

Tackling
The **HARD** issues
Labour Law



GEO
GUARDIAN EMPLOYERS ORGANISATION
Reg. No: LR2/6/3/316
Assisting Employers in Labour Law

NEWSLETTER



Theft or unauthorised removal of company property is commonplace in South Africa. Most of these incidents involve company staff. Understandably, employers have often been forced to go to great lengths to catch the culprits responsible for theft of company property.

Desperation has often led to employers using 'traps' in various forms to try and catch these culprits. The use of traps is however, a controversial issue and considered to constitute a criminal offence.

A Labour Court decision pointed out that the entrapment of employees could be viewed as an unfair labour practice. The case referred to is Cape Town City Council vs SA Municipal Workers Union (SAMWU) C367/98 (LC).

Two employees were dismissed for selling electrical cable belonging to the City Council. A trap had been set by two employees of a security company posing as buyers.

The City Council had authorised a security company to investigate allegations of theft by employees. The security company subsequently approached two employees and asked them to obtain some electrical cable. They did so and were paid R300.00.

In considering whether the trap was fair, the Court referred to Section 252A of the Criminal Procedure Act 51/77.

This section stated that a trap would be admissible ... "if the conduct of the persons setting the trap does not go beyond providing an opportunity to commit an offence".

In Section 252 A (2) a number of factors are listed in terms of Section 252 A (1), such as:

- Whether the kind of conduct used by the traps would have induced an average person to commit an offence;
- What degree of persistence and number of attempts were made to trap the person;
- What form of inducement was made and the type of misrepresentation or deceit utilised or reward offered;
- What the nature of the offence was (including and the prevalence of such an offence);
- Did the person conducting the trap act in good or bad faith;
- Was the accused person exploited in terms of emotion, sympathy or friendship, etc. which may have the effect of causing the person to commit the offence;

The court stated that if the trap went beyond the opportunity to commit an offence, then it might refuse to allow such evidence to be put before it.

The Court, having weighed up all these factors, found that the security company's employees went beyond providing the Council employees with an opportunity to commit an offence. The Court stated that the two Council employees succumbed to the temptation to sell the cable, and it found that the security employees had committed a criminal offence by enticing them to do so. The dismissal was found to be unfair and the employees were reinstated.

The Court also discussed whether the use of traps was permissible in the employment sphere. Whilst the Court did not decide on the matter, it did state that it would be ... "reluctant if not unlikely to hold that a system of trapping may never be fair in the employment context".

Having said that, employers are entitled to set up systems to catch dishonest employees. For example, if an employer believes that its property is being stolen, it could set up a temporary video surveillance camera in order to catch the perpetrator(s). Such video evidence is admissible at a disciplinary enquiry. Similarly, an employer has the right to install permanent video cameras in a workplace, but then it must inform all employees in that workplace of its intention. The employer also has to erect notices which inform people that the workplace/premises are under video surveillance.

NOTE: It is important to be aware that if any video footage is to be shown as evidence at a disciplinary enquiry that the employee should be shown the evidence prior to the enquiry in order to enable him/her to prepare for the enquiry. A good time to show the employee would be when the employer serves the notice for the enquiry on the employee.

COMMENT: Employers must exercise extreme caution when utilising the services of companies or persons who offer to trap employees. Should an employer find it necessary to consider entrapment, it must investigate and obtain clarification on the methods to be used by the company or person undertaking the entrapment.

If such a company utilises the procedures stated above, i.e., to entice and encourage employees to steal, then, not only may a criminal offence be committed, but also the employer, if it subsequently dismisses the employee(s), may have committed an unfair dismissal. The evidence may be regarded as inadmissible.

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Chairman

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Labour Law case involving entrapment

Section 252 A (2) lists number of factors when considering entrapment

e.g Did the person conducting the trap act in good or bad faith

Important information to consider when video footage is to be shown as evidence



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