

**IN THE LABOUR COURT OF ZIMBABWE**

**JUDGMENT NO LC/H/618/13**

**HELD AT HARARE 4<sup>TH</sup> NOVEMBER 2013**

**CASE NO LC/H/757/12**

**AND 22<sup>ND</sup> NOVEMBER 2013**

In the matter between:-

**ALBERT JURUVENGE**

**Appellant**

**And**

**PACKRITE (PVT) LTD**

**Respondent**

Before The Honourable E Kabasa, Judge

**For Appellant**

**Mr M Chimhuka, General Secretary (ZGWU)**

**For Respondent**

**Mr T Thodhlana (Legal Practitioner)**

**KABASA, E:**

This is an appeal against an arbitration award. Section 98 (10) of the Labour Act, [Chapter 28:01] provides that such an appeal should be on a question of law. There is no dispute that this appeal is on a question of law and is therefore properly before the Court.

It is important to state the background to this case in the interests of clarity as regards the basis of this appeal.

### **BACKGROUND**

The Appellant was employed by the Respondent from July 1991 to January 2009 when he resigned. He was re-engaged in July 2010. However, unlike the

2009 resignation, the 2012 resignation was actually “constructive dismissal”, so the Appellant contends. This second parting was not amicable and conciliation efforts failed, which saw the matter being referred for arbitration.

The arbitrator had to decide whether the Appellant was constructively dismissed and if so, the appropriate remedy. His decision was that Appellant had not been constructively dismissed and so there was no award of damages. He however awarded the Appellant a total sum of \$7 007.10 which included, *inter alia*, cash in lieu of vacation leave and housing allowance.

Aggrieved by this decision, the Appellant appealed to the Labour Court. His grounds of appeal being

1. The arbitrator erred at law by holding that the Appellant was not constructively dismissed whilst there is overwhelming evidence to that effect.
2. The arbitrator erred in holding that the Appellant voluntarily resigned whilst he resigned because of the intolerability of his employment.

These two grounds are really saying the same thing, the issue being whether there was constructive dismissal or not.

The Respondent cross-appealed and whilst agreeing with the arbitrator’s decision on the constructive dismissal issue, he contended that:-

1. The Arbitrator erred at law in holding that Appellant accrued leave days from the date he was employed when the law is clear that leave days do not accrue within the first year of employment.
2. The Arbitrator erred at law by awarding housing allowance to the Appellant when the contract of employment did not provide for such a benefit.

3. The Arbitrator seriously misdirected himself by pegging Appellant's salary at US\$1 200 for the months February 2012 - May 2012 when there was no evidence before him to prove that Appellant's salary had been increased from US\$500 to US\$1200.

I will deal with each ground in turn.

1. **CONSTRUCTIVE DISMISSAL**

In looking at this issue, I am guided by J Grogan in his book ***Dismissal, Discrimination and Unfair Labour Practice*** where he enunciated what constitutes constructive dismissal.

*"The singular feature of a dismissal ... generally known as constructive dismissal, is that the employee, rather than the employer, ends the contract with or without notice. Employees who do so can claim to have been dismissed if they can prove that the employer made continued employment intolerable for them."* (Page 156 thereof)

He goes on to enumerate the critical issues for determination and these are:-

- a) *"whether the employee brought the contract to an end*
- b) *Whether the reason for the employee's action was that the employer had rendered the prospect of continued employment intolerable*
- c) *Whether the employee had no reasonable alternative other than terminating the contract. The onus of proving these requirements rests on the employee."*

With this in mind, I turn now to look at the case at hand. It is not in dispute it was the employee who brought the contract to an end. His reasons were:-

- i) Salary was being paid in “bits and pieces”.

The Respondent’s counsel concedes that this was what was happening but it was not a deliberate act calculated to frustrate the Appellant. The Company was going through a lean period, something the Appellant was aware of Salaries were therefore paid in instalments.

The Arbitrator agreed with counsel for the Respondent on this point. I find no fault with the Arbitrator’s acceptance of this fact. The Appellant does give non-payment of salaries and benefits as the reason he resigned in 2009. If this was a deliberate move by the employer, the Appellant would not have sought re-engagement a year later. The employer’s fortunes, unfortunately, did not improve and the Appellant left again barely 2 years after re-engagement. The Arbitrator also saw a summons (page 40 of record) showing a creditor suing the Respondent for \$6 715.67, the same year Appellant decided to terminate the contract. The non-payment of salaries cannot be said to have been deliberate in the circumstances.

The Arbitrator concluded that the Appellant decided to resign so as to avoid total loss in the event of the complete collapse of the company. Indeed the Appellant did assert that,

*“... The Respondent company is on the brink of collapse...”* in his “claimant’s statement of claim” to the Arbitrator. I therefore find no basis to claim that the company was doing well as submitted by the Appellant’s representative.

Does the employer’s conduct fit into the following description?

*“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the*

employer no longer intends to be bound by one or more of the essential terms of the contract, *then the employee is entitled to treat himself as discharged...*” (**Western Excavating v Sharp** [1978] ACC ER 713 per Lord Denning and quoted by Malaba JA (as he then was) in **Astra Holdings (Private) Limited v Peggy Kahwa** SC 97/04). I think not.

An employer should pay the agreed salary and where he withholds it for no valid reasons, it can be said his conduct is a significant breach going to the root of the contract. However, I am of the view that a distinction must be made where the payments are being made in “bits and pieces” due to the Company’s poor performance as opposed to the employer deliberately making such erratic payments so as to frustrate the employee. The Appellant was a member of senior management and obviously knew how the Company was performing, as borne out by his assertion that it was “... on the brink of collapse.”

ii) Scrapping of full allowance

The contract between the Appellant and Respondent (page 38 of record) shows that he was entitled to 40 litres of fuel per week. The undisputed outstanding fuel allowance was calculated at \$180.00 (page 9). This amount cannot possibly be for the whole period spanning 26<sup>th</sup> July 2010 to 14<sup>th</sup> May 2012. This therefore shows that the fuel allowance was not being timeously paid and this is very different from saying it was “scrapped”. The poor performance of the company cannot be said to amount to a deliberate and calculated withdrawal of an agreed benefit.

iii) Reduction of salary from US\$1200 to US\$500

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The Appellant referred the Court to a letter which his employer wrote (Annexure E) confirming that he was employed as a general manager (letter dated 26 March 2012), however the only document showing what his salary was is the “contract” he signed on 26<sup>th</sup> July 2010 after his re-engagement. This document shows a net salary of US\$500. Where is the figure of US\$1200 coming from? He who alleges must prove, it follows that Appellant must furnish the proof to prove his claim that he was now being paid US\$1200. Without such proof I see no basis to dismiss the employer’s claim that his salary was US\$500.

In **First Mutual Life Assurance Limited v Muzivi** 2007 (1) ZLR 325 (S)

Cheda JA (as he then was”) had this to say

*“The suggestion that the employer failed or refused to furnish the Respondent with the appropriate salary scale suggests a wrong approach to the issue. It is the Respondent who had the onus to prove his claims.”*

I need not belabour this point. It was the Appellant who had to prove that somewhere along the line his salary was changed from US\$500 to US\$1200. The mere fact that he was now a general manager cannot be taken as proof that the salary was not US\$1200.

The Arbitrator considered the submissions and came to the conclusion that there was lack of “substantive and convincing” evidence in support of the claim of constructive dismissal. I find no fault with this conclusion and am not persuaded to accept that he erred in so concluding.

As regards the motor vehicle, no evidence was adduced at arbitration to the effect that the motor is the Appellant's. The Appellant sought to introduce this evidence on appeal. He cannot do that. I therefore cannot find fault with the arbitrator's findings as he based them on what was presented to him.

I turn now to the grounds raised in the cross-appeal. The Arbitrator interpreted Section 14A of the Labour Act, Chapter [28:01] to mean an employee cannot take vacation leave during the first year of service but he accrues leave days from the month he commences work.

Section 14 A reads (1). In this section –

*“qualifying service,” in relation to vacation leave accrued by an employee, means any period of employment following the completion of the employee's first year of employment with an employer.”*

(My emphasis)

The plain and ordinary meaning of this provision is that one accrues paid vacation leave following the completion of the first year of employment. In other words for one to be able to go on vacation leave and be paid whilst on leave, they must have completed one year. I am fortified in saying this because “qualifying service” is defined in subsection (1) and subsection (2) then says

*“Unless more favourable conditions have been provided for in any employment contract or in any enactment, paid vacation leave shall accrue in terms of this section to an employee at the rate of one twelfth of his qualifying service in each year of employment..”* So the first year one accrues leave but is not eligible to go on paid vacation until the second year.

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We therefore cannot read the definition of “qualifying service” in isolation from the provision which then talks about this defined “qualifying service.” To do so would, I believe, lead to an absurdity in the sense that an employee can work for a whole year and not accrue any vacation leave. If, for instance, an employee starts work in January, from January to 31 December he accrues days but he will not have clocked the “qualifying service” if he seeks to take paid vacation leave within this first year. It follows that he will then be eligible to take paid vacation leave in the second year.

I would venture to say he will be eligible from January of the following year.

If employees can take paid vacation leave in the first year, what service would they have rendered to qualify for going away, not render any service to the employer, but still be paid whilst away? I think subsection (5) then allows an employee who has not clocked the “qualifying service” to go on leave but without pay.

I therefore agree with the Arbitrator’s interpretation of Section 14 A. He therefore did not err when he calculated the days from the time the Appellant started working. The first ground of the cross-appeal is therefore without merit.

The second issue is on the housing allowance. The only evidence as regards salary and allowances is the letter of Appointment (page 37 of record) which shows the benefits as company vehicle, fuel, cell phone allowance, working attire and holiday allowance. It is my considered view that a housing allowance ranks higher than a cell phone or fuel allowance in terms of importance. Why then are these other “lesser” allowances specifically

mentioned in the letter of appointment, leaving out housing allowance. I do appreciate that a verbal contract is as binding as a written one but the issue here is that the employer denies the existence of a housing allowance as part of the Appellant's benefits. In light of this denial, and a document showing what the Appellant's benefits were, what basis does one have to read "housing allowance" into a written document that shows other benefits but excluded housing allowance? The Arbitrator's calculations added the \$500 Appellant said he had been awarded to the \$500 and came up with \$650. He added the \$150 from August 2011, the date given by the Appellant. I find it difficult to understand how this was arrived at. The letter of appointment may be "shallow" as the Arbitrator puts it, but it was this very letter he used to come up with the salary of \$500 and fuel allowance. There was therefore no factual basis to award the housing allowance. This ground therefore has merit and succeeds.

The last ground was on the salary. I have already touched on this issue as I looked at the constructive dismissal claim. There is nothing to show that the salary was increased from \$500 to \$1200. The documentary evidence shows \$500. The Appellant had to prove that his salary was increased to \$1200, a mere assertion is certainly not proof.

The Arbitrator appeared to have accepted the Appellant's word because the Respondent failed to disprove Appellant's claims. But he had not proved anything, so what was there to disprove?

I am therefore of the view that the Arbitrator erred by shifting the onus of proof to the employer. The Appellant should have proved his claim, the

onus was on him to do so. The letter he referred the Court to is certainly not proof that his salary was raised to \$1200. It is silent on the issue of salary. I therefore fail to see how that letter (page 31 of record) can be taken as proof.

This ground of appeal therefore succeeds. The use of \$1200 to calculate salary shortfalls was a misdirection.

After a careful consideration of the parties' submissions, I am of the view that the Arbitrator correctly held that there was no constructive dismissal and so declined to award damages. He was also correct in holding that Appellant did accrue leave days in the first year of employment and so the calculation of cash in lieu of vacation leave should include the days accrued in the first year. He however erred in awarding housing allowance and a salary of \$1200 from February 2012 to May 2012. The calculations ought to be based on a salary of \$500.

In the result, the Appellant's appeal is dismissed. The Respondent's cross-appeal is allowed in respect of:-

1. The salary calculation from August 2011 to January 2012 to be pegged at \$500 and not \$650.
2. The salary calculation from February 2012 to May 2012 to be pegged at \$500 and not \$1200.

Each party is to bear its own costs.

***Zimbabwe Graphical Workers Union, Appellant's Representative***

***Thodhlana & Associates, Respondent's Legal Practitioners***