

When are the photos on your phone not yours?

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Although an employee has a right to privacy, it is not absolute. The employee's case, in NUMSA and Another v Rafee N.O. and Others [2016] ZALCJHB 512, was that the employer's instruction that he hand over his mobile phone for inspection violated his right to privacy.



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The employer's instruction emanated from a report that the employee had taken photographs using his mobile phone of the company's production line, shift machines and letter trays. The employee was instructed to delete the photographs relating to the company's confidential business operations and to confirm that he had done so. When the employer asked for confirmation that the photographs had been deleted from his mobile phone, the employee replied "no comment". Thereafter, the employer instructed the employee to make his phone available to confirm that the disputed photographs had been removed.

The employee refused on the basis that it was his private phone which contained his personal information. The employee also argued that the employer had no right to look at his phone.

The Company asserted that its business operations needed to be kept confidential and that it operated in a competitive environment. The employee was charged and dismissed for failing to delete the photographs or confirm that he had done so and for refusing to make available his mobile phone to confirm that the photographs had been deleted. The employee challenged the fairness of his dismissal at the CCMA, where he denied that he took the photographs.

The CCMA arbitrating commissioner found that, in the circumstances, the employer's instruction to hand over the phone was reasonable and that the employee's failure to obey the instruction warranted dismissal.

Dissatisfied with the arbitrator's outcome, the employee applied to the Labour Court to review the award. The Labour Court referred to the employee's right to maintain the confidential nature of information on his mobile phone as well as the employer's right to maintain the confidential information about its business. It held that although the employee is entitled to the privacy of the information on his mobile phone, "that does not entitle him to use his personal phone as a camera to capture confidential information belonging to his employer in which it has a proprietary interest. When he did that, he could hardly maintain that his right to preserve the confidentiality of his personal data entitled him to retain data about the company he had obtained without permission, which was stored on the same device." It also held that "the action of taking such photographs is indistinguishable in principle from copying plans of the company's production layout and putting those copies in a personal brief case."

The Labour Court dismissed the employee's review application and held that it was not unreasonable to infer that it was likely that the employee took the photographs, failed to delete them, and retained them on his mobile phone. It also held that this conduct seriously undermined the trust relationship between the employer and employee.

This case is important as it captures the fact that the right to privacy has its limitations and cannot be relied on by an employee acting with ulterior motives to retain an employer's confidential information.

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