REPORTABLE ZLR (55)

Judgment No. SC 63/02
Civil Appeal No. 58/01

KUDA MADYARA v

GLOBE & PHOENIX INDUSTRIES (PRIVATE) LIMITED t/a RAN MINE

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & GWAUNZA AJA
HARARE, JULY 8 & AUGUST 20, 2002

C M Jakachira, for the appellant

R M Fitches, for the respondent

SANDURA JA: The appellant in this matter appealed against the quantum of the damages awarded to him by the Labour Relations Tribunal ("the Tribunal") as an alternative to his reinstatement as an employee of the respondent.

The background facts are as follows. The appellant was dismissed from his job on 23 October 1996. He appealed to the Tribunal in terms of s 101(7) of the Labour Relations Act [*Chapter 28:01*] ("the Act") and, on 28 June 2000, the Tribunal ordered as follows:

> "1. That the respondent being in default, the appeal be and is hereby granted with costs.
>
> 2. That the respondent be and is hereby ordered to reinstate the appellant without any loss of salary or benefits with effect from the 23rd of October 1996, being the date of dismissal.

ALTERNATIVELY:

3. That the appellant be and is hereby awarded damages in lieu of reinstatement, the quantum of which is to be assessed by the Tribunal.

4. That the amount is to be paid together with interest at the prescribed rate of interest with effect from the date of dismissal."

When the appellant was not reinstated, he approached the Tribunal for the quantification of his damages and, on 9 February 2001, the Tribunal ordered the respondent to pay to him damages in lieu of reinstatement in the sum of $162 674.63, together with interest and costs of suit. The respondent was again in default on that occasion.

Dissatisfied with the quantum of damages awarded to him, the appellant appealed to this Court.

The first issue to deal with is whether this appeal raises any question of law because, in terms of s 92(2) of the Act, an appeal from the Tribunal lies to this Court only on a question of law. A ruling by the Tribunal on the quantum of damages is a ruling on fact unless it is wholly unreasonable.

As McNALLY JA said in *Leopard Rock Hotel Company (Private) Limited v Van Beek* 2000 (1) ZLR 251 (S) at 256 B-C:

> "A ruling by the Tribunal on damages is a ruling on fact and thus not appealable unless it can be categorised as wholly unreasonable. This may (but not must) be the situation where the Tribunal has misdirected itself on the law as to the criteria to be taken into account in assessing damages."

In the present case, I have no doubt that in assessing the damages payable to the appellant the Tribunal misdirected itself because it disallowed the appellant's claim in respect of back-pay. The matter is, therefore, properly before the Court.

The sum of $162 674.63, which was awarded to the appellant, was assessed on the basis that the period within which the appellant could not reasonably have been expected to find alternative employment was three years from the date of his dismissal. The sum was made up as follows:

Net salary for three years:	$134 156.76
Rentals:	$23 450.00
Electricity bills:	$5 067.87
TOTAL:	$162 674.63

The appellant's claims for back-pay from October 1996 to July 2000 and for underground allowances and water bills were disallowed. In addition, the amounts claimed by the appellant in respect of rentals and electricity bills were reduced to the amounts shown above because those were the amounts proved by documentary evidence.

The appellant's claims in respect of rentals, electricity and water bills were based on the fact that before his dismissal the appellant was entitled to free accommodation, which included free water and electricity.

The real issue in this appeal is whether, in addition to the sum awarded to him as damages in lieu of reinstatement, the appellant is entitled to back-pay and benefits from 23 October 1996, when he was dismissed, to 28 June 2000, when the Tribunal ordered that he be reinstated or paid damages.

In determining that issue, the starting point is the order issued by the Tribunal on 28 June 2000, which I have already set out at the beginning of this judgment. The Tribunal ordered the respondent to reinstate the appellant "without any loss of salary or benefits with effect from the 23rd of October 1996" or, alternatively, pay him damages in lieu of reinstatement.

Recently, I commented on a similarly worded order in *Oliver Chiriseri and Anor v Plan International* SC-56-2002 (not yet reported). At p 6 of the cyclostyled judgment I said:

> "It is clear from the wording of the order that if the appellants had been reinstated they would have been entitled to back-pay and benefits. … I say so because the order makes it clear that the reinstatement is to have a retrospective effect.
>
> As this Court stated in *Chegutu Municipality v Manyora* 1996 (1) ZLR 262 (S) at 268 A-B:
>
> > '… the word "reinstate" or "reinstatement" carries no automatic retrospective connotation, either in ordinary language or in our legislation. Normally it means simply that the person concerned will be placed again in his/her former job. If retrospectivity is intended, one would normally look for additional words such as "with effect from the date of dismissal" or "with effect from (a particular date in the past)" or "with back-pay and all benefits from … (date)".'
>
> Applying that test to the order of reinstatement issued by the labour relations officer … it is clear that retrospectivity was intended. …

> In my view, where the order of reinstatement indicates that retrospectivity was intended, the damages to be paid in lieu of reinstatement must include back-pay and benefits."

Those comments apply to the present case with equal force. As far as back-pay and benefits are concerned, there is no cogent reason for distinguishing between an employee who is reinstated and one who is not, where the order of reinstatement has a retrospective effect. In my view, both of them are entitled to back-pay and benefits. The only difference between them is that one gets his job back whilst the other is paid damages for the premature termination of his employment contract.

Commenting on the relationship between back-pay and damages, McNALLY JA said the following in *Leopard Rock Hotel Company (Private) Limited v Van Beek supra* at 254H-255A:

> "… it seems to me that 'back-pay' and 'damages' are indeed different concepts, but only in the sense that 'damages' is a wider concept. It will normally include back-pay, but may include, for example, compensation for loss of promotion prospects, interest, and other elements as appropriate."

I entirely agree with those comments.

Later on in the judgment the learned JUDGE OF APPEAL said the following at 255H-256A:

> "'Back-pay' is thus a concept associated with reinstatement. If an employee is reinstated she will normally be awarded back-pay. If she succeeds in proving wrongful dismissal, but is not reinstated, she will be entitled to 'damages', a major element of which will be back-pay. Perhaps, more correctly, one should say the damages will be assessed by reference to the back-pay lost. But here the back-pay will be limited to a period from the date

> of wrongful dismissal to a date by which she could, with reasonable diligence, have obtained alternative employment."

Again, I agree with those comments. However, the comment that "the back-pay will be limited to a period from the date of wrongful dismissal to a date by which she could, with reasonable diligence, have obtained alternative employment" must be interpreted in the context of the facts of that case, which are set out at p 252 E-F as follows:

> "The appellant ('the hotel') employed Ms van Beek as a bookkeeper from 7 June 1993 to 4 January 1995 on which date she was suspended pending approval of her dismissal by a labour relations officer ('LRO').
>
> Dismissal was approved by the LRO and by a senior labour relations officer ('SLRO'). The Labour Relations Tribunal ('the Tribunal') reversed their decisions and ordered reinstatement or damages. It transpired that she had found alternative employment in January 1997. The Tribunal awarded her back-pay for twenty-four months which was calculated (by consent) to be $287 138.89."

By taking alternative employment in January 1997 Mrs van Beek, instead of standing by her contract of employment and enforcing her rights against the hotel, elected to accept the repudiation of her contract and terminated it. She could not, therefore, seek reinstatement, but could only claim damages.

Commenting upon an employee who had elected to terminate his contract of service by taking alternative employment whilst on suspension, GUBBAY JA (as he then was) said the following in *Zimbabwe Sun Hotels (Private) Limited v Lawn* 1988 (1) ZLR 143 (S) at 153 A-B:

> "But I am inclined to go further and hold positively that the respondent was shown on the probabilities to have elected to terminate his contract of service in reliance upon the appellant's breach in suspending him without pay. His remedy therefore lay in delict and not in contract, but I express no view as to

> whether or not he might succeed in a claim for damages, since altogether different considerations will apply."

In my view, those comments apply with equal force to Mrs van Beek.

In the circumstances, Mrs van Beek's position is very different from that of an employee, like the present appellant, who has not elected to accept the repudiation of his contract of employment, and in respect of whom the Tribunal has ordered "reinstatement with effect from the date of dismissal with back-pay and all benefits or, alternatively, damages". In my view, the comment by McNALLY JA would not apply to the calculation of damages in lieu of reinstatement payable to such an employee.

Before leaving the issue of back-pay and benefits, I would like to clarify this Court's decision in *Ambali v Bata Shoe Company Limited* 1999 (1) ZLR 417 (S) (Ambali's second appeal), criticised by counsel for the appellant in his heads of argument. Ambali was not awarded back-pay and benefits for the period during which he was on suspension for the simple reason that the order of reinstatement issued in his favour did not have a retrospective effect. It simply stated that Ambali was to be reinstated. It did not say that he was to be reinstated "with effect from the date of suspension" or "with back-pay and all benefits". See *Charles Ambali v Bata Shoe Company Limited* SC-100-98 (not reported) at p 2 of the cyclostyled judgment (Ambali's first appeal).

Having said that, I would like to consider the benefits to which the present appellant was entitled, in addition to his salary. They were two.

The first benefit was an underground allowance. In terms of clause 20 of the Collective Bargaining Agreement: Mining Industry (General Conditions) 1990, published in Statutory Instrument 152 of 1990, the appellant, being an employee working underground, was entitled to an underground allowance equal to three per centum of his basic salary. Had he not been unlawfully dismissed, that allowance would have been paid to him every month. He is, therefore, entitled to it from 23 October 1996, the date of his dismissal, to 28 June 2000, when the Tribunal ordered the respondent to reinstate him without loss of salary or benefits with effect from the date of dismissal. The fact that during that period he was not working underground is irrelevant, because he had been unlawfully prevented from working by the respondent.

The second benefit to which the appellant was entitled was free accommodation, which included free water and electricity. In this regard, the appellant ought to have produced evidence showing how much it cost him to rent a house of the same standard as the one which had been provided to him free of charge, and the cost of water and electricity incurred whilst occupying such a house during the relevant period. Regrettably, no such evidence was produced, apart from receipts showing that during the relevant period the appellant paid rentals totalling $23 450.00, and electricity bills totalling $5 067.87.

However, as the two amounts have not been challenged on appeal, there is no basis for interfering with the Tribunal's awards in respect of the costs of alternative accommodation and electricity. No documentary evidence was produced

in respect of the water consumed during the relevant period. The appellant was not, therefore, entitled to any award in that respect.

I now wish to deal with the mitigation of damages. It is well established that an employee who considers that he has been dismissed unlawfully should mitigate his damages by taking temporary employment. See, for example, *Gauntlet Security Services (Private) Limited v Leonard* 1997 (1) ZLR 583 (S) at 586 C-G and *Ambali v Bata Shoe Company Limited supra* at 419 A-B.

In the present case, the Tribunal found that the appellant did not do anything to mitigate his damages. However, the burden of showing that the appellant earned or ought to have earned some money during the relevant period rested on the respondent.

Thus, in *Nyaguse v Mkwasine Estates (Private) Limited* 2000 (1) ZLR 571 (S) at 575 C-D this Court said:

> "But at the same time it must be borne in mind that the *onus* is on the employer to show that the employee has, or should have, earned an income from some other source. If the Tribunal is forced to make an estimate, it must use the information to hand, and not simply pluck a figure from nowhere."

As the respondent was in default on 28 June 2000, when the appeal was heard by the Tribunal, and on 6 February 2001, when the application for the quantification of the appellant's damages was heard, the *onus* of showing that the appellant earned or should have earned some money, and how much he earned or should have earned, during the relevant period was not discharged. In any event, it was not argued on behalf of the respondent that the appellant should have mitigated

his losses. On the contrary, it was submitted that the assessment of the appellant's damages was fair and reasonable, a submission with which I disagree.

Consequently, on the basis of the appellant's net salary figures, produced to and accepted by the Tribunal, the appellant is entitled to the following:

(a)	Three years' net salary, being damages in lieu of reinstatement:	$137 676.76
(b)	Net back-pay from November 1996 to June 2000:	$197 678.44
(c)	Underground allowance (3% of back-pay):	$5 930.35
(d)	Rentals:	$23 450.00
(e)	Electricity:	$5 067.87
TOTAL:		$369 803.42

In the circumstances, the following order is made –

1. The appeal is allowed with costs.

2. The order issued by the Tribunal on 9 February 2001 is set aside and the following is substituted:

"(a) That the respondent shall pay to the applicant the sum of $369 803.42 together with interest at the prescribed rate from 9 February 2001 to the date of payment in full.

(b) That the respondent shall bear the applicant's costs."

CHEDA JA: I agree.

GWAUNZA AJA: I agree.

Jakachira & Company, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners