

Civil Appeal No. 365/02

LEVER BROTHERS (PRIVATE) LIMITED v ELISHA
PFUMO

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & MALABA JA
HARARE, SEPTEMBER 25 & NOVEMBER 20, 2003

A Brooks, for the appellant

T Fitzpatrick, for the respondent

CHEDA JA: The appellant had employed the respondent as a supervisor. The respondent's duties included taking care of the appellant's property which included empty cartons.

Some cartons valued at \$2 370.00 were stolen by some people who came to deliver certain goods at the appellant's premises. Both the respondent and the people who stole the cartons were arrested and charged with theft. The other people were convicted but the respondent was acquitted.

The respondent was subsequently charged with misconduct in terms of the appellant's Code of Conduct. He was found guilty and discharged from employment.

The respondent appealed to the Labour Relations Tribunal ("the Tribunal") and succeeded. The appellant now appeals against the decision of the Tribunal.

In its heads of argument, the appellant argued that the Tribunal determined whether the loss was extensive and that this determination was unsustainable. Mr *Fitzpatrick* argued that the issues that the Tribunal should have

set out and determined were the fact of loss, negligence and finally accountability.

I do not agree with this submission. The loss, negligence and accountability were not in issue. It was common cause that the respondent was negligent, his negligence resulted in a loss of the appellant's property, and he was therefore accountable. What was in issue was whether the loss that occurred could be described as extensive, as this was the basis of the dismissal of the respondent from employment.

The appellant argued that the Tribunal misdirected itself in determining that in its opinion the loss was not extensive. It further submitted that the chairman of the Tribunal misdirected himself when he held as follows:

"I am not persuaded that the term 'causing loss of an extensive nature' refers to potential harm as suggested by counsel for the respondent. The term clearly refers to actual loss and not possible harmful effects likely to flow from the theft."

The finding attributed to the Tribunal in para 11 of the appellant's heads of argument, to the effect that it found the respondent to be innocent despite the admission that a loss occurred, is not supported by the record. It is the criminal court that acquitted the respondent, but the Tribunal said:

"... that the respondent was negligent resulting in the theft of 16 empty cartons boxes valued at \$2 370.00 is beyond question."

What the Tribunal did not agree with was the determination that the loss was of an extensive nature and merited the dismissal of the respondent from employment.

I see no fault in the Tribunal's finding that cartons worth only \$2 370.00 were stolen. They were all recovered. The end result is that there was no actual loss.

To suggest that such a situation as described above amounts to a loss of an extensive nature as stated in the Code of Conduct is certainly a misrepresentation and an exaggeration. The appellant drafted its Code of Conduct and inserted the condition "loss of an extensive nature".

I am satisfied that the Tribunal correctly interpreted the provision in the Code of Conduct. It cannot be extended to mean potential

loss or refer to the level of the respondent's negligence. It means "loss of an extensive nature" and nothing more.

In the circumstances, there is no merit in the appeal and it is dismissed with costs.

CHIDYAUSIKU CJ: I agree.

MALABA JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

N H Franco & Co, respondent's legal practitioners