

IN THE LABOUR COURT OF ZIMBABWE JUDGMENT NO.
LC/MT/12/2014
HARARE, 23 & 31 JANUARY 2014 CASE NO.
LC/MT/26/05

In the matter between:-

FARAYI BAKO

Applicant

And

Air Zimbabwe

Respondent

Before Honourable F.C. Maxwell, Judge

For Applicant

Mr. S. Mutema (Legal Practitioner)

For Respondent

In default

MAXWELL J:

Applicant entered into a contract of employment with the Respondent on 1 May 1988 as a trainee junior traffic assistant based at Bulawayo airport. He rose through the ranks to the position of traffic Officer which position he held until his suspension in January 2000. On 10 February 2000 Applicant appeared before a disciplinary committee. The outcome of the hearing was only communicated after Applicant had approached the High Court in October 2000 seeking an order that the results be communicated. Respondent faxed to Applicant an unsigned letter dated 17 February 2000 advising that Applicant's services had been terminated with effect from 11 February 2000. Applicant failed to get audience from Respondent's managing director and thereafter appealed to this Court.

On 17 October 2006 this Court allowed the appeal and ordered that Appellant be reinstated without any loss of salary and benefits. If reinstatement is not possible parties were to agree on charges payable in lieu thereof. If parties failed to agree either party may approach the court for quantification. There was no appearance for the Respondent at this hearing. On 17 November 2006 Respondent applied for rescission of judgment which application was dismissed on 28 September 2007.

Applicant was reinstated in 2009 but was only paid from February 2009. Attempts to get payment for the period between his dismissal and 2009 were fruitless. On 4 March 2013 Applicant made an application to this Court for the quantification of the outstanding monies owed to him. He computed his damages to a total amount of \$84 466,00 made up of

Salary Arrears	\$65 759,04
Pension Arrears	\$ 4 542,03
Medical Air Arrears	\$ 6 213,00
Leave Days Arrears	\$ 7 802,00

Applicant must either have made an error in his calculation because the total of the listed figures is \$84 316,07 or he inadvertently included \$150 which he had claimed as gratuity in his letter to the Human Resources Manager dated 26 March 2012 which is on page 12 of the record. Gratuity is discretionary and as such it cannot be claimed as a right. The Applicant's claim is therefore for \$84 316,07.

On 4 October 2013 Respondent responded to the application for quantification. The opposing affidavit raises the following issues

- that the application is fatally defective as it is not in terms of the Labour Act [Chapter 28:02] or any other enactment.
- that the Labour Court is **functus officio** in respect of the relief being sought by Applicant as same issue was determined in the order of Honourable Kachambwa J. dated 17 October 2006.

- that the Applicant's affidavit does not disclose any cause of action thereby rendering the application a nullity.

The matter was set down for hearing on 20 January 2014. Respondent was in default despite service having been effected on its legal practitioners, Messrs Sawyer & Mkushi. I proceeded to hear the Applicant on the basis of Rule 30 (a) of the Labour Court Rules 2006 and the following is my decision on the matter.

I will proceed to examine the issues raised by the Respondent in opposition.

- (1) That application is not in terms of the Labour Act [Chapter 28:01] or any other enactment.

This is a surprising stance by the Respondent in light of the order by this Court on 17 October 2006. The Court ordered that:

"3. If reinstatement is not possible parties shall agree on charges payable in lieu thereof.

4. If parties fail to agree on damages in para 3, either party may approach the court for qualification (sic)"

Applicant has indicated that he has not been successful in getting "no loss of salary and benefits" from Respondent. The Court directed that in the event of that happening he was free to approach this court. The Respondent's stance is therefore misdirected.

- (2) That the Labour Court is ***functus officio*** as the relief sought was determined in the order of 17 October 2006.

Again this is surprising as the order of 17 October 2006 did not quantify the damages being claimed by Applicant. The Court had offered the parties a chance to resolve the matter other than by having an order of Court, which opportunity Respondent spurned.

As was stated by **Korsah JA** (as he then was) in **ZESA v Bopoto** 1997 (1) ZLR 126 @ 129.

*“The general rule is that the pronouncement of an order does not render a tribunal **functus officio** in respect of matters ancillary or consequential upon such an order”*

The quantification of damages in casu is consequential upon the order of reinstatement with no loss of salary and benefits given by the Court on 17 October 2006.

(3) That the Applicant’s Affidavit does not disclose any cause of action. Respondent based this assertion on the fact that Applicant is claiming payments which were in Zimbabwe dollar currency and has sought to convert them to United States dollars.

In his Heads of Argument Applicant makes reference to two cases decided by the High Court in which amounts owed in Zimbabwe dollars were claimed and awarded in United States dollars. See **Mutyasira v Gonyora** HH 218/10 and **Mpofu v Commissioner of Police and Another** HH 8/200. The case **Mpofu v Commissioner of Police and Another** (supra) (Mpofu case) is relevant. Mpofu was awarded damages for a period of ten years from 1999 to 2009. The Court assessed the damages for salary arrears based on the salary that was current at the time of judgment. In this case Applicant has based his computation on the June 2009 salary scale which he justifies in paragraph 6 of the Applicant’s affidavit in the following terms:

“... The claim is based on the salary I was entitled to in February 2009, as demonstrated by a payslip for June 2009 which has the same salary as that of February 2009. I attach a copy hereto as Annexure “G”.....”

In response Respondent did not dispute that the salary of June 2009 was the same as for February 2009. Respondent simply stated that Applicant was entitled to payment in Zimbabwean dollar currency which is no longer legal tender. I find therefore that the basis of the computation by the Applicant remains unchallenged.

The principles applicable to the computation of damages for unlawful dismissal were enunciated by the Supreme Court in the case of **Ambali v Bata Shoe Company Limited 1999 (1) ZLR 417 @ 419** where it was said,

“... an employee who considers, whether rightly or wrongly, that he has been unjustly dismissed, is not entitled to sit around and do nothing. He must look for alternative employment. If he does not, his damages will be reduced. He will be compensated only for the period between his wrongful dismissal and the date when he could reasonably have expected to find alternative employment.”

Applicant is claiming damages for a period close to ten years. Clearly he had a duty to mitigate his loss. He did not make any submissions on this aspect and his damages will therefore have to be reduced. I have adopted the approach taken in the Mpofo case where Karwi J stated;

“A reasonable deduction would have to be based on the same rate of US \$165 per month for a period of ten years.”

In *casu* the deduction will be based on the rate of the June 2009 salary.

Applicant's computation in annexure F1 (page 15 of record) reveals that the amount for salary arrears include bonus. Applicant is not entitled to bonus since it is usually performance related unless there is evidence

to the contrary. No such evidence was led. See **Clan Transport Company (Pvt) Ltd v Clan Transport Workers Committee** SC 1/02. It follows therefore that the amount of salary arrears will be reduced by a month for each year.

Applicant has also claimed pension arrears. Annexure G on page 19 shows that an amount of \$41,67 would be deducted monthly as “Air Zim Pension.” Pension contributions are not given to an employee who is still on the job. Since Applicant was reinstated he is not entitled to pension arrears. The amount claimed as pension arrears is therefore not awarded.

Applicant has also claimed medical aid arrears. The amount claimed is the total from the monthly contribution of \$57 as per annexure F3 on page 17 of record. Medical aid contribution is not an amount given to an employee. It is paid to a medical aid society. An employee benefits by receiving services from the medical aid society. What Applicant is entitled to is reimbursement of medical expenses that he incurred during the period he had been unlawfully dismissed. For him to be entitled to such reimbursement proof in the form of bills or receipts is required. In the absence of any such proof the amount claimed as medical aid arrears is not awarded.

In the circumstances Applicant is entitled to

- (1) Salary arrears 109 months @ \$557.28 per month
 - = 109 x 557.28
 - = \$60 743.52
 - Less 9 months for mitigation of loss (a month for each year claimed)
 - = 9 x 557.28
 - = \$5 015.52
 - \$60 743.52 - \$5 015.52
 - = \$55 728.00
- (2) Leave days arrears 14 months @ 557.28 per month

= 14 x 557.28
= \$7 801.92
Less one month for mitigation of loss
= 1 x 557.28
= \$557.28
\$7 801.92 - \$557.28
= \$7 244.64

Accordingly the following order is made.

1. That Respondent shall pay to the Applicant the following:

Salary arrears	\$55 728.00
Leave days arrears	\$ 7 244.64
Total	<u>\$62 972.64</u>

2. The claims for pension and medical aid arrears be and are hereby dismissed.
3. There shall be no order as to costs.

Gunje & Chasakara Law Firm - Applicant's Legal Practitioners