

IN THE SOUTH AFRICAN ROAD PASSENGER BARGAINING COUNCIL

IN THE MATTER BETWEEN

TOWU OBO T SONGELWA

APPLICANT

and

GOLDEN ARROW BUS SERVICES

RESPONDENT

AWARD

CASE REF NO RPNT 485

DATE OF AWARD: 27 July 2010

ARBITRATOR: DJG WOOLFREY

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing was held at the offices of the Metal and Engineering Industries Bargaining Council in Cape Town on 9 June and 5 July 2010.
2. The employer was represented by Ms Karin de Jongh and the applicant by Mr Nezaam Davids of the Transport and Omnibus Workers' Union (TOWU).

ISSUES IN DISPUTE

3. Mr Songelwa was charged as follows:
 1. Dishonesty / Theft / Fraud
 2. Supplying false and misleading information
 3. Not complying with company and Security Procedures.
4. There is considerable splitting of the charges. The `dishonesty' and `fraud' captured under charge (1) is repeated under charge (2). Charges (2) and (3) should properly have been alternative charges to the theft charge, and charge (3) an alternative to the entire charge (1), the latter itself containing apparent alternative charges.
5. A proper, and fairer, construction of the charges would be:

Charge 1: Theft; alternatively

Charge 2: Dishonesty (or fraud); alternatively

Charge 3: not complying with company and security procedures.

6. Mr Songelwa concluded a plea bargain with the company, and pleaded guilty to dishonesty. At the commencement of these proceedings, Mr Songelwa applied to change his plea to one of `not guilty'. The company agreed after giving the matter some consideration.
7. The effect of the change of plea was to set aside the plea bargain. This obviously meant that the employer was at liberty to pursue all the charges (main

and alternative) and not simply the charge (the alternative charge of dishonesty), which had been accepted as part of the plea bargain.

SUMMARY OF EVIDENCE

8. Mr Simon Somdyala (Somdyala) testified that he works for Recall Security, which is contracted to Golden Arrow. He currently works at the Arrowgate Depot in Montana, where the alleged incident took place. He works as a Site Manager. He said that anyone exiting the premises with items must produce a gate release. The rule is well known to all employees.
9. On 14 January at about 10.35 Songelwa approached the pedestrian gate. The access control officers challenged him, and asked him where he was taking the can. Songelwa told the security officers that he got the container 'from Mr Lee.' Somdyala then approached Songelwa, and asked him where he got it. He again said he got it 'from Mr Lee.' Somdyala suggested they go inside to phone Mr Lee. However, Songelwa was not willing to do so. He said he was chasing the caboose (bus). Somdyala told Songelwa that he can't let him go without a gate release, and he must go inside. But he left nevertheless. Somdyala went back inside to write a report, and informed the tower. A copy of the report was handed up by the employer.
10. Somdyala said that Songelwa did not say anything about taking the container to his son who was stuck on the highway, or that he would bring the container back.
11. Somdyala said that he was on duty for the rest of the day, and did not see Songelwa bring the container back. There is only one pedestrian entrance gate, which is next to the vehicle entrance gate. He also said that a person bringing any item on the premises must declare it at security. According to his knowledge, Songelwa had not declared that he brought a container onto the premises.
12. Somdyala said it would not have taken long for Songelwa to phone Lee. He also said it would not have taken more than five minutes to obtain a release slip from Mr Van Deventer.

13. Somdyala referred to his report at page 5 of the employer's bundle, and said that he wrote the report at 10h50. Under 'time' in the top right hand corner there is an entry 10h50. Somdyala said that he wrote the report after the incident, which could have taken about 10 to 15 minutes.
14. Mr Vincent Lee ('Lee') testified that he is a Berco Contract Manager stationed at Arrowgate Depot. He said that anyone leaving the premises with an item that is not his must get a gate release slip. Lee says he has authority to give gate release slips for Berco items.
15. Lee said that on 14 January, just after 10h00, though he was not sure exactly when, Songelwa asked him for a 25 litre container. He told Songelwa that he did not have one. Songelwa then left his office.
16. Lee said that he examined the container long after the event, and there was no Berco name on it. If it had been a Berco can, it would have had a sticker on it. He smelt inside to see if there was any chemical, but did not smell anything.
17. Under cross-examination Lee said all Berco cans have stickers on them that identify them. He said Berco cans are stored in the store room and picked up monthly by the supplier. He also said Berco and Golden Arrow cans could not get 'mingled' because of the stickers.
18. Lee said it was not long after ten when Songelwa approached him. He did not actually check his time. Van Deventer approached him at about 11h30 to find out if anyone had asked for a 25 litre can. He told Van Deventer that the security had asked for one, and that he had said he did not have one.
19. Under re-examination Lee said that he would have to explain a shortage of cans to his suppliers if there were any missing.
20. Mr James Van Deventer ('Van Deventer') testified that he is head of security at Golden Arrow. He has worked for Golden Arrow in its security department for 22 years, and has been head of security for one year and three months. Van Deventer said he is Songelwa's supervisor, and that Songelwa reports to him.

21. He said that employees leaving the premises with items that are not theirs must have a gate release. The procedure has been in place since Van Deventer started working at the company, and that all employees are aware of it. Songelwa has been a security officer for more than 6 years. In that time period he had never sought clarity regarding the company's gate release procedure.
22. Van Deventer said that the company views it as very serious incident if a person did not comply with the policy on gate releases. A transgression could lead to dismissal. The company had disciplined and dismissed employees who had left the premises without gate releases in the past. They had done so even in circumstances where employees had not attempted to conceal an item.
23. Van Deventer said it would have taken Songelwa about five minutes to obtain a gate slip.
24. Van Deventer said that after receiving a report from Somdyala he approached Lee at about 11.20am and asked him whether Songelwa had asked for a 25 litre container. He replied that Songelwa had asked him but he could not give him one, and had not given him one. Van Deventer said he then asked Lee to submit a report to him. A copy of Lee's report was included in the employer's bundle.
25. After speaking to Lee, Van Deventer said he asked Mr Jansen ('Jansen') in the security tower to phone Songelwa and advise him that he was suspended. He said Jansen phoned Songelwa at 12h17, and produced a phone record showing a phone call to Songelwa's phone number.
26. Van Deventer said that just before 13h55 Songelwa called him and told him that he had returned the container and would leave it where the clip card sellers pay their money in. Van Deventer said he should rather bring it to his office. Songelwa brought the container to his office and told him that he had needed it to assist his son with diesel because he had been stuck without diesel. Then he left the office.
27. Van Deventer said he smelt the container and it was dry. There was no smell of diesel in it. There were also no diesel stains on the container. He said that to the

best of his knowledge Songelwa did not declare the container when he brought it back.

28. Van Deventer said that Songelwa's shift ends at eleven. However, the officers hand in their firearms 15 minutes before the end of their shift, and can leave any time after that. So, they may leave at about 10h.50.

29. Van Deventer said if Songelwa had explained to him why he needed the container he would have assisted him.

30. Under cross-examination Van Deventer said that he could not say whose container it was with any certainty, but he did not think it belonged to Berco as there was no Berco sticker on it. He also said that the security personnel cannot physically restrain employees who refuse to stop at security. He said that Songelwa was a good worker, and never had a problem with him. He further said that Songelwa is responsible for the company's assets, and escorts clip card sellers when they go out on the road. He is, however, not responsible for handling cash.

31. Van Deventer said that he examined the camera footage of the incident at the gate, and that it did not show that Songelwa forced his way out. It showed where Simon approached him and Simon showing Songelwa the container went on for a while and Songelwa walked away

32. Under re-examination, Van Deventer said the company's policy on gate-releases was regardless of the value of the item in question. He also said that from the video footage it did not look like Songelwa was in a hurry.

33. Mr Herman Hartman ('Hartman') testified that he is employed as a company representative or initiator, which he has been doing for 17 years. The company has implemented its gate release policy strictly in order to stop theft. Even if an employee borrows equipment from the company, the employee must have a release slip. Employees must also declare items they bring into the company. Every worker is aware of the policy. The reason the company must implement the policy was to combat pilfering and theft.

34. Hartman said Van Deventer contacted to inform him what had transpired at the gate. He investigated the incident, by collecting information from Van Deventer, Lee and the security officers.
35. Hartman said that when he investigated the matter, sometime after the incident (when he received his charge sheet) Songelwa told him that Lee had given him the container. He also told Hartman that he wanted to go and help his son who was stuck somewhere.
36. Hartman said that Songelwa did not produce any evidence to back up his version that he had used the container to assist his son. He had not asked for such information.
37. Hartman said that Songelwa was charged because he only brought the container back after he was told that he had been suspended.
38. Hartman said that Songelwa would still have been subject to disciplinary action and dismissed even if he had been guilty of unauthorised removal of company property, and not theft. He said it was not about the value of the item in question but the principle. Songelwa is employed to protect the company's assets and he failed to do that.
39. In all previous cases the company has consistency applied dismissal where employees have been found guilty of theft or unauthorised removal of company property. In his seventeen years with the company there had been many such cases and the policy was strictly applied. He said that the company had sought dismissal in this case because the Songelwa had lied. He had lied to the two security guards, and he had lied about their being fuel in the tank.
40. Under re-examination, Hartman said that if Songelwa had told Van Deventer about the emergency, the company would not have taken the same attitude towards the offence.
41. Mr Thomas Songelwa ('Songelwa') testified that he is employed as a security officer and has held the position for 13 years. He said that on 14 July 2010 he received a call from his home to say that his son was stuck on the freeway and was out of petrol. He ran to Lee and asked him for a container. Lee told him he

does not have one. He then left and found a container 'by Mr Lee'. He took the container and ran to the gate. He was chasing the caboose which was leaving at 11h00. At the gate the two security officers stopped him. Somdyala was in the kiosk. The security officers asked him for his gate release. He said 'No ... I will bring the container'. They then let him go. Somdyala then came out of the kiosk. He called him. He said 'no, I will bring it back'. As he turned the corner, the caboose was turning the corner and he missed it.

42. He decided to hitch a lift to the garage. He was picked up by someone he did not know. At the airport garage, he asked the driver to do him a favour, and drop the petrol with his son. The driver had a five litre container, which they decided to use. They filled up the can. He then called his son and told him that that someone would bring him petrol.
43. He then returned by bus to the depot with the container. He arrived at the depot at about 11h50. He returned the container to the place he had got it – 'near Lee.' Then Jansen called him from the tower at around 12h00, and told him he was suspended. Lee said he will go to Van Deventer to find out why he was suspended. He proceeded straight to Van Deventer. Van Deventer told him he was suspended. Songelwa explained to Van Deventer why he had taken the container and said that he had told the security officers that he would return the container. Van Deventer handed him a suspension letter and told him the report was already in.
44. Songelwa said he did not go for a release slip because he was in a hurry, as his caboose was leaving at 11h00. He rejected the evidence of the security officers that he was at the gate at 10h35. He would not have had to run to catch a bus leaving at 11h00 if it had been 10h35.
45. Songelwa denied that he only reported to Van Deventer at 13h55 and said that Qaba, a Golden Arrow driver who happened to be a passenger on the same bus, would be able to corroborate what time he returned to the depot.
46. Songelwa said he did not want to steal the container. 'There were many ways to steal ... the company does not search the clip card vans.' He could have taken it out in one of those vans. He said that the company was acting against him because he is outspoken at meetings and creates enemies. That made him a

'target for small things.' He also said that the company is outsourcing security positions, and wanted to get rid of the security officers so that it could replace them with contractors.

47. Vincent Qaba testified that he is a driver for Golden Arrow and has been working for the company for 10 years. He said that on the day in question he was on the bus from Kayelitsha, it turned into Modderdam Road. They stopped to pick up Mr Songelwa. He had a 25 litre container. He teased him about having an empty container as though he were in the rural areas of the Eastern Cape. Songelwa explained that it was for his son. His son had called him because he was out of petrol.

48. They got back to the depot. It was the last time he saw him. He saw him a week later and told him that he was being dismissed for the empty can.

49. Qaba said they picked up Songelwa at the Engen garage. The bus arrived at the depot at about 11h55.

50. Under cross-examination Qaba said that he starts work at 14h00. He said he arrived early because he 'did not want to run'. The bus times were very irregular where he lived. He confirmed that you have to declare an item to security when you enter with it. He could not say whether Songelwa had entered through the security gate, as he did not take note after they got off the bus.

51. Qaba said that the can was cream / white. He said he did not know whether the security would allow an employee to take an item out if he did not produce a gate pass.

52. Thembisile Nkobo (one of the two security access personnel, who were called at my request) testified that he is employed by Recall Security as a Security Officer, and was stationed at the Arrowgate Depot. He said that on the day in question, he was stationed at the small gate. Songelwa approached the gate with a 25 litre plastic container. They asked him whether he had a gate release. Songelwa said that he did not have a gate release, but was given the container by Mr Lee.

53. After Songelwa exited the gate, Somdyala approached and saw him. Somdyala asked him where he was taking the container and whether he had a gate release. Songelwa gave the same answer to Somdyala. He said Mr Lee gave him the container. Songelwa asked him to go back and confirm what he was saying. He said Lee will regard him as if he had stolen the container because it is quite some time since Lee had given him permission. Nkobo said that Lee 'pleaded' with Songelwa not to take the container as it would bring trouble. However, Songelwa left with the container.
54. Nkobo said that Songelwa did not give a reason why he wanted to take the container. He did not tell them that he needed to take the container to get petrol for his son who was stuck on the highway. He also did not tell them that he would bring the container back.
55. Under cross-examination Songelwa said it was approximately 11h00 when Songelwa exited the gate.
56. Mr A Thimla ('Thimla'), who was the second of the access security officers called on my request, said that he saw Songelwa approach the security gate with a white container. Thimla asked him where he was taking the container. He said he was given the container by Mr Lee. Somdyala then approached Songelwa. Somdyala asked him for a gate release. However, Somdyala left with the container.
57. Thimla said that Songelwa did not say that he would return the container. Nor did he say that he needed the container to get petrol for his son. Thimla said that he did not see Songelwa return the container that day. He worked at the gate in question until 11h00.
58. Under cross-examination, Thimla said that when he stopped Songelwa to ask him for his a gate release, but he kept on walking. He conceded that he did not stop Songelwa. When it was put to him that Songelwa had told the security officers that he got the container 'near the place where Lee is working' and not 'from Lee', he said he 'did not hear it like that'. He repeated that Songelwa said 'I got the container from Lee'.

ANALYSIS

59. The company's case is that Songelwa, on being asked for his gate release, told the security officers that Lee had given him the container. When they insisted on verifying the claim, and asked him to go back into the premises so that they could phone Lee, he declined and left with the container. It is also the company's case that Songelwa took the container without any intention of returning it, and only returned it after being told that he had been suspended.
60. Songelwa denies that he told the security personnel that Lee had given him the container. What he told them was that he got the container 'by Lee', meaning 'nearby Lee'. After telling them that he would return the container, they let him go. It is also Songelwa's case that he intended returning the container after using it to assist his son with petrol.
61. It is common cause, or not disputed, that there is a company rule or policy that employees must have a gate-release whenever they remove items that are not their own, and that the rule is strictly applied by the employer. It is also common cause that Songelwa removed the container, that it did not belong to him, and that he did not have a gate-release for the container.
62. What is disputed is (1) whether Songelwa told the security officers that he had got the container 'by Lee' (nearby Lee') or 'from Lee'; (2) whether Songelwa was ultimately permitted by the security offices to proceed without the gate release; and (3) whether Songelwa took the container with the intention of permanently depriving the employer of its ownership (an essential element of the theft charge), or whether he took it with the intention of returning it, in which event he would be guilty of 'unauthorised borrowing' or unauthorised possession / removal'. Nothing in my view turns on whether the property belonged to the company or Berco. It was common cause that it did not belong to Songelwa.
63. The question of why Songelwa borrowed the container or, put differently, whether he did, indeed, borrow it to assist his son (as he says and as the company disputes) is also material. First, if true it would give support to Songelwa's version that he intended returning the container (there would have been no reason to keep it any longer); secondly, it would have a bearing on

sanction, in the event that Songelwa is guilty of misconduct. It would be a mitigating factor that Songelwa acted in an 'emergency' situation.

Did Songelwa make a dishonest disclosure to the security officers?

64. Songelwa denies telling the security personnel that he got the container from Lee. He ascribes the evidence of the security officers that he did to a misunderstanding. It was argued by Mr Davids, and put to the security personnel in cross-examination (by both Mr Davids and Songelwa himself), that Songelwa had actually said he got the container 'by Mr Lee' meaning 'nearby Mr Lee', and that he had not, in fact, said that he got the container 'from Mr Lee'.
65. Both Nkobo and Thimla were adamant that Songelwa had not said that he got the container 'by Lee' meaning 'near Lee' (the issue was never canvassed with Somdyala), and that he had said he got it 'from Lee'. Both persisted despite thorough cross-examination, and despite it being put to them that there may have been semantic confusion.
66. The probabilities support the company's version. Songelwa was being asked for a gate-release. It would be no answer to disclose *where* he had found the container. It would be an answer, or at least an attempt at an answer, to say *who he had got the container from*. That would give him some chance (or at least some chance in his mind) of being let through without a gate release.
67. Hartman also testified that during the investigation Songelwa told him that Lee had given him the container.
68. If there had been any semantic confusion as to what Songelwa meant, he would have been able to clear it up immediately when he was met with the retort 'well let us go and phone Lee'. The natural response would have been 'no, you misunderstand me, I did not get it from Lee, but from somewhere near his office'. According to the security officers, he did not say that, or anything like it. Instead, he said, according to Nkobo, that Lee would regard him as having stolen the container, because it was a long time since Lee had given his permission to take it.

69. It was not entirely clear from the line of cross-examination, or argument, whether Songelwa was suggesting that the security officers *may* have been lying, as an alternative to them being simply mistaken. I will assume that it was, and remains, his contention.

70. No plausible reason was advanced as to why the three security guards would lie in order to falsely implicate Songelwa. Songelwa did say in his evidence in chief that there are people in the company who would like to get rid of him because he outspoken at meetings and makes enemies. He also said that the company was trying to replace permanent security officers with contracts.

71. In my view, it is extremely unlikely that the security officers in question would have fabricated, and perjured themselves, simply to assist the company in its quest to outsource security staff. And even if Songelwa was outspoken and made enemies, there was no evidence (or even suggestion) that the three security guards in question bore any grudge or ill-will towards him.

Did the security officers permit Songelwa to leave without the gate release?

72. On Songelwa's own version, he did not disclose why he wanted the container, or when he would return it. Having confronted Songelwa and asked for a gate-release, it seems highly improbable that the security personnel would have backed down and waived him on purely because they had received a bland assurance from him that he would return the container. The security officers were aware of the company's strict policy on gate releases, so why risk discipline to assist Songelwa for no apparent reason?

73. Much was made by Mr Davids of the fact that the security officers did not actually compel (or 'force' in his words) Songelwa to remain behind. The fact that Songelwa was able to proceed without being restrained, he argued, showed that the security personnel were satisfied with his explanation and approved Songelwa leaving.

74. All three guards said that they are not permitted to physically restrain people who leave without a gate pass. If they insist on leaving, they must allow them to go and report them. The explanation is entirely plausible and I accept it. I do not

regard it as improbable in the least that Songelwa would have been able to leave, without restraint, if he did not have the guards approval to do so.

75. All three security personnel said that Somdyala was not satisfied with Songelwa's explanation and that Somdyala asked Songelwa to return to the premises so that he (Somdyala) could phone Lee and confirm his (Songelwa's) account. This is hardly consistent with approval to leave. Also significant is the fact that immediately after the incident (at 10h50) Somdyala wrote a report and made an entry in the occurrence book. Again, this is not the reaction of someone who has just given someone permission to leave.

76. On the probabilities, I am satisfied that the security officers did not permit Songelwa to leave the premises without a gate pass.

Did Songelwa remove the container with the intention of keeping it, or with the intention of returning it?

77. Songelwa's version is that he removed the container to assist his son who was stranded without petrol, and that his intention was to return the container.

78. Songelwa's account of *why* he removed the container finds support in his self-corroborating statement to Qaba on the bus. It would have taken remarkable prescience on Songelwa's part for him to make a false, and corroborating, statement to Qaba in anticipation of calling Qaba one day to back up his version.

79. Nevertheless, I am persuaded that there are sufficient improbabilities in Songelwa's version as to why he borrowed the container to warrant its rejection.

80. First, it is highly improbable that Songelwa would not have mentioned to anyone, prior to leaving the premises, why he needed the container. He knew the policy on gate releases, and how strictly it was applied, and would surely have anticipated difficulty leaving with the container. Why not mention to Lee – who he had just spoken to and who was after all 'nearby' – that he had found a container and needed to borrow it to assist his son? It would have been the most natural thing to do.

81. If Songelwa's failure to give Lee any explanation can be explained by his haste, his failure to mention his reason for taking it to the security personnel cannot. Why mention to the security personnel that he would return it (his version), but not mention *why* he needed it. Telling the security personnel that his son was stranded on the highway, and that he needed the container to assist him, would be much more likely to get them to yield than a bland undertaking to return the container without any explanation as to why he was taking it or when he would return it. The most plausible inference is that the explanation was indeed an afterthought, as the company alleges.
82. Songelwa claimed under cross-examination that he did not obtain a gate release (which it was not disputed would have taken no more than five minutes) because he was 'panicking'. His son was stranded at a dangerous place on the highway, where drivers of the company had been accosted by criminals in the past. Songelwa's explanation of being in a panic because his son was in danger contradicted other parts of his testimony under cross-examination. He said, under cross-examination, that his original intention was to ask the 11h00 caboose driver to drop the container next to his son on the highway. When he was asked why he would send the container with the caboose driver and not take it himself (on the bus) he replied that 'I must wait my time'. When it was put to him that it was eleven o' clock (on his version), and that he had already finished his shift, he said that his son 'must feel the pain' meaning he should have to walk to get the petrol. Songelwa was clearly dissembling, or making it up as he went along.
83. Songelwa had no answer when it was put to him that there was a contradiction in saying, on the one hand, that he was panicking on account of his son being stranded, and, on the other, that he was happy for his son to walk to the garage so that he could 'feel the pain'. Songelwa was also unable satisfactorily to explain why he did not ultimately accompany the driver who gave him a lift, but was content to trust a 'total stranger' to deliver the petrol.
84. My conclusion is that the explanation about the son is so riddled with contradiction and improbability that it ought to be rejected.

85. The fact that Songelwa may not have taken the container to assist his son does not necessarily mean that he took it with the intention of keeping it. His intent must be inferred from the remaining circumstances and probabilities.
86. The company argues that Songelwa only returned the container *after* being told that he had been suspended. Songelwa claims that he returned it *before* being told of his suspension. The issue is relevant to a construction of Songelwa's intent.
87. It is common cause that Songelwa received the call from Jansen no later than 12h17 (the company phone records show that to be the time). What is disputed is whether Songelwa returned the container before then (he said, it was 'about 12h00' when he received the call), or after (the company said it was closer to 14h00).
88. Van Deventer claimed that Songelwa first reported to him at about 13h55. He denied that it was anywhere close to 12h00, and expressed himself firmly on the point. It was not suggested that Van Deventer was mistaken. The contention was that Van Deventer was lying.
89. I see no plausible reason why Van Deventer would lie. He actually spoke favourably of Songelwa's work, even mentioning that Songelwa did overtime whenever asked. This was hardly the attitude of a person setting out to falsely implicate someone. The suggestion that Van Deventer wanted to get rid of Songelwa either because he wanted to replace him with contractors, or because Songelwa was a thorn in the flesh was without any apparent foundation and seems highly speculative and improbable.
90. I am therefore faced with the evidence of two witnesses, neither of whom were shown to be unreliable witnesses, and neither of whom had any apparent reason to lie.
91. The inherent probabilities of the respective versions do not assist in resolving the dispute. The company asks why Songelwa did not declare the container on his return, in view of the policy on signing in items being brought onto the premises. The implication, it argues, is that Songelwa did not want anyone to know what time he was returning the container.

92. The short and obvious answer to the company's conundrum is that Songelwa had taken the container off the premises without declaring it and there would have been no point in signing it back in.
93. The company also made much of the fact that none of the security officers saw Songelwa return. But, equally, no one (even on the company's version) saw him when he, in fact, did return with the container - whether at 12h00 (as he claims) or closer to 14h00, as the company claims. If he was missed coming in later, he could equally have been missed coming in earlier.
94. The implication was that Songelwa somehow evaded detection coming in. But, the company's own version was that its gate control is very tight. It remains a mystery, not explained by the company either, how a man could smuggle in a 25litre container without being detected, under conditions of tight gate security.
95. Ultimately, in my view, the evidence of an apparently independent witness must prevail. Qaba places Songelwa at the premises with the container at around 12h00. That version has not been shown to be improbable, either because of the unreliability of Qaba's evidence, or because of the inherent probabilities.
96. My conclusion is therefore that Songelwa has shown that he did, indeed, return the container at about 12h00. This would have been before he received the call about his suspension.
97. There are other probabilities, apart from the time that Songelwa returned the container, which suggest that, despite his disingenuousness about his reason for taking the container, he is unlikely to have taken it without the intention of returning it. On the company's own version, the security officers had confronted Songelwa and had refused to accept, at face value, his explanation that Lee had given him the container. They had objected to his leaving without a gate release, and had warned him that 'trouble would follow' if he did not return to the premises. It is also the company's version that it is very strict about the policy. Under these circumstances, it is highly unlikely that Songelwa could have thought that he would get away with it if never returned the container. He knew the company's policy on theft, and would have known that he would face the loss of his job. It is highly improbable that he would have run the risk for the sake of an empty container to the value of R38.00.

98. Much more probable is that Songelwa did intend taking the container for some temporary purpose (though not to assist his son, as he claimed), and that he hoped that he could return it before any action was taken. He probably banked on the security officers not pursuing the matter once he returned it. What he did not bank on was the swiftness of their response (he was suspended within an hour) and their willingness to pursue the matter despite the ultimate return of the container.

99. I therefore conclude that the company has not shown that Songelwa removed the container with the intention of keeping it permanently (or, put differently, without the intention of returning it).

100. The charge of theft cannot, therefore, be sustained. It is an essential element of theft that the person alleged to have stolen an item did so with the intention of permanently depriving the owner of his ownership in the item. The company did not establish that intention and the probabilities in fact point the other way.

101. Songelwa is however guilty of a competent 'verdict' of unauthorised borrowing or unauthorised removal of property from the company's premises. He is also guilty of dishonesty.

SANCTION

102. I must determine whether dismissal was – and is – an appropriate sanction for (1) temporarily removing an empty container without authority and (2) falsely representing that he had been given the container by a particular manager. I must take into account that the circumstances surrounding the offence, the fact that the employee in question is a security officer, that he has 13 years' service, a clean disciplinary record and was described by his supervisor as a 'good worker'.

103. Ms de Jongh made the legitimate point that a higher standard of compliance, particularly when it comes to matters of honesty, may be asked of a security officer. He, after all, is employed to protect the company's assets. Security officers more perhaps than other employees must demonstrate an unflinching willingness to comply with security procedures (such as the gate

release policy) and general honesty (and absence of deception) in their dealings with their employer.

104. It is also aggravating that Songelwa persisted with the deception after being confronted, and throughout these proceedings.

105. Ms de Jongh argued that the value of the container (R38.00) is not relevant. What is relevant, she argued, is the principle of the matter. The employee had shown himself to be dishonest and (to paraphrase) there are no degrees of dishonesty.

106. Ms de Jongh further argued (and it was not disputed) that the employer adopts a zero-tolerance approach to acts of dishonesty, and that it strictly applies its gate release policy. The company has consistently dismissed employees for not complying with its gate policy. Songelwa would have known this.

107. Had this been a case of out and out theft, I would have had no hesitation confirming the sanction of dismissal. There are a number of reasons why employers are justified in taking such a strong line (zero-tolerance) in cases of theft, despite the value of the stolen item being relatively small and therefore the absence of any significant loss. One reason is that theft invariably involves stealth or an element of stealth, and the employer will never know whether the employee will repeat offence. Another is that the employer cannot be sure what else the employee may have stolen previously. Of course, there is the added requirement of deterrence.

108. In a matter such as this, these considerations do not carry the same weight. Songelwa probably deceived the security guards in order to get them off his back. He hoped that, given the explanation, they would let him through, despite not having a gate pass. He did not deceive them (as I have found) with the purpose, or expectation, of being able to deprive the company of the container and make it his own.

109. Whilst honesty is an important, and non-negotiable, principle especially for a security guard (as Ms de Jongh argued) this does not mean the principle ought to be considered in isolation. When determining the gravity of an offence

of dishonesty, consideration must be given to (1) why the employee was dishonest and (2) what the impact of the dishonesty was.

110. Songelwa was dishonest in order to secure the temporary unauthorised use of a container worth R38.00. He was not dishonest in order to enrich himself at the company's expense.

111. In my view, it is also relevant to the sanction (though Ms de Jongh thought otherwise) that that Songelwa made no attempt to disguise the fact that he was removing the container, and did so quite openly. The company's policy of dismissing, without exception apparently, employees for removing items without a gate-pass is surely aimed mainly at employees who attempt to smuggle goods out, rather than towards employees who take them out openly, though without authority, but with the intention of returning them.

112. In view of these considerations, the company's view that the trust relationship has irretrievably broken down is, in my view, not reasonable or justifiable.

113. Accordingly, I find that the dismissal was unfair on the basis that the sanction was too harsh in the circumstances. A final written warning would have been more appropriate.

114. Songelwa seeks re-instatement, and I see no reason (none was advanced) why it ought not to be ordered. However, to avoid any inference of approval of his conduct, I intend ordering that half the period during which he has been out of work be without pay, the period in question to operate as a period of disciplinary suspension without pay.

115. Accordingly, it is ordered that:

1. The dismissal was substantively unfair;
2. The employee is re-instated, retrospective to date of dismissal, on the same terms and conditions of employment that prevailed at the time of his dismissal;

3. The employee is re-instated on a final written warning valid for 12 months;
4. Half of the period for which the employee has been out of work shall be without pay.



DJG WOOLFREY