**DETAILS OF HEARING AND REPRESENTATION**

1. Subject to para 11 below, I satisfied myself that the ……………had jurisdiction to hear this arbitration.
2. The arbitration hearings were held on 18 November 2014, 24 March 2015; 26 May 2015; 13 August 2015 and 6 October 2015 at the offices of the ………… Anton Lembede St, Durban.
3. The applicant was represented by Ms ……………(………official) while the respondent was represented by attorney Ms …………during the pre-arb on 18 November 2014. The respondent was advised that when the arbitration proper commenced it would be required to make an application for legal representation. That application was made on 24 March 2015. It was opposed. A written ruling was made granting legal representation for the reasons contained in that ruling. The applicant indicated at that stage that he also wished to be legally represented. The proceedings were accordingly postponed to enable the applicant seek such representation.
4. On resumption on 26 May 2015 the applicant arrived without any legal representative. He however sought a postponement of the matter due to the illness of his union official representative. The applicant was granted in a written ruling.
5. For the remainder of the proceedings, the applicant was represented by union official Mr ……………and the respondent by attorney ……….
6. The respondent handed in 2 bundles of documents at the outset. The applicant was given time to inspect them and check whether the documents contained were authentic and/or correct as regards their contents. On resumption he indicated that all the documents were authentic and correct as regards their contents.
7. A pre-arb was conducted on 18 November 2014 and a printed minute thereof was distributed to both parties. On 24 March 2015 the parties approved the minute with no amendments. It was then read into the record. The parties were advised that they should keep the minute handy and ensure that their witnesses deal with the disputed issues as identified therein.
8. On 26 May 2015 the second applicant was inexplicably absent. His claim was dismissed. On 19 June 2015 the second applicant’s application to rescind the dismissal ruling in relation to his claim was refused. References to the second applicant in the pre-arb minute were thereafter deleted.
9. At the commencement of the arbitration proper, the parties were advised of the significance of cross-examination in the following terms: “*The purpose of cross-examination is, amongst other things, to show that your version is more probable than that of the other side. It is important to bear 3 things in mind when cross-examining – You must put your version to the opposing witness; If an opposing witness has left out an important fact then that should be put to the witness; If you consider that any evidence of the witness to be false or incorrect then that should also be put to the witness. The purpose of all this is to give the opposing witness an opportunity of commenting on your version. It is very important to contest evidence that you disagree with because evidence that is left uncontested is likely to be accepted as being true. An adverse inference may be drawn if you do not put your version or put a new version ie a version that was not part and parcel of your case previously*.”
10. The above advice was repeated at the commencement of the proceedings on each day that the matter sat. It will become apparent, when the evidence is analysed that this advice was not heeded by the applicant.
11. The applicant’s witness, Mr S Mdlalose gave evidence to the effect that the respondent had targeted those who had taken part in the protected strike action for dismissal. The applicant was advised that if that is the case, then the MEIBC could not entertain such dispute for lack of jurisdiction. After a short adjournment the proceedings resumed with the applicant indicating that he would not pursue that line of evidence.
12. From time to time the proceedings reverted to conciliation at the request of, or with the consent of the parties. As will be obvious by virtue of this award, no mutually agreed resolution was found.
13. Depending on the context, references to the applicant includes his representative.

**THE ISSUE TO BE DECIDED**

1. Whether the applicant was unfairly dismissed. He sought reinstatement.

**SUMMARY OF EVIDENCE**

1. The first applicant is ……………………(age 42), a receiving clerk. Between 1999 and 2010 he was employed by ………….(Pty) Ltd (a temporary employment service provider) and placed at the respondent’s site. He earned R7400 per month for working a 46 hour / 4 day week. He was suspended with pay on 29 July 2014 and dismissed on 20 August 2014. In 2010 he was absorbed into the permanent staff complement of the respondent. As a breadwinner he supported 4 persons including 3 children. He has attained a standard 9 education; has not yet found alternative employment despite making efforts; and has not earned any income from any form of casual employment.
2. The respondent is …………….(PTY) LTD, a manufacturer of electronic components and equipment. At its 3 branches in the Republic it employs a total of 167 permanent employees and 200 fixed term contract employees.
3. It was agreed that a protected strike ensued in the workplace between 1 and 28 July 2014. It was agreed that the alleged misconduct was said to have taken place during that strike.
4. The applicant received a notice to attend a disciplinary hearing on 8 August 2014. A disciplinary hearing was held on 13 August 2014. He was found guilty of misconduct and dismissed.
5. The applicant faced two charges of “threatening behaviour”. Charge 1 was that *“During the NUMSA strike on the 11 July 2014 you tried to push …….shuttle full of employees off the road with the vehicle you were driving*”. Charge 2 was that *“During the NUMSA strike on the 16 July 2014 you blocked or restricted the transport from entering the ………..site”*.
6. It was agreed that a contractually binding disciplinary code applies in the workplace. The Code provides in para 8.3.3 for “threatening behaviour”. It is defined as “*behaviour that constitutes a threat of harm on another person and / or property. Could be verbal or physical*.” The Code prescribes dismissal for the first occurrence of such offence.
7. The charges were also said to be based on para 8.3.5 of the Code which provides for “intimidation and / or incitement” and is defined as “*a threat using words or conduct or a combination of both with the intention to influence a person or a group of people to act in a certain way. This is aimed at actions that are detrimental to the company, its staff and or client*.” This paragraph also prescribes dismissal for the first occurrence of such offence.
8. It was agreed that picketing rules were agreed to between the applicant’s trade union NUMSA and the respondent 1 July 2014. The relevant provisions of the rules were as follows:
	1. *Picketing shall be carried out in a lawful manner;*
	2. *Employees participating in the industrial action and picketing agree not to intimidate non-striking employees or any other person who may enter upon the company’s premises for the purpose of carrying out the business of the company. In particular, they may not require people to stop or compel them to listen to their demands;*
	3. *Picketers will not obstruct vehicles or traffic entering or leaving company premises although they may hold discussions with or distribute pamphlets to drivers and passengers for the purpose as described under para 2 above;*
	4. *Para 2: A picket is a form of public demonstration for the purpose of demonstration peacefully in support of any protected strike or in opposition to any lock-out;*
	5. *Those taking part in the picket, under the leadership of their shop stewards, shall ensure that they yield right of way promptly and courteously to any traffic moving on roads which may wish to pass whilst those participants are dancing along such a road;*
	6. *Management of the company and picketers will refrain from behaviour which is provocative or which could incite violence or intimidation;*
	7. *Participation in a protected picket does not exempt picketers from their obligation not to commit criminal offences. Accordingly any picketers who intimidate any person or who damage property or who assault any person or who engage in any criminal act may be liable to arrest and criminal prosecution;*
	8. *Pickets will not damage or threaten to damage the company property or property of personnel or the property of customers or suppliers;*
	9. *The picketers may gather 150 meters from the front gate*.
9. The respondent does not maintain an appeal procedure.
10. After his dismissal the applicant referred a alleged unfair dismissal dispute to the …………... The matter was set down for conciliation but remained unresolved. Hence the referral to arbitration.
11. During the pre-arb the following issues were either disputed or agreed to as the case may be. The applicant did not raise any procedural issues. The substantive issues raised were as follows:
	1. The applicant agreed that the rules as identified above in paras 20, 21 and 22 applied in his workplace;
	2. The importance of the rules was self-evident and agreed to: that violence, threats of violence or behaviour that intimidates others cannot be tolerated in any workplace. As such the rules were agreed to be reasonable and valid;
	3. The applicant disputed having breached the rules. He submitted that the charges had been fabricated against him and submitted that the respondent had fabricated the charges because it wanted to get rid of long serving staff members and that this was the view of a manager by the name of Rajah. The applicant submitted that they had not engaged in any acts or omissions that could be misinterpreted or misunderstood by the respondent;
	4. The applicant’s defence was a bare denial;
	5. The applicant did not raise any issue relating to the consistent application of discipline in the workplace;
	6. The applicant did not raise any issue relating to the lack of training;
	7. The applicant had approximately 4 years of service with the respondent but had spent many years before that at its site while being employed by Capacity. It is therefore not clear whether they had long service or not. This issues is accordingly disputed;
	8. The respondent submitted that the misconduct had led to a breakdown of trust serious enough to warrant dismissal. The applicant disputed this issue;
	9. The respondent submitted that the alleged misconduct was serious and that dismissal was a fair and appropriate response. The applicant disputed this submission. He submitted that a fair sanction would have been a final written warning if he had indeed committed the misconduct;
	10. The respondent submitted that there were a number of aggravating factors. The applicant disputed these;
	11. The applicant submitted that there were a number of mitigating factors. These were disputed by the respondent;
	12. It was agreed that both applicant had a clean disciplinary record;
	13. The respondent submitted that as a result of the alleged misconduct the employment relationship had become intolerable. It submitted therefore that reinstatement or re-employment was not reasonably practicable nor was there any prospect of a good working relationship being restored. In any event reinstatement would cause a disproportionate level of disruption or financial burden to it. The applicant disputed all these issues.
12. At the conclusion of the arbitration, the parties made closing submissions in support of their respective positions.

**SURVEY & ANALYSIS OF EVIDENCE AND ARGUMENT**

1. The following gave evidence for the respondent: ………….(operations manager of 2 years for Fidelity Security Services (a private security services provider). He has been with Fidelity for 6 years. It provided security services to the respondent at the time of the alleged incidents); …………….(operations manager for 2 years for Fidelity); …………..(head of planning for the respondent for 7 years and who has been with it for 14 years).
2. The following gave evidence for the applicant: the applicant himself and ………….. (technician with respondent for 16 years).
3. In addition to what was agreed to during the pre-arb, the following was either common cause, agreed to, undisputed or conceded in cross-examination:
	1. That the applicant is the owner of a white Nissan Sentra with registration number ND109659;
	2. That the applicant had driven his Nissan vehicle on 11 July 2014 on the very road when the incident described in charge 1 occurred;
	3. That the applicant had driven through a red traffic light on 11 July 2014 on that road;
	4. That the CCTV cameras at or near the entrance to the respondent’s premises were not operational on 16 July 2014;
	5. That both the charges faced by the applicant were serious and warranted dismissal for anyone found to have committed them;
	6. That there were other incidents on days other than 16 July 2014 when other employees had prevented vehicles from entering the respondent’s premises.
4. I pause at this stage to make findings on the credibility and reliability of the witnesses:
	1. The respondent’s witnesses: I found all of them to be credible witnesses for the following reasons:
		1. They answered questions posed to them in a logical and straightforward manner;
		2. None of them were shaken during cross-examination;
		3. They were able to deal satisfactorily with all the issues of which they should have had knowledge;
		4. …………….corroborated the version of Gumede in important respects insofar as the events at Bridge City courthouse complex were concerned;
		5. None of them was shown to have an axe to grind with the applicant;
		6. Gumede and ……………. are not employed by the respondent and there was no evidence to show that they would be rewarded or given inducements to give evidence for the respondent;
		7. Gumede’s evidence was too detailed and elaborate to have been fabricated. His memory did not fail as regards important details. He was an impressive witness.
	2. The applicant: I do not find the applicant’s version to be credible for the following reasons:
		1. His version was a bare denial. He could not offer any reasonable explanation or motive for the respondent’s witnesses having given the evidence that they did;
		2. The applicant stated during the pre-arb that the respondent’s motive for fabricating evidence against the applicant was to get rid of long serving staff members. However when he gave evidence, he failed to deal with this issue.
		3. His version was that he was travelling with his girlfriend on 11 July 2014 when the alleged incident occurred. The respondent’s version was that he was travelling with 3 other males. The applicant could have brought his girlfriend along to corroborate his version. He failed to do so.
	3. Mdlalose: I cannot rely on his evidence for the following reasons:
		1. It is not clear whether Mdlalose suppressed evidence all along and choosing to reveal it only at the arbitration; or whether he fabricated evidence to rescue the applicant from his predicament. In either event, I do not find his evidence to be credible or reliable;
		2. His reason for revealing that Ngobese was the culprit, rather than the applicant was that he was trying to “protect” his member (presumably Ngobese). It is not clear how, as a shop steward, he chooses to protect one member and not the other;
		3. In cross-examination, Mdlalose admitted that he did not know of other similar incidents on other days involving other employees, and as such could not say with any certainty that the applicant was not involved in the incident described in charge 2.
5. The applicant damaged his credibility further by not putting to the respondent’s witnesses the following in cross-examination:
	1. That the applicant had parked at the Bridge City shopping centre instead of having parked outside the Bridge City courthouse complex;
	2. That the document produced by Gumede during the arbitration bearing the SAPS rubber stamp was allegedly fraudulent. (Gumede had produced this document to show that he had reported the incident iro charge 1 to the Phoenix police station on the very day of the incident);
	3. In relation to charge 2, that the actual culprit was one Ngobese. Even though Mdlalose allegedly had known this fact all along, he had failed to give evidence in support of the applicant during the disciplinary hearing in his capacity as the applicant’s representative.

1. In relation to charge 1 the following findings are made on a balance of probabilities:
	1. That Gumede had driven a minibus with about 10 passengers on 11 July 2014. They were employees who were not participating in the strike. They were being taken home after completing a shift;
	2. That both the applicant and Gumede had driven along the same route on 11 July 2014;
	3. That the applicant had swerved his vehicle towards Gumede’s vehicle causing Gumede to take evasive action;
	4. Further down that road, the applicant swerved again towards Gumede’s vehicle causing the latter to take evasive action again;
	5. That the actions of the applicant jeopardized the lives and limbs of the passengers who were being driven by Gumede.
2. Insofar as charge 2 is concerned, I find that the applicant probably engaged in the misconduct for the following reasons:
	1. The applicant failed to deal with it when giving evidence in chief;
	2. Gumede’s evidence was clear on this issue and not shaken during cross-examination: that the applicant had parked his vehicle outside the respondent’s premises. A delivery truck approached the premises. It was stopped by the applicant. Gumede intervened and escorted the truck into the premises. The applicant at that stage swore at Gumede and the truck driver.
3. The applicant agreed during the pre-arb that violence or threats of violent behaviour that intimidates others cannot be tolerated in the workplace. I find that both charges have their origin in para 8.3.5 of the respondent’s contractually binding disciplinary code which provides for dismissal for “intimidation / incitement”. The agreed picketing rules furthermore provide as follows:
	1. That employees participating in the industrial action agree not to intimidate non-striking employees;
	2. Picketers will not obstruct vehicles or traffic entering the respondent’s premises.
4. The following findings are made as regards the other disputed issues:
	1. Whether the misconduct had led to a breakdown of trust serious enough to warrant dismissal: …………………evidence on this issue was undisputed by the applicant in cross-examination. I find for the respondent on this issue;
	2. Whether there were aggravating factors or mitigating factors: Neither party dealt with this disputed issue and I accordingly refrain from making any findings thereon;
	3. Whether the employment relationship had become intolerable: ……..’s evidence was that the misconduct of the applicant had led to a breakdown of the employment relationship. This went undisputed. I accordingly find for the respondent in this regard;
	4. Whether reinstatement was reasonably practicable: Having regard to the findings already made it is not necessary to deal with this issue.
5. Both the applicant and his witness agreed that dismissal was the appropriate and fair sanction for anyone found to have committed the offences contained in the charges. In all the circumstances I find that the applicant was correctly found guilty of both charges and fairly dismissed. I propose to dismiss the application.

**AWARD**

1. The application is dismissed.

**COUNCIL COMMISSIONER: RANJIT PURSHOTAM**