator should not do (Paragraph [79] – “A Commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair.”)

[6] I find it impossible to agree with the assessment of the arbitrator that the suspicion plays no part and after finding that misappropriation was not proved that all that one is left with is to decide whether the offence of taking the truck for a joyride justifies dismissal. 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 as 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 deviation on a day when the truck had extra unauthorised goods loaded on it, it was a day in which the truck stopped near a fruit and vegetable stall where the persons at the stall behaved like persons who had something to hide and it was a day when the deviation from the route carried with it sinister connotations. Like any form of dishonest misconduct, 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. I do not consider that a reasonable commissioner could come to any other conclusion on the facts of this case than that the trust relationship had been completely destroyed. I find that the approach adopted by the commissioner in treating the two counts as entirely independent of each other and, having found the first count as not being proved of then largely ignoring the impact of the extra load and peculiar conduct of the market stall holders on the breakdown of trust in assessing the impact of the misconduct that was proved to be artificial and erroneous. In my assessment the only answer to the question “Was it fair to dismiss the Second Respondent from deviating from his route in the circumstances in which it occurred on the day in question?” is yes. That is the question the arbitrator should have asked himself and not whether deviating from the route in a vacuum is a

dismissible offence. In the result I find that the review should succeed.

[7] The Order I make therefore is the following:-

[7.1] The award of the Fourth Respondent under case no 1401-06FS is reviewed and set aside and replaced with an award reading ”the application is dismissed”.

[7.2] The First and Fourth Respondents are ordered to pay the Applicant’s costs occasioned by their opposition to the review.

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M PILLEMER

ACTING JUDGE OF THE LABOUR COURT

Date of Judgment: 10 July 2008.

APPEARANCES

For the Applicant: Adv C A Nel instructed by Deneys Reitz

For the Respondent: Adv S Grobier instructed by J Nortje-Kramer Weihmann and Joubert Attorneys