

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Not Reportable

CASE NR: D669/09

5 In the matter between

LEWIS STORES (PTY) LTD

APPLICANT

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

FIRST RESPONDENT

10 COMMISSIONER A ZWANE

SECOND RESPONDENT

MUNTU JOHANNES MTHIYANE

THIRD RESPONDENT

JUDGMENT

17 October 2008

15 PILLAY D, J

In this review the applicant employer dismissed the third respondent/employee on the following charge:

20 "Misconduct in that you demonstrated gross insubordination with action to institute a group grievance against the Regional Controller without verifying the facts of the allegation of a situation where you were not present. The grievance was instigated on 3 February 2006. Through your action of involving

25 a customer in an internal dispute, you have brought the Company name in ill repute referring to the

incident/s on 3 February 2006.”

The background to the charge was that an irate customer came into the employer’s store. In the course of his conversation with the customer

5 Charles van Wyk, the regional controller, allegedly uttered words to the effect that the staff were thieves. The employee was not at work when this incident occurred. On returning to work he found that the staff had gathered together. Someone spoke about a letter. Petro de Villiers had the letter with her.¹ She read the letter. Ursula July was interpreting the letter. The letter recorded the

10 grievance of the staff relating to the allegation that they were thieves.

On the employee’s version, Elizabeth Mitchelson gave the employees the telephone number of the customer. He called the customer to confirm the allegation attributed to Van Wyk. He introduced the subject with the customer

15 by discussing whether her purchases had been delivered and whether she was satisfied with her goods.² This action, according to the employer, “brought the name of the company in ill repute”.

In the opinion of the Court, even before the employee called the customer,

20 the employer did not enjoy a good name because it had failed to deliver the customer’s goods. There was no evidence that the customer reacted negatively to the employee. The employee gave several evasive explanations for not asking van Wyk whether he had alleged that the staff were thieves. However, if the submission by Mr Jorge, the employer’s

¹ Page 72, line 22-25 of transcript; Page 83, line 17-18 of the transcript

² Page 76, line 1-4 of transcript

representative, that tensions were running high and that the relationship was acrimonious, is accepted, the employee would hardly have accepted Mr van Wyk's denial that he did not make the allegation. The employee wanted to establish the truth before pursuing a grievance. The employee was entitled

5 to call the customer to investigate a staff grievance. The charge that he brought the company into ill repute is therefore unfounded and unreasonable in the circumstances.

With regard to the first charge, the employee did not "instigate" a group

10 grievance. In any case that can hardly be misconduct. The unchallenged evidence of the employee and of his witnesses was that the grievance letter was already available for signing before the employee arrived at work. None of the witnesses could tell who drew up the letter except the employee's witness, Gladman Msomi, who said under cross-examination that Petro de

15 Villiers had drawn it up. That evidence stood unchallenged.

All three witnesses for the employer testified that they felt intimidated, but none said that the employee intimidated them. Mitchelson said that she was not compelled to sign the grievance letter, and that she signed it on her own

20 free will.³ She explained that she was intimidated because she was not the first person to sign the letter. Petro de Villiers testified that she did not fear the employee.⁴ Ursula July said that she "trusted" the employee when he told her what the contents of the letter was and asked her to sign.⁵

³ Page 43

⁴ Page 51, line 8 of the transcript

⁵ Page 61 of the transcript

According to the employee's witnesses, John Nxumalo and Goodman Nyawu, de Villiers approached them to sign the letter.⁶ The employee's witness, Goodman Msomi, testified that Ursula July informed him about signing the letter.

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The employer attacked the award on the grounds that the second respondent commissioner did not weigh the probabilities properly in the context where the employee did not cross-examine on material issues and contradicted his evidence at the disciplinary enquiry. Mr Jorge submitted
10 that the employee should have challenged the evidence and the circumstances in which the employee's witnesses signed the letter.

Whether the employee took the letter to the employer's witnesses or they came to him to sign is insignificant once the employer's witnesses did not
15 point to the employee as the person who intimidated them. Asking a colleague to sign a grievance letter is hardly a basis to discipline an employee.

Furthermore, at the arbitration, the employee did not materially contradict his
20 evidence given at the disciplinary hearing. His evidence at the arbitration was that he telephoned the customer as a courtesy and the customer continued to discuss the grievance. Whether he raised the grievance or the customer did is immaterial because the Court has found that he was entitled to pursue the investigation into the grievance in a manner that did not offend

⁶ Page 99 of transcript

the customer. There is no evidence that he did offend the customer.

Whether he lied or was mistaken about how the issue arose in the discussion with the customer is hard to tell as the employee is old and he could have forgotten. The incident occurred five months before the arbitration. The difference in his version at the arbitration and the disciplinary enquiry was so subtle that he might not have been aware of its significance. Even if he had lied because he knew he was breaking a workplace rule, the enforcement of the rule was in the circumstances unfair. His dishonesty to escape penalty for breaking a rule that was applied unreasonably is therefore excusable.

In the circumstances the application for review is DISMISSED WITH COSTS.

Pillay D, J

Date of hearing: 15 October 2008

Date of Judgment: 17 October 2008

Date of Editing: 22 May 2009

Appearances:

For the Applicant: Jose Jorge- Perrott, Van Niekerk, Woodhouse & Matyolo

Inc

For the Respondent: In person

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO : D699/06

DATE : 17 OCTOBER 2008

LEWIS STORES (PTY) LIMITED

versus

M J MTHIYANE

BEFORE THE HONOURABLE MS JUSTICE PILLAY

ON BEHALF OF APPLICANT : MR JAFTA

ON BEHALF OF RESPONDENT : NOT ON RECORD

JUDGMENT

REPORT ON RECORDING

Clear recording.

CERTIFICATE OF VERACITY

This is, to the best abilities of the transcriber, a true and correct transcript of the proceedings, **where audible**, recorded by means of a mechanical recorder in the matter:

LEWIS STORES (PTY) LIMITED v M J MTHIYANE

CASE NO : D699/06

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