

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA**  
**HELD AT JOHANNESBURG**

**CASE NO: JA 1/2000**

In the matter between:

**JDG TRADING (PTY) LTD t/a PRICE 'n PRIDE**

Appellant

and

**MICHAEL CONRAD, VAN DEN HEEVER**

Respondent

---

**JUDGMENT**

---

**NICHOLSON JA**

[1] The Respondent was employed by the Appellant as a warehouse manager from 1 March 1994. On 16 February 1996 he was suspended from duty and an enquiry was held on 6 March 1996 after which his services were terminated.

[2] The Respondent was found guilty of misappropriating company property, valued at R 22 171-00, by having a lounge suite and coffee table at his house, without the authorised documentation or authority, thereby enriching himself at the expense of the Appellant.

[3] The Respondent instituted proceedings in the Industrial Court which found that his dismissal was procedurally and substantively unfair and awarded him compensation of R 127 400-00, as well as Magistrates Court costs, on the attorney and client scale. The Appellant challenges these findings on appeal.

[4] It was common cause that the Respondent was in possession of a Jennifer three piece sitting room suite and four Sorento coffee tables, which belonged to the Appellant, from prior to Christmas 1995 until 14 February 1996, when they were returned.

[5] These items emanated from the Louis Trichardt warehouse of the Appellant, where the Respondent was the warehouse manager. The Respondent said that they came to be in his possession, because his wife wanted to buy the said items, but she could only pay for the items at the end of February 1996. This was contradicted by Respondent's own witness Mrs de Beer who said payment was to be effected at the end of December.

[6] The Respondent said that the Respondent's wife approached Mr Stippek, a regional manager of the Appellant, who authorised the removal. The Respondent testified that a waybill was completed and that the goods were removed to his house by his wife and mother-in-law in his private vehicle.

[7] It was common cause that no invoice or delivery note was generated and the reason given by Respondent was that the computers were down. The procedure which should have taken place was that invoices, delivery notes and waybills should have been created manually, i.e. in writing and then the data captured on the computer when it came on line again.

[8] The Respondent made use of the furniture in his house.

[9] It is clear, therefore, that the Respondent's explanation for why he had the items in his possession was that he had purchased them.

[10] It was the Appellant's case that Respondent had stolen the items or alternatively had misappropriated them. It is necessary to investigate whether a genuine sale took place or whether they were stolen or misappropriated.

[11] The return of the furniture was effected after two of Appellant's employees came to the warehouse to investigate losses which were occurring. It was common cause that the Appellant suffered severe losses as a result of the disappearance of stock.

[12] As a result of the visit by the two head office investigators, including a Mr Pickles, the Respondent was placed on suspension by Stippek. On this occasion Respondent told Stippek that he wanted to pay for the items. This was a strange response from a person who had received the goods as a result of a credit sale. He ought to have told Stippek that he had purchased the goods and was to pay at the end of February for them.

[13] Stippek, on Respondent's own version, had authorised this "sale" and should then have allowed the Respondent to complete the necessary invoice and make payment. Stippek would not allow the Respondent to pay and said: "Nee, dit gaan beter wees dat jy dit terugbring."

[14] The response by Stippek totally undermined the alleged “sale” that had taken place and cast grave doubts on its authenticity. It will be recalled that the furniture was in use at Respondent’s house and it was never his case that it was on loan to him by the Appellant.

[15] The suspicious nature of the whole transaction is fortified by the fact that on Respondent’s own version he then said to Stippek: “Dit gaan moeilikheid veroorsaak as ek dit terugbring.” The reason he said this was obvious, namely, that it would not square with his version that it was a genuine sale.

[16] To establish bona fides on his own version, the Respondent needed the permission of Stippek and the necessary documentation. This permission had to be on the basis that Stippek was authorising a genuine sale albeit a credit sale. If Stippek genuinely agreed to the sale his conduct thereafter should have been consistent with this sale.

[17] When the Respondent told him that he foresaw problems should he return the goods Stippek told him: “Wie gaan weet as jy dit terugbring?” Clearly he intended that the furniture be surreptitiously returned with no documentation so that no-one would be the wiser.

[18] This modus operandi i.e. the absence of documents evidencing transactions, is a feature of the case and this chance comment speaks volumes. Stippek, who I gather was also fired for having furniture at his home without the necessary documentation, owed a duty of care to the Appellant. The secret return of goods to the warehouse was for one purpose only; to thwart the head office investigators. It was of course totally destructive of the version of a credit sale.

[19] There is another feature which casts serious doubt on the alleged “sale”. When Stippek told Respondent he was suspended he gave no reasons for the suspension, nor did the Respondent have an inkling of what he had done. Despite this fact the first matter that came to the mind of Respondent was the furniture in his home. Had this been a genuine sale he would surely have racked his brain for some other misdemeanor that had incurred the wrath of his employer.

[20] He thought of the presence of the furniture at his home because he knew he had either stolen it or misappropriated it. The fact that Stippek connived at committing the offence with him does not make the former’s permission sufficient to ensure a valid credit sale.

[21] Respondent’s case was that a waybill was sufficient documentation for a credit sale.

[22] Reference was made during the proceedings to section 10.12 of the Staff Code of Conduct which provides that: “no employee may be in possession of unpaid property without the authority of the manager and the correct documentation.”

[23] I have indicated that the authority of Stippek, given his role, was no authority at all. Respondent claimed that none of the manuals or directives were available in his warehouse and that he was not aware of section 10.12 of the Staff Code of Conduct. I can accept that he could not quote chapter and verse but he must have known he had to have the right documentation.

[24] It goes without saying that anyone in the furniture business must be aware of at least three documents; the invoice, the delivery note and the waybill. The invoice would be of great importance to the credit control of the Appellant and the auditors. The Respondent claimed that the waybill was the “correct document” for his “credit sale”. Other evidence from the Appellant’s witnesses contradicted this in convincing fashion. He needed to have an invoice and a delivery note as well.

[25] I believe the Respondent was not telling the truth when he said the waybill was the only document necessary. It, no doubt, helped to secure the exit of the goods from the warehouse. No trace has been found of the waybill and the Respondent was in charge of the premises where it was kept. It was certainly in his interest that it disappeared. Although we have our suspicions about this no positive finding can be made.

[26] In an unguarded moment when speaking to Stippek and offering to pay for the furniture the respondent said: “Kan ons nie teruggaan dat ek dit dan betaal nie, dat ons die ‘invoice’ uitmaak?” This was his own evidence and clearly showed that he knew that an invoice was necessary to effect a sale.

[27] It was also clear that purchases could not be made from the warehouse.

[28] What the Respondent did constituted theft to all intents and purposes. At best for him it amounted to use of furniture in a manner which breached the rules of the Appellant. Two managers, Venter and K van den Heever, acknowledged that such conduct warranted dismissal. I agree with them. A warehouse manager is in a special relationship of trust with his employer. He must guard his employer’s goods and take all reasonable steps to protect the employer’s interests. To act as the Respondent did was to totally subvert his most important duty. Dismissal was warranted and the appeal on the substantive issue must succeed.

[29] The Industrial Court found four grounds for concluding that there was procedural unfairness in the dismissal. It was submitted that witnesses were intimidated not to testify in Respondent’s case at the enquiry. No case was made out, however, that they had any knowledge of the furniture he took to his home. Their evidence would not have assisted the Respondent.

[30] It was submitted that Respondent had insufficient information and time to prepare his defence. On the charge of misappropriating the furniture the evidence was clear and arose out of facts which were common cause. The Respondent knew of the charges and had volunteered the information about the furniture, because of the pressure of the investigators. He gave his explanation that he had permission from Stippek and that the waybill constituted the correct

documentation. There was nothing else he could add. This explanation was properly rejected by the disciplinary hearing and the appeal, for reasons I have mentioned.

[31] No transcription was necessary for his appeal and the facts were summarised in the documents. No procedural unfairness has been proved and the appeal must succeed on this ground as well.

[32] The Appellant has been considerably remiss in various procedural matters and seeks condonation for the late filing of its heads of argument, the power of attorney and the record including the exhibits. The exhibits have never been found and, fortunately, the appeal could be disposed of without reference to them. No objection was raised to the heads which were a day or two late.

[33] The record was filed on 24 January 2000, the decision having been given by the Industrial Court on 2 April 1998. A series of letters to the Secretarial Services dating from 5 May 1998 establish that the fault lay with them rather than Appellant or its attorneys.

[34] The power of attorney was only filed on 3 May 2000, the day before the hearing of the appeal. This power of attorney gave authority to bring the appeal and ratified the earlier steps taken by Appellant's attorneys to prosecute the appeal. An affidavit by the Human Resources Director of Appellant Lindsay Mentor dated 5 May 2000 confirmed that authorisation was given to Appellant's attorneys to prosecute the appeal from the end of April 1998.

[35] The late filing of the heads, the record and the power of attorney is condoned.

[36] In the result, the appeal succeeds with costs and the order of the Industrial Court is altered to read "The application is dismissed".

SIGNED AND DATED AT JOHANNESBURG ON THIS 7<sup>TH</sup> DAY OF JUNE 2000.

---

Nicholson JA

---

Zondo JP

---

Date of hearing: 4 May 2000.

Date of judgment: 8 June 2000.

For the Appellant: Adv A. J. Nel instructed by Snyman van der Heever Heyns.

For the Respondent: Adv J. Nel instructed by Steytler, Nel & Partners.