

Dismissal based on circumstantial evidence: the risks involved

The employee in *Adcan Marine v CCMA & Others* (Labour Court D352/06, 19 March 2009 per Molahlehi J) was a driver for the applicant ('the employer') and had to deliver fresh and frozen products to clients. Over a period of a few months the employer received complaints from clients about incorrect and short deliveries of goods, several of these being complaints by clients on the employee's route. A trap was subsequently set as the problem could not be solved. A manager of the employer placed an extra block of cheese in the employee's truck one evening, after the truck had already been loaded for the following day's deliveries. When the employee arrived back from his deliveries the following day, the manager approached the employee's truck and found that the extra cheese was not there. The employee denied knowledge of the cheese.

It was clear to the court that the employer relied on circumstantial evidence to prove that the employee was responsible for the disappearance of the cheese. The court in the matter of *National Union of Mineworkers v Commission for Conciliation, Mediation and Arbitration and Others* (2007) 28 ILJ 1614 (LC) held that the onus in civil cases, where the case was based on circumstantial evidence, was discharged if the inference to be drawn was the most readily and acceptable inference from a number of possible inferences. An inference from



circumstantial evidence could be drawn only if there existed objective facts from which to infer other facts which was sought to be established.

The court held that the employer did not discharge its duty of establishing a prima facie case, which would then have called upon the employee to provide an explanation as to what happened to the cheese. The one possibility which the commissioner considered and accepted was that the employee's assistant could not be ruled out in the disappearance of the cheese. The commissioner could not be faulted for deciding to resolve the issues before him on the basis of this possibility alone.

The court held that as per *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 12 BLLR 1097 (CC), the question was whether the decision the commissioner reached was one which a reasonable decision-maker could not have reached. The court agreed with the employee that there were many possibilities which the employer failed to eliminate by way of evidence in connection with the missing cheese.

In the result, the application was dismissed, with costs.

September 2009