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Judgment No S.C. 104\2002
Civil Appeal No 302\2000

STANDARD CHARTERED BANK OF ZIMBABWE LIMITED v
CHRISTOPHER CHIPININGU

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE JUNE 4 2002 & SEPTEMBER 7, 2004

G.E. Mandizha, for the appellant

D.A. Machingura, for the respondent

MALABA JA: This is an appeal from the Labour Relations Tribunal dated 14 September 2000 dismissing with costs an appeal from a decision of the Appeals Board of the National Employment Council for the Banking Undertaking "the Appeals Board"). The Appeals Board had held that failure by the respondent to take care to protect the appellant's money against theft by a co-custodian of the money did not constitute "gross negligence causing serious loss to the bank.

The respondent, to whom I shall refer as "Mr Chipiningu" was employed by the appellant ("Standard Chartered") a financial institution registered as such under the laws of Zimbabwe. He had worked as a teller at the West End branch

of Standard Chartered in Harare and was acting in the position of "Teller-One" at the time the events which led to disciplinary action being taken against him arose.

When acting in the position of "Teller-One" Mr Chipiningu bore the onerous duty of controlling treasury cash jointly with an officer of the rank of Deputy Personnel Manager or above. It was his duty as a co-custodian of treasury cash to protect it from possible theft by anyone including the co-custodian. The strong room in which the money was kept could only be opened by the use of two different sets of keys. Each custodian had to have physical custody of one set of keys.

In terms of the standing instructions brought to the attention of Mr Chipiningu at the time he assumed the duties of joint controller of treasury cash, he was not to hand over his set of keys to the strong room to anyone, including the co-custodian, without first obtaining authority from the Branch Manager.

Breach of this rule was viewed seriously. It was a provision of the standing instructions that a plea of acting in obedience to superior orders would not be accepted as an excuse for breach of the duty. The reason for the strict prohibition is obvious. If a custodian handed over his set of keys to his co-custodian that would enable the latter to open the strong room and have access to treasury cash alone without supervision from anyone. The co-custodian would, in the circumstances, be placed in a position from which he could easily steal treasury cash and cause loss to the bank.

On the morning of 10 November 1995 Mr Chipiningu was working at West End branch serving customers. He had his set of keys to the strong room. One of the tellers ran out of cash and approached the co-custodian of treasury cash, a Mr Jambo. Mr Jambo happened to be the branch operations manager. He exercised joint control with Mr Chipiningu over payments of money into and withdrawals from treasury. He had physical possession of the second set of keys to the strong room.

Mr Jambo asked Mr Chipiningu to hand over to him the other set of keys to the strong room. Mr Chipiningu was expected not to hand over his set of keys to the branch operations manager but to go with him to the strong room and use his own keys as Mr Jambo also used his to jointly open the strong room. He had to witness the withdrawal of the amount of cash needed by the teller and countersign in the treasury cash book that the amount recorded therein was the correct amount of money withdrawn from treasury.

What actually happened that day was in total breach of the standing instructions. If Mr Chipiningu was unable, for some reason, not to accompany Mr Jambo to the strong room in compliance with his duties as a co-custodian of treasury cash he had to first obtain authority from the Branch Manager to hand his keys over to him. He did nothing of the sort but simply complied with the request by Mr Jambo. In handing over his set of keys to the co-custodian, Mr Chipiningu enabled him to open the strong room and have access to treasury cash alone without anyone to oversee what he was doing.

Mr Chipiningu said he handed over his set of keys to Mr Jambo and did not accompany him to the strong room because he was busy serving customers. He also said he trusted his co-custodian who was a branch operations manager, presumably not to steal treasury cash.

Mr Jambo returned Mr Chipiningu's keys later that day. They never jointly opened the strong room again. Ten days later Mr Jambo surrendered all the keys he held for the bank and disappeared. When the strong room was opened and the cash therein counted, it was found that an amount of $50 000 was missing. Mr Jambo was suspected of having stolen the money on 10 November when he opened the strong room and had access to treasury cash on his own.

It was clear that Mr Chipiningu's breach of duty as a custodian of treasury cash had contributed in bringing about the serious financial loss suffered by the bank. On 13 December 1995 he was brought before a disciplinary hearing officer to answer a charge of "gross negligence causing serious loss to the bank" in contravention of section 11 subsection 15 of the Code of Conduct S.I. 201 of 1995. The sanction for Category D offences in which the act of misconduct charged against Mr Chipiningu fell was dismissal.

Mr Chipiningu admitted that he was negligent in handing over his keys to Mr Jambo without first obtaining authority from the Branch Manager to do so. He also admitted that his negligence caused the serious financial loss suffered by the bank. He, however, argued that his negligence did not constitute "gross negligence".

Different answers were given by the different tribunals that had to determine the question whether the admitted failure by Mr Chipiningu to discharge his duty to protect treasury cash constituted gross negligence. The particulars were that he handed over his set of keys to the strong room to his co-custodian without having obtained authority to do so from the Branch Manager and as a result enabled him to open the strong room and have access to treasury cash on his own without any supervision.

The disciplinary hearing officer ruled that his negligence was "gross" and imposed the sanction of dismissal. Mr Chipiningu appealed to the Grievance and Disciplinary Committee. The members of the committee who heard the appeal were equally divided on the question. A second hearing of the appeal by the Grievance and Disciplinary Committee was reconvened. The decision this time went against Standard Chartered. It appealed to the Labour Relations Tribunal but lost.

In the judgment the learned acting Chairman of the Tribunal made reference to the definition of "gross negligence" given by MURRAY J in *Rosenthal v Marks* 1944 TPD 172 cited in *Bickle v Minister of Law and Order* 1980 (1) ZLR 36 and *Zeeta Manufacturers (Pvt) Ltd v Zimbabwe United Freight Company Ltd* 1990 (1) ZLR 337 (H).

In an apparent application of the principles extracted from the definition of gross negligence adopted in the cases referred to, the learned acting Chairman said:-

> "On the facts of this case can it be said that the appellant's conduct in handing over his keys to the operations manager without first obtaining permission from the branch manager or administrative manager amounted to a total disregard of his duty? I think not, otherwise what would have been the degree of negligence had he handed over the keys to a total stranger?
>
> It appears to me that what we have here is a question of misplaced trust. The operations manager was a person employed in a responsible position of trust. He had authority to enter the treasury albeit under given restrictions. Although the appellant's conduct amounted to negligence it certainly did not amount to gross negligence."

There is no doubt that the learned acting Chairman of the Tribunal misdirected himself in the application of the principles derived from the definition of "gross negligence" and reached a wrong conclusion on the facts of the case. One must first have a clear understanding of what "gross negligence" entails.

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: *Gov. R.S.A. (Dept of Ind) v Fibre Spinners and Weavers* 1977 (2) SA 324 at 335E; *Bickle v Minister of Law and Order* 1980 ZLR 36 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"(*Prosser, "Law of Torts"* 4 ed 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*, *supra* 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 Ice Co (*88 LT 192))."

Prosser, supra, makes the observation at pp 183-184 that:-

> "There is, in short, no generally accepted meaning; but the probability is, when the phrase is used, that it signifies more than ordinary inadvertence or inattention, but less than conscious indifference to consequences; and that it is, in other words, merely an extreme departure from the ordinary standard of care."

The meaning of gross negligence may also be better understood from results of the application of principles derived from the definitions adopted in some of these cases. In *CSAR v Adlington & Co* 1906 TS 964 WESSELS J gave as an example of "gross negligence" the case of a person who, when he has taken charge of property, leaves it so exposed that thieves may carry it off. In *Rosenthal's* case, *supra*, there was no gross negligence because the garage owner had not completely abandoned the duty to take care of the respondent's car when he left it parked on the ground floor near to the entrance to the street from where it was stolen.

The reasons for the decision in the case of *Essa v Divaris* 1947 (1) SA 753 show that had the appellant proved that the fire which damaged his motor vehicle, at the time it was parked in the respondent's garage, had been caused by the latter's employee by striking a match at night in order to be able to replace a plug in the petrol tank of one of the cars from which he was extracting petrol, the respondent would have been found guilty of gross negligence rendering him liable for the damage which resulted from the burning of the motor vehicle. Just like the person who leaves, exposed to thieves, the property of which he was expected to take charge the

respondent, in *Essa's* case, *supra*, would have totally disregarded his duty to protect the respondent's motor vehicle at the time his employee struck a match and caused the fire which damaged the motor vehicle. The appellant in *Essa's* case, *supra*, failed to prove the cause of the fire.

Lastly the respondent in *Zeeta Manufacturers (Pvt) Ltd v Zimbabwe United Freight Co Ltd*, *supra*, was found not guilty of "gross negligence" because when its employee left the tricycle used in the delivery of parcels to various customers, unattended and unlocked, leading to its being stolen together with the parcel belonging to the appellant which was in a container fixed to the front part of the tricycle, the employee had not completely abandoned his duty. He was in the course of performing his duty of delivering parcels to the customers. When he parked the tricycle it was in order to carry out his duty to deliver a parcel to one of the customers. His was ordinary negligence in that his failure related to not locking the tricycle or securing it to some fixed object or having somebody attend it whilst he delivered the parcel to the customer.

In this case there was total disregard of the duty itself by Mr Chipiningu. The facts of his case fit the example given by WESSELS J in *Adlington's* case *supra*. In leaving the property so exposed that thieves may carry it off the person would have totally disregarded his duty to take care of the property. Mr Chipiningu did not seek authority from the Branch Manager to do so before he handed over his set of keys to Mr Jambo. In handing over the set of keys to his co-custodian he totally disregarded his duty to take care of treasury cash against possible theft by the joint custodian. He did not accompany Mr Jambo to the strong room.

As a result of being placed in possession of both sets of keys Mr Jambo was able to open the strong room and have access to treasury cash on his own without any supervision. He was put in a position from which he was able to steal the money which he did. I can think of no better example of an "entire failure of duty" or "total disregard of duty".

The reasoning by the learned acting Chairman that Mr Chipiningu would have been guilty of gross negligence if he handed the keys to a total stranger, suggests that at the time he handed over the keys to his co-custodian and let him open the strong room and have access to treasury cash, he was still acting in accordance with some aspect of his duties as defined in the standing instructions. The fact is that Mr Chipiningu stopped acting in accordance with his duties as a joint controller of treasury cash the moment he handed over his keys to the strong room to Mr Jambo without having obtained the authority of the Branch Manager to do so. From then on he did nothing to protect treasury cash from theft.

The explanation given by Mr Chipiningu for his entire failure of duty did not help him at all. He was not to discharge his own duty through the branch operations manager. It must have been clear to him from the nature of the duties given to him, that the other custodian would always be an officer of a rank higher than or superior to that of Teller-One. They were equal partners when exercising the duties of joint custodians of treasury cash.

The issue was, in fact, not whether Mr Chipiningu was right or wrong in trusting his co-custodian of treasury cash with both sets of keys to the strong room.

Whether the handing over of his set of keys to Mr Jambo was motivated by the trust he placed in him or not did not detract from the fact that it constituted an entire failure of duty or a total disregard of duty by him. In my view Standard Chartered proved "gross negligence" against Mr Chipiningu and should have succeeded in it appeal to the Labour Relations Tribunal.

The appeal accordingly succeeds with costs. The decision of the Labour Relations Tribunal is set aside and in its place substituted the following:-

> "The appeal against the determination of the Appeals Board of the National Employment Council of the Banking Undertaking is allowed with costs."

CHIDYAUSIKU CJ:

ZIYAMBI JA: I agree

Coghlan, Welsh & Guest, appellant's legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners