

JOHANNES GOVORA
v
INNSCOR AFRICA LIMITED

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GWAUNZA JA & PATEL JA
HARARE, MAY 19, 2015

R Mukozho, for the appellant

T Magwaliba, for the respondent

MALABA DCJ: After hearing counsel for both parties the appeal was dismissed with costs. It was indicated that reasons would follow in due course. These are they.

The appeal is from the judgment of the Labour Court upholding a decision of the respondent's Appeals Committee handed down on 14 October 2010. The decision of the Appeals Committee upheld the earlier decision of the Disciplinary Committee finding the appellant guilty of "gross negligence of duty" as defined under s 9.2.4. of Inncor Africa Mass Market Food Division Code of Conduct (2002).

The appellant was employed by the respondent as a Distribution Manager at Nuffield Road Factory which produces confectionery products for the mass market. His duties included, amongst others, ensuring timely product delivery to customers, 100% crates collection, ensuring correct and optimum manpower levels at all times, effectively supervising the dispatch

department including the keeping of records and dispatch equipment; monitoring delivery times of the drivers and the conduct of drivers while undertaking any work falling under the control of the dispatch department.

On 20 September 2010 the appellant was suspended from work without pay on the allegation that on 13 September 2010 he failed to ensure that crates that were required for delivery of confectionery products the following day were collected and made available to the production department. The respondent failed to dispatch all ordered and produced confectionaries on 14 September. The appellant had failed in his duty to ensure 100% collection of crates as was required by his job.

The appellant was charged before a Disciplinary Committee which found him guilty of “gross negligence of duty” in contravention of clause 9.2.4(xix) of the respondent’s Code of Conduct. The appellant was dismissed from employment with effect from the date of suspension. He appealed to the Appeals Committee which dismissed the appeal. The appellant lodged an appeal to the Labour Court on the grounds of unfair dismissal. The grounds of unfair dismissal were as follows:

- (i) The committee failed to appreciate that on 13 September 2010 a senior person, Artwell Rice was in charge but instead held that there was no supervisor on this particular day.
- (ii) The committee erred in failing to find that the appellant gave Artwell Rice time off from 14 – 16 September 2010 for genuine reasons.

- (iii) The committee erred in deciding that the appellant was not able to achieve the set targets of crate collection when it was clear that the driver and the van assistant were responsible for the duties and that they failed to reach the target because they were diverted by the Operations Manager to further his personal business and there were written statements to that effect.
- (iv) The Committee failed to appreciate that the targets were not reached because of production constraints and there were statements to that effect.
- (v) The committee erred in failing to find merit in the appellant's conduct of charging the driver and the van assistant for failing to get enough crates on 13 September 2010. The Human Resources Department chose not to discipline them but instead disciplined the appellant.
- (vi) The committee failed to articulate the very nature of the charge of "gross negligence of duty" and came up with a decision which was so outrageous in defiance of logic that no reasonable person applying his mind objectively would have come to that decision.

The appellant's contention was that the court *a quo* misdirected itself in upholding his dismissal. He argued that, charging him with "gross negligence of duty" was outrageous as the facts placed before the court *a quo* constituted negligence which is not a dismissible offence. The question for determination is whether the charge of "gross negligence of duty" was properly preferred against the appellant regard being had to his conduct as proved by the evidence. In other words was the appellant correctly found guilty of "gross negligence" or was he guilty of negligence.

The section under which the appellant was charged provides as follows:

“(xix) Gross Negligence of Duty

An employee is grossly negligent if he does not take reasonable care in the performance of his duties to avoid acts or omission that he can reasonably foresee would be likely to cause major loss, damage or injury.”

The argument by the appellant was that the charge of “gross negligence of duty” was not substantiated. In *Standard Chartered Bank of Zimbabwe Ltd v Chipininga* 2004(2) ZLR 94(S) at 98F-99C it is stated as follows:

“It has been pointed out that ‘gross negligence’ is a nebulous concept, the meaning of which depends on the context in which it is used and it is a futile exercise to seek to provide a definition which would be applicable to all circumstances: see *Govt of Republic of SA (Dept of Ind.) v Fibre Spinners and Weavers (Pty) Ltd* 1977(2) SA 324(D) at 335E; *Bickle v Minister of Law and Order* 1980(1) ZLR 36(H) at 41A. It has been described as ‘ordinary negligence of an aggravated form which falls short of willfulness’ (*Bickle’s case supra*); ‘very great negligence or want of even scant care or a failure to exercise even that care which a careless person would use’. See Prosser “*Law of Torts*” 4ed at 183.”

The definition of the concept which has for practical purposes, been quoted with approval in many cases is that suggested by MURRAY J in *Rosenthal v Marks* 1944 TPD 172 at 180 where he said:

“Gross negligence (*culpa lata, crassa*) connotes recklessness an entire failure to give consideration to the consequences of his actions, a total disregard of duty: see per WESSELS J IN *Adlington’s case supra* at p 973, and, *Cordey v Cardiff ke Co.* (88LT 192).”

In *Nyahuma v Barclays Bank (Pvt) Ltd* 2005(2) 445(S) SANDURA JA, also observed that it was not possible to give a universally suitable definition of the term “gross negligence”. He went to state at 440 F-G:

“Thus, in *Government of the Republic of South Africa (Department of Industries) v Fibre Spinners & Weavers (Pty) Ltd* 1977 (2) SA 324(D) DIDCOTT J said the following at 335D-E:

‘Gross negligence is not, of course, an exact concept lending itself to a neat and universally apt definition. The degree of negligence which is called gross for one purpose may not necessarily be thought such for another’.”

In deciding whether the appellant’s negligence was gross or ordinary, the court must make a value judgment. (See *Bickle’s case supra* at 771H).

The question whether or not the appellant was correctly found guilty of gross negligence of duty can only be determined by reference to evidence that proved on a balance of probability that he totally disregarded his duties. It is true that under the respondent’s code of conduct gross negligence is committed when an employee in the performance of his or her duties fails to take reasonable care to avoid acts or omissions that he can reasonably foresee would be likely to cause major loss or damage or injury. In this case there was total disregard of duty.

Ensuring that there was 100% collection of crates was the appellant’s personal duty. It was reasonably foreseeable that failure on his part to ensure that the number of crates necessary for the delivery of confectionaries produced in the early hours of the following day was collected and made available for conveyance of the products to customers whilst fresh, would cause the employer to incur huge losses.

It was common cause that on 13 September 2010, the appellant went home without having ensured that all crates that were to be used in the delivery of confectionaries the following day were collected. Failure to ensure collection of all the required crates led to the

failure to dispatch all ordered and produced products on 14 September 2010. The applicant had a duty to ensure that the required number of crates were collected on each particular occasion to enable the delivery of the respondent's products on the various shops the following day.

The appellant admitted that he failed in his duty. He was required to collect 460 crates. It was discovered the following morning that 400 crates had been collected. The appellant had left work in the evening of 13 September without making sure that there was 100% crate collection. He did not even know how many crates had been collected. In that regard the appellant did not execute his duty. He was aware of what would happen if the required crates were not collected. Any reasonable man in his situation would have foreseen that failure to collect the required crates would cause huge losses to the employer.

Despite knowing that the collection of 100% crates was critical to the operation of the respondent's business, the appellant left his place of work on 13 September 2010 without making sure that the crates were collected. According to the record of proceedings, the appellant stated that he became aware of the fact that the required number of crates were not collected on 14 September 2010 at 7.30a.m. It was common cause that by then the confectionaries should have been delivered to the clients. The fact that he became aware of the shortage of the crates the following morning did not exonerate him from being guilty of "gross negligence".

The appellant was aware at the time he left the workplace that there was no supervisor at the dispatch department. He had given the supervisor who left the workplace at 8.00p.m. on 13 September, days off. He failed to ensure that in the absence of the supervisor,

there was another suitably qualified employee to perform the duties of the supervisor. In the absence of such a person who would have stood in the place of the supervisor it was the appellant's duty to man the dispatch department to ensure that the required number of crates were collected.

In as much as he was not the one to physically collect the crates, he was supposed to make sure that those who were responsible for collecting the crates had done so timeously and in required numbers. The appellant failed to perform his duties not because of anything which was beyond his control but because he grossly neglected what he was under the duty to do. This is a clear case of total disregard of duty by an employee. The appellant was correctly found guilty of gross negligence in terms of the respondent's code of conduct.

For these reasons the appeal was dismissed with costs for lack of merit.

GWAUNZA JA: I agree

PATEL JA: I agree

Sinyoro and Partners, appellant's legal practitioners

Wintertons, respondent's legal practitioners