WHEN IS A DISMISSAL FOR THEFT JUSTIFIED? - *(Karen Phiri, Associate)*

Theft is one of the most serious forms of disciplinary offences that would justify a dismissal at first instance. This is regardless of the absence of previous warnings or the subsequent return of the stolen property by the employee. The employer must, as in all cases of misconduct, prove on balance of probabilities that the employee committed the offence or (at the very least) was an accomplice to it. Often, however, employers are unable to justify a dismissal for theft when the dismissal is eventually challenged in Court.

Examples of instances of where the Court has found a dismissal for theft to be unjustified include the following:

- where it is not the only reasonable inference on the circumstantial evidence led at the disciplinary hearing that the employee, in fact, committed the alleged theft **(Omphile v Botswana Breweries Ltd 2008 3 BLR 197 IC)**;
- where the employer only places reliance on investigations by the police or a conviction in a criminal or customary Court to justify the dismissal **(Gaopotlake v. Dulux Botswana (PTY) LTD 2000 (1) BLR 458 (IC))**; and
- where the employer fails to properly identify the property that is alleged to have been stolen at the disciplinary hearing **(Tshwaedi & Others V Bolux Milling Co(Pty) Ltd 2000(2) BLR 373 (IC))**.

This article sets out general guidelines for employers when seeking to take disciplinary action, relating to theft, against an employee.

The following factors must be taken into account at all times:

- As with any form of misconduct, where an employee is suspected of having committed an offence involving theft, it is important to have a proper hearing prior to dismissing or imposing the appropriate sanction on the employee.
- Prior to the hearing, the employer MUST carry out its own investigations and should not rely solely on police investigations or findings of a criminal or customary Court.
- Suspicion alone is not enough to prove that an employee is guilty of theft. It is therefore important that evidence must be led by the employer not only that the theft was committed but also that it is the employee so charged who committed it. Such evidence would normally include (but not be limited to);

    - Production of the stolen property, at the disciplinary enquiry, as an exhibit. Where the property cannot be produced (which is often the case), the property that is alleged to have been stolen should be properly identified by size, color, quantity or any other distinguishing characteristics.
    - Evidence to prove that the alleged stolen property in fact belongs to the employer, another employee or a customer/client of the employer.
    - If there is an eye witness to the theft, such a witness should be called to give evidence at the hearing. Hearsay evidence should not be relied upon to reach a finding of guilt. Similarly, where there is video footage connecting the employee to the theft, the footage should be placed before the disciplinary enquiry.
    - Where the evidence relied upon is circumstantial (a series of facts that point to a conclusion that the employee has stolen), a finding of guilt should not be reached unless the ONLY reasonable inference to be drawn from the circumstantial evidence led or presented is that the employee indeed committed the theft.

At all times, it bears remembering that it is not for the employee to prove his/her innocence but for the employer to prove the employee's guilt on a balance of probabilities. The employer should, therefore, at all times ensure that before an employee is dismissed, that there is sufficient proof judged objectively that the employee has committed the theft. Where the employee has admitted guilt (which rarely occurs) the employer need only lead sufficient evidence for him to decide on an appropriate sanction.