

DISTRIBUTABLE (122)

**CIMAS MEDICAL AID SOCIETY
v
LINDIWE MHUNDURU**

**SUPREME COURT OF ZIMBABWE
HLATSHWAYO JA, BHUNU JA & BERE JA
HARARE: 12 JULY 2018 & 22 OCTOBER 2021**

H.Mutasa, for the appellant

A.Muchadehama, for the respondent

HLATSHWAYO JA:

[1] This is an appeal against the decision of the Labour Court where it ordered that the appellant reinstate the respondent into employment without loss of salary and benefits or be paid damages *in lieu* of reinstatement if reinstatement was no longer possible.

FACTUAL BACKGROUND

[2] The respondent was employed by the appellant as a Marketing Manager. Sometime in 2012, the appellant resolved to renovate its front office. The respondent being a senior

employee was tasked to oversee the implementation of the aforesaid resolution. Efforts to find suitable vendors to do the renovations failed and as a result it was suggested that the appellant engage the services of the respondent's advertising agency, a company called DDH & M Advertising (Private) Limited. It was agreed that the company would be engaged to select reputable interior architects and to manage the project implementation on behalf of the appellant.

[3] Sometime in November 2012, the advertising agency wrote to the respondent advising her of the outcome of its search for suitable contractors. The agency brought forward three contractors. The first contractor, Thuthukile International (Private) Limited was keen to supply but it later pulled out due to pressures from other clients. The second contractor was Kaschula and Co. It had certain conditions which the advertising agency deemed not to have been standard procedures. The last company Archi Craft Architect (Private) Limited was determined by the advertising agency to have a combination of both the mechanical and technical knowhow to do the job.

[4] As a result, acting upon the recommendation of the advertising agent, the respondent on 6 November 2012 authored an internal memorandum in terms of which permission was sought to award Archi Craft Architect (Private) Limited the contract to renovate the offices. At a meeting held on 28 November 2012 with the respondent's superiors including the finance executive, it was decided that the contract would be awarded to Archi Craft Architect (Private) Limited. This decision was made with the respondent and her superiors

being fully aware of the company's written policy which prohibited the engagement of a service provider without the involvement of the purchasing committee.

- [5] As the respondent and her superiors had failed to follow company procedure, they were subsequently charged in terms of the appellant's Code of Conduct, under Group IV offences; namely, gross negligence or incompetence in the performance of their duties which damaged the employer's interests. The appellant's disciplinary committee found the respondent guilty of the charges and she was subsequently dismissed. She appealed to the appeals committee which appeal was also dismissed.
- [6] Aggrieved by the decision of the appeals committee, the respondent appealed to the Labour Court seeking an order for the setting aside of the decision of the appeals committee. The court *a quo* held that it was unproven that the respondent had flouted the appellant's procurement policy. It further determined that all she did was to merely advise that a certain vendor be contracted. It was further held that in the circumstances, the respondent had not advised anyone to by-pass the purchasing committee. In the result the court *a quo* upheld the appeal and ordered that the respondent be reinstated or be paid damages *in lieu* of reinstatement if reinstatement was no longer possible.
- [7] Aggrieved by the decision of the court *a quo*, the appellant has lodged the present appeal on the following grounds:

- a. The court *a quo* grossly erred and misdirected itself on the facts when it failed to find that the respondent had participated in the process that culminated in the wrongful engagement of Archi Craft Architect (Private) Limited to carry out renovations at appellant's offices. Such a misdirection was so gross as to amount to a misdirection at law.
- b. The court *a quo* erred at fact, in that, on one hand it noted that in terms of the appellant's procurement policy, all tenders had to be submitted to the Procurement Committee for final approval and in the other failed to find that the respondent had flouted this procedure, when all facts pointed to this. Such misdirection was so gross as to amount to a misdirection at law.
- c. The court *a quo* erred in law when it failed to find that the conduct of the respondent in that regard constituted gross negligence on her part.
- d. The court *a quo* seriously misdirected itself when it proceeded to determine this matter on the basis that the respondent had been accused of contracting Archi Craft Architects (Private) Limited when in fact the charge was that she had caused and/or facilitated the aforesaid engagement such gross misdirection by the court *a quo* amounts to a misdirection at law.
- e. The court *a quo* erred when it failed to find that the respondent through her memorandum dated 6 November 2012 led to the wrongful engagement of Archi Craft Architect (Private) Limited.

[8] At the hearing of the appeal, the appellant submitted that the respondent failed to follow proper channels as required by the company's policy. The appellant further argued that instead of securing three quotations and then submitting them to the company's purchasing

committee, the respondent secured two quotations only and submitted them to her immediate supervisor. It was further argued by the appellant that the court *a quo* erred in overturning the decision of the disciplinary committee which was based on factual findings yet the court *a quo* had not found any gross misdirection on the part of the disciplinary hearing.

Per contra, counsel for the respondent submitted that the respondent in the discharge of its duties had merely recommended the engagement of Archi Craft Architect (Private) Limited. It was submitted that the respondent in recommending the vendor to her supervisor was not grossly negligent nor was she incompetent in the execution of her duties.

[9] After hearing submissions by both parties, it seems to me that there are only two issues for determination, and these are they:

1. Whether the court *a quo* erred in not finding that the respondent had flouted the company procedure; and
2. Whether the court *a quo* erred in not finding that the conduct of the respondent constituted gross negligence.

I shall deal with the issues in turn.

Whether the court *a quo* erred in not finding that the respondent had flouted the company procedure.

[10] The appellant in its submissions argued that the respondent acted unlawfully by setting in motion an unprocedural process that led to the awarding of the contract to Archi Craft Architect (Private) Limited. It further submitted that the respondent made the request to recommend the awarding of the contract to Archi Craft Architect (Private) Limited with the full knowledge that the appellant's purchasing committee had not presided over the selection process. In the circumstances the appellant submits that the court *a quo* erred in not finding that the respondent had flouted its company procedure.

On the other hand, the respondent denied flouting any procedure. She insisted that it was not her duty to select the ultimate vendor. She further submitted that her role was to simply request, which request could be granted or denied and that whoever contracted the vendor is the one who by passed the company's purchasing committee.

[11] In determining the issue before it, the court *a quo* was alive to the fact that the awarding of the contract to Archi Craft Architect (Private) Limited violated the appellant's written policy. Whilst recognizing this procedural irregularity the court *a quo* however did not put the blame on the respondent. In supporting the respondent's case, the court *a quo* stated:

“... it was not clear what her duties were in connection with the procurement procedures ... it is not clear who specifically contracted the vendor but what is apparent is that it was not the appellant (now respondent) ... whoever contracted the vendor is the one who by passed the committee and was thus answerable for flouting policy.”

[12] From the record of proceedings, what is apparent is that on 5 November 2012, the respondent received a letter from the advertising agent to the effect that they had found

suitable contractors and from the contractors found, they recommended Archi Craft Architect (Private) Limited for the job. On 6 November 2012, the respondent acting on the letter by the advertising agent wrote an internal memorandum that stated as follows:

“We are seeking the permission to contract Archi Craft Architect (Private) Limited to carry out the Front Office renovations based on the submissions by our agency DDH&M who we had contracted to source for architectural and design firms bids to renovate the offices.”

The respondent in the memorandum sought “permission to contract” Archi Craft Architect (Private) Limited. The respondent at that stage and with her position as one of the senior employees implementing the project ought to have known that as they now had a list of prospective contractors, the list was supposed to have gone through to the purchasing committee. That did not happen. The respondent sought permission to contract, and permission was granted. The respondent’s submission that whoever awarded the contract was the one who flouted policy lacks merit. What her superiors did was to concur with the wrongful path that had been proposed by the respondent. It follows that the procedure taken by the respondent and the subsequent concurrence with the procedure flouted company policy.

Hypothetically, if the renovations had been done in line with company policy and credit was being given, surely the respondent would not have excused herself and say that I was not involved in the final selection so do not give me credit. The court *a quo* in the circumstance erred in not finding that the respondent had flouted company policy.

Whether the court *a quo* erred in not finding the conduct of the respondent constituted gross negligence.

[13] The argument proffered by the appellant was that at all times the respondent was aware of the fact that the appellant had a Purchasing Committee whose mandate was to preside over the selection of service providers. *Mr Mutasa* for the appellant submitted that the respondent set in motion the process that led to the unprocedural engagement of Archi Craft Architect (Private) Limited and that the manner in which the respondent handled the affairs of the appellant shows negligence of a gross nature. On the other hand, the respondent submitted that she had no final say in the awarding of the tenders and she did not prevent anyone from complying with the procurement requirements. She argued that the charge of “gross negligence of duty” was not proved.

[14] To determine if the court *a quo* erred in not finding the conduct of the respondent grossly negligent, it is important to establish what the term gross negligence entails. It was held in *Standard Chartered Bank of Zimbabwe Ltd v Chipininga* 2004(2) ZLR 94(S) at 98F-99C that:

“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 was stated in *City of Harare v Chikwanda* SC 70/20 wherein BHUNU JA quoted the remarks of 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).” (My emphasis).

[15] It is apparent that the question whether the respondent ought to have been found guilty of gross negligence of duty can only be determined by reference to evidence that proved on a balance of probability that she totally disregarded her duties. It is common cause that the appellant had a written down policy which provided for the procedures to be followed in certain circumstances. It is also common cause that the respondent had a procurement committee which had a mandate to preside over the selection of suppliers as and when needed. In the circumstances as there were renovations to be done, the procurement committee was crucial in the eventual selection of the prospective vendor. All bids that were to be considered would have to pass through the procurement committee. This was a standard procedure that was common to all employees especially the respondent as the appellant’s Marketing Manager. Her position in the company placed her in a position that she knew, or she ought to have known, about that written policy.

[16] It is not denied that the respondent wrote to her superior recommending the contracting of Archi Craft Architect (Private) Limited without first going through the procurement committee. In her defence she submitted that it was not her duty to select the ultimate supplier, and that all she did was merely recommend which supplier they could pick. I find no merit in that defence. As the marketing manager of the company, and as one of the senior employees who were seized with the duty of overseeing the implementation of the renovations at the appellant’s premises, she had a duty to ensure that the renovations were

done through lawful procedures and to ensure that the policy of the appellant is implemented properly.

The conduct of the respondent, as one of the employees who oversaw the project, in recommending the awarding of the contract to Archi Craft Architect (Private) Limited amounted to gross negligence. The fact that she initiated the process that led to the unprocedural awarding of the contract shows that she neglected her duty to follow proper procedure. I associate myself with the remarks in *Rosenthal v Marks (supra)* that her actions were grossly negligent in that she totally disregarded the consequences of her actions which amounts to a disregard of duty. The court *a quo* after considering all the evidence should have found the respondent's conduct grossly negligent. Accordingly this ground of appeal has merit and it is upheld.

DISPOSITION

[17] The respondent having been one of the senior employees and managers responsible for the implementation of the renovation project at the appellant's offices had the duty to make sure that at all times the interests of her employer were looked after. It is common cause that she authored the internal memorandum that culminated in the awarding of the contract to Archi Craft Architect (Private) Limited in a way that was contrary to the appellant's company written policy. As a result, the respondent was actively involved in the flouting of the company's procedure. Her conduct of not following company policy was grossly negligent as she disregarded the consequences of her actions.

In the result, the appeal is allowed with costs and the decision of the court *a quo* is set aside and substituted with the following:

‘The Appeal is hereby dismissed with costs.’

BHUNU JA: I agree

BERE JA: No longer in office

Gill, Godlonton & Gerrans, appellant’s legal practitioners

Mbidzo, Muchadehama & Makoni, respondent’s legal practitioners