

DISTRIBUTABLE (2)

MEDICAL INVESTMENTS LTD t/a AVENUES CLINIC v
FLORENCE CHINGWENA

SUPREME COURT OF ZIMBABWE
GARWE JA, CHEDA AJA & OMERJEE AJA
HARARE, JANUARY 16, 2012

L Mazonde, for the appellant

F Mahere, for the respondent

GARWE JA: This is an appeal against the judgment of the Labour Court setting aside the decision of a disciplinary and grievances committee constituted by the appellant and directing that the matter be heard afresh before a properly constituted committee.

The facts of this case are these. A disciplinary and grievances committee which included two management and two worker representatives was constituted to deal with allegations of misconduct leveled against the respondent. In the course of the proceedings one of the two managerial representatives who had been elected chairman of the committee became unavailable to so act as a result of which the other managerial representative assumed the chairmanship. The committee found the respondent guilty of misconduct and ordered her dismissal from employment. Dissatisfied, the respondent took the matter on review to the Labour Court on the basis that the disciplinary committee had not been properly constituted.

The Labour Court accepted the submission by the respondent that the committee had not been properly constituted. In particular the Labour Court found that it was improper for one of the two managerial representatives to chair the committee and secondly that when the remaining managerial representative assumed the chairmanship of the committee that left the committee without a managerial representative as required by the code of conduct and that in any event that representative who assumed chairmanship was a subordinate of the respondent. Consequently the Labour Court granted the review application.

Dissatisfied with this finding the appellant has appealed to this Court. In its grounds of appeal the appellant has attacked the decision of the court *a quo* on the basis that the court erred in coming to the conclusion that the committee was not properly constituted in terms of the appellant's Code of Conduct. The appellant has also argued that in the light of the provisions of s23 of the Labour Act, Chapter 28:01 ("the Act") the committee was improperly constituted in that it included representatives who were not solely managerial employees.

Having considered the provisions of the Code of Conduct, it is clear that in order to be properly constituted, the disciplinary and grievances committee was to include two managerial and two employee representatives, that the chairman of that committee was to be elected from one of the managerial representatives who constituted that committee and that if the chairman were to become unavailable for any reason one of the other managerial representatives would assume the chairmanship of the committee.

As already noted the court *a quo* was of the view that in addition to the members of the committee already mentioned, there was need to appoint an independent person to act as chairman of the committee and that when the remaining managerial representative took over as chairman, the committee was left without a managerial representative. There can be no doubt that the Labour Court erred in coming to this conclusion. It is clear that the provisions of the Code of Conduct were observed during the proceedings. There is no provision in the Code of Conduct for an independent chairperson apart from one of the managerial representatives who constitute the committee. Were an independent chairperson to chair the committee as suggested by the court *a quo* the proceedings of the committee would be irregular. It is also not correct that once the remaining managerial representative assumed chairmanship that left the committee with no managerial representative. In terms of the Code of Conduct the remaining managerial representative who takes over the chairmanship of the committee shall have a casting vote.

I have considered the submission made on behalf of the respondent that in terms of s23 of the Act the committee should have been constituted of managerial employees only. I do not accept this submission. It is clear from the provisions of s23 of the Act that that section refers to the formation of a workers committee, which committee represents the interests of the workers in general. On a careful reading of that section it is clear that there can also be a workers committee composed of managerial employees elected to represent the interests of managerial employees. That section has no bearing on the composition and functioning of the disciplinary and grievances committee. That

committee is not composed of members of the workers committee but of managerial and employee representatives.

It is also important to note that the Code of Conduct specifically provides that it applies to all employees including managerial employees. As noted in *Madoda v Tanganda Tea Co* 1999(1) ZLR 374 SC whilst the prospect of having a non-managerial employee sitting in judgment over a managerial employee might be inappropriate, the Code of Conduct has to be followed particularly in a case, such as this one, where everyone was agreed that it was to apply to all workers including managerial employees.

In the result the appeal must succeed. Accordingly I make the following order.

1. The appeal be and is hereby allowed with costs.
2. The decision of the Labour Court be and is hereby set aside and in its place the following substituted:
“The application for review be and is hereby dismissed with costs”.

CHEDA AJA: I agree

OMERJEE AJA: I agree

Atherstone & Cook, appellant's legal practitioners

Matsikidze & Muccheche, respondent's legal practitioners