

**IN THE INDUSTRIAL COURT OF SWAZILAND****HELD AT MBABANE****CASE NO. 282/2003**

In the matter between:

**MSHAYELI SIBIYA****Applicant****and****CARGO CARRIERS (PTY) LIMITED****Respondent****CORAM:****P. R. DUNSEITH : PRESIDENT****JOSIAH YENDE : MEMBER****NICHOLAS MANANA : MEMBER****FOR APPLICANT : S. KUBHEKA****FOR RESPONDENT : Z. D. JELE**

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**J U D G E M E N T - 13/02/2008**

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1. The Applicant Mshayeli Sibiya was employed by the Respondent in August 1995 as a heavy duty driver.
2. On the 15<sup>th</sup> June 2001, whilst driving the Respondent's truck to Durban, the Applicant was arrested by the South African Police on a charge that he stole diesel from Respondent's truck ten days earlier on

the 5<sup>th</sup> June 2001 at a place called Bushlands in KwaZulu-Natal, South Africa. He was released on bail after spending about two weeks in custody. On his return to Swaziland, the Respondent suspended him from his employment without pay. He was subsequently charged with the theft of diesel, and following a disciplinary hearing he was found guilty and dismissed from the Respondent's employ on 15<sup>th</sup> October 2001. His appeal was unsuccessful and his dismissal was confirmed.

3. The Applicant was aggrieved by his dismissal and he reported a dispute to the Conciliation, Mediation and Arbitration Commission. The dispute remained unresolved after conciliation and the Commission issued a certificate of unresolved dispute.
4. The criminal case against the Applicant was finalized on the 21<sup>st</sup> February 2003 and he was acquitted and discharged on the charge of theft of diesel from the Respondent.
5. The Applicant thereafter applied to the Industrial Court, alleging that his services were unfairly terminated and claiming compensation for unfair dismissal and payment of terminal benefits, namely notice pay and severance allowance. He also claimed payment of wages for days worked and for the period of his suspension; sleep out allowance; and overtime.
6. At the end of the trial, the Applicant's counsel conceded that no case had been made out for payment of sleep out allowance and overtime, and these claims were abandoned.
7. It is common cause that the Applicant was at the date of his

dismissal an employee to whom section 35 of the Employment Act 1980 applied, and that the Respondent bears the onus of proving that the termination of the Applicant's services was fair and reasonable.

8. In its Reply the Respondent alleges that the Applicant was dismissed after a properly constituted disciplinary enquiry found him guilty of dishonesty involving the theft of diesel and also of negligence relating to exceedingly high consumption of fuel. No evidence was produced at the trial to show that the Applicant was charged or found guilty of the latter offence of negligence or that this was ever a ground for the termination of his services. The evidence showed that the Applicant was charged, found guilty and dismissed for theft of diesel. At the trial the Respondent sought to prove on a balance of probabilities that the Applicant was indeed guilty of the theft of diesel from the Respondent's truck on the 5<sup>th</sup> June 2001.

9. It is convenient for the purposes of this judgement to examine firstly the evidence adduced by the Respondent at the disciplinary hearing and appeal in October 2001, and secondly the evidence adduced in court on trial.

10. The chairman of the disciplinary hearing was Hennie Jordaan, a Branch Manager who has been in the Respondent's employ for 27 years. From the minutes of the disciplinary hearing and the testimony of Jordaan in court, it appears that the following evidence was led at the hearing:

10.1 The Applicant's manager Craig Dommissie was the complainant. He produced and read out a report from the South African Directorate of Special Operations (Scorpions).

Dommissie incorrectly referred to this document as a police report, whereas the Scorpions are actually an investigative arm attached to the Directorate of Public Prosecutions in South Africa. According to this report, on 5<sup>th</sup> June 2001 at 0410 hours a Cargo Carriers truck No. 4337 was reported to have turned off the N2 highway near Mtubatuba area and to have stopped at a place which was under surveillance by the Scorpions. At 1420 hours on the same day the same truck was reported to have again stopped at the place under surveillance. It was reported that *“a black 25 litre container was being filled with whatever was transported from the truck. The off loading took place next to the front left tanker of the truck.”*

- 10.2 The Applicant was known to have been driving truck no 4337 from Lavumisa border to Durban and return on the N@ highway on 5<sup>th</sup> June 2001 between the hours of 0230 and 2200.
- 10.3 The daily log sheet for truck no. 4337 did not reflect that the Applicant had made any short stops on his journey. The truck was however fitted with a tachograph, which recorded the speed of the truck and the revolutions per minute (RPM) of its engine throughout the journey. The tachograph record (referred to as “the co-driver report”) for the 5<sup>th</sup> June 2001 reflected a number of short stops made by truck no. 4337 on its journey to and from Durban, including stops at about 1410 hours and 1420 hours respectively. These latter stops were each of about ten minutes or less in duration, and

coincided with the times the truck was sighted by the Scorpions.

10.4 The Applicant denied at the hearing that he deviated from his route as alleged in the Scorpions report or that he stole diesel from his truck. He explained that he made short stops near Mtubatuba at or near the turn off to Bushlands because the road was under construction and traffic lights (robots) had been installed to regulate the flow of traffic in one direction at a time. He invited the chairman to accompany him to the construction area so that he could point out the robots. The chairman did not take up this invitation.

10.5 Craig Dommissie analyzed the Applicant's fuel consumption for the period April – August 2001 and stated that there had been a marked improvement in consumption since the Applicant's arrest (and suspension). He also stated that the trip or daily log sheet showed that the Applicant's fuel consumption on 5<sup>th</sup> June 2001 was 91 litres per 100 kilometres, which is excessive. No explanation was given as to how the figure of 91 litres per 100 kilometres was calculated, and there is an inexplicable reference to a figure of 130700 kms which does not tally with the facts.

11. The chairman postponed the disciplinary hearing to enable Craig Dommissie to obtain a satellite tracking report to support the Scorpions report and to confirm that the Applicant had deviated from his route. The Respondent had a contract with a company that tracked and recorded the movements of its trucks by satellite surveillance.

12. The hearing resumed on 15<sup>th</sup> October 2001. According to the minutes the chairman Jordaan immediately announced that he had looked into the reports - presumably the satellite tracking reports – and he now believed that fuel was really stolen on the day in question. He summarily terminated the Applicant's services with immediate effect.
  
13. Hennie Jordaan told the court that he relied on the Police report, the co-driver report and to lesser extent the evidence of Craig Dommissie about fuel consumption, in finding the Applicant guilty of stealing fuel on the 5<sup>th</sup> June 2001. He said that he telephoned Johannes de Waal, the officer in charge of the Scorpions surveillance unit, to check whether there were robots on the highway at the place alleged by the Applicant. De Waal told him there were none.
  
14. We make the following observations about the evidence led at the disciplinary hearing:
  - 14.1 It is common cause that the author of the Scorpions report Johannes De Waal was not called to testify at the hearing. Notwithstanding that the Applicant denied the allegations of the Scorpions, and squarely placed the contents of their report in issue, he was not afforded the opportunity to cross-examine De Waal to test the truth of the allegations made against him in the report.
  
  - 14.2 The chairman claims to have relied on what he was told by De Waal over the telephone outside the hearing regarding the presence of robots at or near the turn off to Bushlands.

He did not disclose this conversation at the hearing so the Applicant was denied the opportunity to challenge what De Waal had allegedly told the chairman in his absence. Oddly enough, De Waal himself denied in court that he ever discussed the case with Jordaan.

14.3 The chairman arrived at his verdict after looking into the satellite tracking report outside the hearing. The Applicant was not shown the report nor given any opportunity to challenge its contents.

14.4 The Applicant testified that he was also not given a chance to look at the Scorpions report, the co-driver report or the daily log sheets during the hearing. Mr. Jordaan said he could not remember whether the Applicant was shown these documents, but insisted that they were produced at the hearing. The minutes of the hearing show that reference was made to these documents, but there is no record that they were made available to the Applicant or his representative for perusal.

14.5 In court, Jordaan could not deny that the comparisons of fuel consumption made by Craig Dommissie at the hearing were flawed because the Applicant was on leave and his vehicle driven by another driver during April 2001 when fuel consumption was at its most excessive.

15. One of the fundamental requirements of a fair disciplinary hearing is that the accused employee must be given a proper opportunity to be heard.

**Administrator of Transvaal v Theletsane 1991 (2) SA 192 (A) at 206 C-E.**

This requirement includes the right to challenge any statements which are detrimental to his credibility and integrity.

**Mahlangu v CIM Deltak (1986) 7 ILJ 346 (IC) at 357.**

**Rycroft : A Guide to SA Labour Law (2<sup>nd</sup> Ed) at 208-209.**

16. In our view the Applicant was not given a proper opportunity to scrutinize the Scorpions report, the co-driver report, the daily log sheets and the satellite tracking report. Furthermore he was entirely denied the opportunity to test the veracity and reliability of the Scorpions report since the author was not called as a witness. Regarding the satellite tracking report, this was not even produced at the hearing. Nonetheless the chairman based his verdict on his wholehearted acceptance of these reports. The Applicant's denials and explanations were brushed aside as unworthy of credence. The Applicant's request that he be taken to point out the location of the road construction and robots was ignored, and the chairman relied on information he obtained outside the hearing to reject Applicant's version. These procedural irregularities not only render the hearing fundamentally unfair but they are so gross as to call into question the *bona fides* of Mr. Jordaan. They give rise to a perception that the purpose of the hearing was to dismiss the Applicant, not to determine whether he committed the offence alleged.
  
17. The Applicant appealed to the Respondent's managing director,



who delegated the Human Resources Officer to hear the appeal. The Applicant raised all the procedural irregularities which the court has alluded to above at his appeal hearing, but they fell on deaf ears. The appeal chairman dismissed the appeal, relying on the Scorpions report and the corresponding stops reflected in the co-driver report. He rejected the Applicant's explanation for the stops, stating that the Applicant's allegation of road construction "*was investigated by the previous chairperson and it was found to be untrue*". Since there is no mention of this alleged investigation in the minutes of the disciplinary hearing or the verdict, the inescapable inference must be drawn that the appeal chairman discussed the case with Mr. Jordaan before the appeal hearing – presumably in order to close a perceived loophole in his verdict. The appeal chairman also stated erroneously that the Applicant was seen stealing diesel by the South African Police. No such allegation is contained in the Scorpions report.

18. The appeal hearing was a perpetuation of the travesty of justice experienced by the Applicant at his disciplinary hearing. The Applicant was given the chance at the appeal to advance his complaints regarding the irregularities at the hearing, but he may as well not have bothered. The appeal chairman either had no appreciation of the requirements of a fair hearing, or his mandate was to rubber stamp the decision of Mr. Jordaan.

19. The Industrial Court does not merely decide whether the decision of the disciplinary enquiry and the appeal enquiry were fair and reasonable on the basis of the facts and evidence before these enquiries at the time. The court must arrive at its own decision on the facts, and to that end we must have regard to the evidence led during the disciplinary process as well as fresh evidence led before the court.

**Central Bank of Swaziland v Memory Matiwane (ICA Case No. 11/1993).**

**Swaziland United Bakeries v Armstrong Dlamini (ICA Case No. 117/1994).**

20. The Respondent thus had the opportunity to cure the defects in its evidence before the disciplinary enquiry by leading proper evidence before the court, where the Applicant would be given the opportunity he was previously denied to challenge the evidence and test it under cross-examination.
21. Nonetheless, the Respondent led no evidence in court regarding the fuel consumption of the vehicle driven by the Applicant during the period April to June 2001, and in particular on the trip to and from Durban on 5<sup>th</sup> June 2001. Nor did the Respondent produce the satellite tracking report relied on by Jordaan at the enquiry.
22. The Respondent called Johannes De Waal, the Scorpion in charge of the surveillance unit in June 2001 and the author of the Scorpion's report relied on by Jordaan and the appeal chairman.
23. De Waal testified that the Respondent had approached the Directorate of Special Operations in about 2001 for assistance because it suspected that its fuel cargoes were being siphoned off along the N2 highway between Durban and Lavumisa. De Waal was in charge of a team of investigators dispatched to an area near

Mtubatuba to carry out surveillance operations. The object was to identify the sites and persons involved in the suspected theft syndicate and to gather evidence before arrests could be made by the police. He said the Respondent would alert the surveillance team once its satellite tracking revealed that a Cargo Carriers vehicle was approaching the surveillance area. The vehicle would then be kept under surveillance for suspicious behaviour.

24. According to De Waal, on a certain morning at about 0200 hours he was telephoned by an investigator and told that a Cargo Carriers truck was on its way to the surveillance area. He was given the registration details of the truck. He deployed his team at five target surveillance areas. He was subsequently informed that the truck was entering one of the target areas. De Waal said he then went to the area on foot. It was about 0400 hours. The area was a short distance off the highway. When he arrived he found a stationary truck about 10 – 12 meters from a small building. He saw two or three people next to the driver's side of the truck but it was dark and he could not identify anyone. The people had a 25 litre container with them. To the best of his recollection the engine of the truck was turned off and only the parking lights were on. About 5 minutes after he arrived the truck drove away. De Waal gave a dramatic account of how he ran after the truck and noted the registration details of the horse and trailer by the light of a small torch he was carrying. He recorded these details in his notebook. Its common cause that the details were those of the truck driven by the Applicant on the day in question. A day or two later De Waal completed and filed his report.

25. After some days the target areas were raided. In the building where the truck had stopped he found numerous 25 litre containers containing

fuel.

26. De Waal said he was not involved in the arrest of the Applicant. He testified at the trial at the Mtubatuba court. He was not aware of the outcome.

27. Asked about the road construction robots along the N2 highway in June 2001, De Waal confirmed that there was traffic control at a road construction site along the highway near Mtubatuba, but he said this was outside his team's 7 kilometer surveillance area.

28. De Waal handed into court a copy of the report he made shortly after the incident on 5<sup>th</sup> June 2001. This is the same report relied upon at the disciplinary enquiries. Astonishingly, the report reflects that De Waal did not personally witness the events on the morning of 5<sup>th</sup> June 2001, but the events were related to him by his colleague. For example, the report contains the following narrations:

*“At 04h10 **one of my colleagues reported that truck 4337 with registration number JYP207GP (horse) and JYT615GP (trailer) stopped at the position that was under surveillance .....** At 14h20 of the same day **it was again reported to me by the same colleague that the same truck that he saw during the morning was at the premises that was under surveillance. This information was confirmed when he supplies me with the registration number JYT615 GP.**” (emphasis added).*

29. The court asked De Waal why his written report recorded that he was not present during the events recounted in his *viva voce* evidence. The explanation he gave was most unsatisfactory. He started off by

saying that the Scorpions are not in the habit of going to court because they are a covert unit. He added that the Scorpions are sometimes at risk when gang members are released on bail. He then said that he wrote the report *“on behalf of our group, that when we went to court I was supposed to testify because I saw what’s written in that statement.”* De Waal seemed to be suggesting that the Scorpions deliberately make false statements for their records to conceal the identity of the officer who witnessed an offence. This explanation is quite incredible, and we reject it as untrue.

30. The serious inconsistency between De Waal’s written report and his oral evidence in court, and his inability to credibly explain the inconsistency, has the effect of discrediting his testimony entirely. The report he recorded contemporaneously at the time of the incident is more likely to be reliable, but acceptance of the report means that his dramatic *viva voce* testimony on oath was a pack of lies. One then wonders what reliance can be placed on the report he authored. In any event the report is inadmissible to prove the truth of its contents because it is hearsay.

31. The Scorpions report was relied on at the disciplinary hearing and the appeal hearing as the foundation of the charge against the Applicant. Not only was the author of the report not called to testify but it now transpires on the face of the report that the author (De Waal) had no personal knowledge of what is stated therein.

32. To make matters worse, the report contains this hearsay allegation:

*“He reported that a black 25 litre container was being filled with*

*whatever was transported from the truck. The off loading took place next to the front left tanker of the truck.”*

Firstly, it is common cause that the truck was transporting grape fruit and cartons on the day in question, not fuel. Secondly, there is no evidence that the Applicant was driving a tanker. He said he was driving a horse and trailer. Incidentally, according to De Waal's oral evidence, the people he saw were standing on the driver's side of the truck, not the front left.

33. We reject the oral evidence of De Waal, and his report is of no evidential value. As a result, there is no direct evidence before court that fuel was stolen from the truck driven by the Applicant. There is also no circumstantial evidence of a theft of fuel. No evidence was led that fuel was missing or that tampering was detected. No evidence was led in court to prove excessive fuel consumption by the applicant. We certainly cannot rely on the vague pronouncements made by Craig Dommissie at the disciplinary hearing. Not only do his calculations of the fuel consumption on the 5<sup>th</sup> June 2001 appear to be statistically and logically unsound, but his comparisons also appear to be flawed because the Applicant was on leave during the period of comparison. No attempt was made by the Respondent to tender Dommissie's statistics in court for proper scrutiny.

34. The only evidence remaining against the Applicant is the co-driver report, which does indeed show that he stopped his truck at about 0410 hours and 1420 hours on 5<sup>th</sup> June 2001 for 10 minutes or less. This evidence standing alone does not prove that the stoppages were the occasion for the theft of fuel.

35. At the disciplinary hearing the Applicant explained that he stopped at robots near Mtubatuba. Jordaan and De Waal agreed that there was road construction near Mtubatuba and traffic was controlled by robots. Jordaan failed to travel to Mtubatuba to verify the position of the robots. De Waal says there were no robots at the Scorpion's surveillance area. Even if we believe De Waal on this point, there is no reliable evidence before court that the stops indicated in the co-driver report occurred within the surveillance area. The Applicant's explanation may reasonably be true.
36. The co-driver report shows that the engine continued running when the truck stopped at about 0410 hours. This is consistent with the Applicant's explanation. De Waal on the other hand recollected that the truck's engine was switched off at 0410 when the theft of fuel is alleged to have taken place.
37. During his evidence in chief the Applicant testified that he could not have stolen diesel from the fuel tank of his vehicle because the vehicle was fitted with a non-removable sieve as an anti-syphoning device. This evidence was neither challenged in cross-examination nor contradicted by any witness.
38. At the appeal hearing the Applicant stated that he stopped to sleep at about 0300 hours between Mkhuze and Hhluhluwe. In court, this statement was demonstrated to be untrue. No such stop was recorded in the daily log sheet or the co-driver report. The Applicant was vigorously cross-examined on this issue. He persisted in his false statement until the very end of his testimony, when he finally conceded that he did not stop to sleep.

39. The Respondent's counsel makes much of this false testimony and urges the court to find that it indicates a guilty mind and proof that the Applicant stole fuel. In our view it is significant that the applicant first made the allegation at the appeal hearing on 27<sup>th</sup> November 2001 when he was asked by the chairman to give an account of what happened on the 5<sup>th</sup> June 2001. At this stage he had still not been given the chance to peruse his daily log sheets or the co-driver report. We think that it is quite likely that the Applicant simply made a mistake in saying that he stopped to sleep at 0300 hours. He made frequent trips to Durban, and one trip must be very like another. He had nothing to gain by deliberately concocting such a statement, since it was never alleged that he stopped to commit theft at 0300 hours. The reference to stopping to sleep was merely part of the applicant's narrative of the trip as he recalled it.
40. It was demonstrated to the Applicant in court under cross-examination by means of the log sheets and the co-driver report that he did not stop to sleep at 0300 hours. He damaged his credibility by persisting in the version he gave at the appeal even after it must have become apparent to him that he had made a mistake. This was unfortunate, because the Applicant otherwise struck the court as an honest and decent man.
41. The onus of proving the theft of fuel by the Applicant rests on the Respondent. This onus cannot be discharged merely because it is shown that the Applicant lied in the witness box. There is insufficient acceptable proof before us that the offence was committed at all. As stated earlier, there is no direct or indirect evidence that the



Respondent suffered a loss of fuel. The Applicant's evidence that fuel could not be siphoned from his truck has not been refuted. The evidence of De Waal regarding suspicious behaviour has been rejected as unreliable. The Applicant has given a reasonable explanation for the stops shown on the co-driver report.

42. The Respondent has not proved that it had a fair reason to terminate the Applicant's services. We find that the dismissal of the Applicant was substantively and procedurally unfair.

43. The Applicant was earning E1750-00 at the date of his dismissal. He had completed 6 years of service. He is entitled to be paid his notice and severance allowance.

44. The Applicant has claimed payment of 'wages for days worked'. No evidence was led to explain or prove this claim. We dismiss the claim in the circumstances.

45. The Applicant also claimed 44 days wages for the period he was under suspension. In terms of the minutes of a discussion on 27<sup>th</sup> September 2001 it appears that the parties agreed that the Applicant would not be paid his salary for the 14 days he was in prison and for the first month of his suspension from 3<sup>rd</sup> July - 3<sup>rd</sup> August 2001. This is the 44 day period for which the Applicant is claiming payment of wages.

46. Section 39 of the Employment Act 1980 permits an employer to suspend an employee without pay where the employee is remanded in custody, or for a period not exceeding one month pending disciplinary

action. This is subject to the condition that –

- ◆ where the employee is remanded in custody in respect of an offence relating to his employment on the complaint of his employer and is subsequently acquitted of the charge, he shall be paid for the period he was in custody (section 39(5) of the Act); and
- ◆ if the employee is found not guilty at his disciplinary hearing he shall be paid for the period of suspension (section 39(3) of the Act).

47. The Applicant cannot contract out of the rights afforded him by the Employment Act (see section 3 of the Act). In our view the Applicant is entitled to be paid for the period he was remanded in custody on a charge of stealing diesel from his employer. The Respondent was the complainant, and the applicant was acquitted of the charge.

48. We also consider that he should be paid for the month that he was suspended without pay. The verdict of the disciplinary chairman was not only unfair but on the evidence before him he should have dismissed the charge.

49. It remains for the court to consider an appropriate award to compensate the Applicant for his unfair dismissal. He served the Respondent for a period of 6 years and he had a clean service record. He has two wives and six school-going children to support. The

termination of his employment must have fallen upon him like a calamity. His prospect of a lifetime of secure employment with a reputable company disappeared abruptly. The stigma of his dismissal for theft will remain with him for many years. He has been unable to procure permanent employment to date, although he appears to have had regular part-time employment since 2002. His part-time salary averages E1200-00 per month, although he worked for a period in Durban earning E2500-00 per month.

50. The unfair nature of the disciplinary process must have greatly aggravated the Applicant's sense of injustice. He has had to wait for 7 years to be vindicated. In the meantime he has suffered personal and financial hardship. In our view an award of 10 months salary is appropriate in the circumstance.

**51. Judgement is entered against the Respondent for payment to the Applicant as follows:**

|         |                              |                 |
|---------|------------------------------|-----------------|
| 1750-00 | Notice pay                   | E               |
| 1400-00 | Additional notice pay        | (4x5xE70)       |
| 3500-00 | Severance allowance          | (10x5xE70)      |
| 2590-00 | Salary for suspension period | ([12+25] x E70) |

Compensation for unfair dismissal 17500-00

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26740-00

TOTAL

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**The Respondent is ordered to pay the Applicant's costs.**

The members agree.

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PETER R. DUNSEITH  
PRESIDENT OF THE INDUSTRIAL COURT