

IN THE LABOUR COURT OF ZIMBABWE

JUDGMENT NO LC/H/158/2014

**HARARE, 27 JANUARY 2014 &
28 MARCH 2014**

CASE NO LC/REV/H/61/2012

In the matter between:

JOHN MUCHENGI

APPLICANT

Versus

LED TRAVEL & TOURS

RESPONDENT

Before the Honourable L Kudya : Judge

KUDYA J:

This is an application for quantification of damages. In this case the applicant successfully applied for a review of the disciplinary proceedings which were carried out by the respondent employer, which proceedings saw his dismissal.

The Labour Court on 10 July 2013 made the following order in the applicant's favour:

IT IS ORDERED THAT:

- 1) The application for review be and is hereby granted with costs.
- 2) The re-suspension of the applicant by the respondent of 18 June 2012 and any disciplinary proceedings premised on it be and is hereby set aside.
- 3) The applicant be and is hereby re-instated to his original position without loss of salary and benefits with effect from 31 May 2012.
- 4) In the event that reinstatement is no longer possible, the respondent pays the applicant damages (inclusive of

back pay and benefits) the quantum of which is to be agreed between the parties, upon failure of which either party may approach this court for quantification.

Following the above order the respondent did not reinstate the applicant or at least agree on the quantum payable. This development prompted the applicant to make the instant application which is the subject matter of this judgment. In the instant application the applicant claimed basic salary and arrear salary, bonus, funeral policy figure, notice pay and damages in place of reinstatement. The claim for the basic salary was \$300-00 per month from 2012 to the date of the application for quantification (16 months) and \$18 x 16 months for the funeral policy, three months' notice pay and 24 months damages in place of reinstatement.

In response to the application the respondent indicated that reinstatement was indeed impossible given the fact that the applicant's dismissal was premised on theft allegations. It conceded that it indeed should pay the applicant his basic salary x 16 months. On funeral policy it said it could not pay that because it was only a benefit deductible if the applicant had remained in effective employment with it. Bonus was at its discretion and the applicant had not adduced evidence to demonstrate his entitlement to the same.

On notice pay the respondent agreed that it had to pay that as claimed. On damages, it maintained that twenty four months was outrageous taking into account the fact that the applicant had been dismissed because of dishonesty and to that end his failure to get a new job was thus not of the respondent's making. Rather it was of the applicant's own making since the criminal conviction on the matter militated against his getting a new job. To that end the respondent maintained that it could not be blamed for the applicant's

failure to get a new job timeously. In the result the respondent proposed that only three months' salary in place of damages would be just in the circumstances. The respondent however went further and argued that it had paid restitution to the third party (Econet) who the applicant had stolen from. It maintained that to that end the court had to deduct the reinstatement figure which it paid on the applicant's behalf. If the applicant were to be granted all his dues as claimed that would result in his unjust enrichment at the respondent's expense.

On the date of the hearing of instant application the applicant objected to the respondent's reference to the criminal law proceedings which had given rise to the applicant's conviction and being asked to pay restitution to the third party. His argument was that those proceedings had no role to play in the instant case which effectively is the a civil case.

In response, the respondent was adamant that there was a nexus between the two cases and maintained that it be allowed to make such reference as that criminal case has a bearing on the civil matter at hand. After hearing both parties on the objection the court sustained the objection. It indicated that reasons for sustaining the objection would follow in the main judgment. These are they.

The case of **Zesa v Dera SC-79-98** states clearly the standard of proof requisite in labour matters notwithstanding the fact that the infraction in question would be of a criminal nature. It is also trite law that in any case which has both a civil and criminal component the components are dealt with exclusive of each other. To that end, whether or not the applicant got convicted by the criminal court has no play on whether he was guilty of the misconduct complained

about by the respondent. To that extent it would be irregular for the respondent to be allowed to make particular reference to the criminal proceedings as if they are the ones founding the instant case.

It is clear from a reading of the record that the instant quantification claim is premised on the civil award granted by the Labour Court. In the result therefore any reference to the criminal case would be misplaced at least for purposes of the quantification of the award.

Having concluded the issue about the objection it is pertinent to then move on to the merits of the instant application. For clarity of record the court's reasoning and conclusions would be made based on each item claimed as appears below:

1. Basic Salary and Back pay

A reading of submissions made by the parties shows that the respondent is not opposed to the payment of the basic salary. Its only argument is that since it made good the loss suffered by Econet on the applicant's behalf it would want the court to declare a set off of the amounts concerned.

It is noteworthy that after adjournment of the proceedings at the stage when judgment was reserved the respondent was invited by the court to tender proof of the payment for completeness of record. It to that end tendered a receipt from Econet dated 25 June 2012 to the tune of \$10 030-00 styled fuel payment and received from LED Travel.

It is however worth noting that whilst it is commendable that the respondent decided to maintain its good customer

relations with Econet by paying off the restitution meant to be paid by the applicant it should be stressed that there was no legal obligation on it to do that for the applicant. It can thus not try to avoid its responsibility of fulfilling the Labour Court order by arguing that it restituted the third party. It was not obliged to discharge that responsibility on the applicant's behalf and that defence can thus not avail it. In the result, the court rules that the respondent has to pay the applicant his salary and back pay as ordered by the court on this item.

2. Bonus

As regards this component no cogent evidence was adduced by the applicant to demonstrate his entitlement to same. The claim is thus dismissed for want of evidence.

3. Notice Pay

The respondent conceded that it indeed owes the applicant this money as claimed. To that extent no issue arises out of it and the court rules that the applicant should accordingly receive his notice pay.

4. Funeral Policy

This benefit is intricately linked with one's conditions of service and unless it has been demonstrated that moneys were deducted from an employee's salary thus prejudicing him there would be no such entitlement. In the instant case no such evidence was led hence it cannot be said that the applicant proved his entitlement to the funeral policy figure. This claim thus also falls away.

5. Damages in place of reinstatement

The law is settled that once an employee has demonstrated the extent to which he mitigated his loss after his dismissal he would be granted the damages as he would have claimed. (See case of *Ambali v Bata Shoe Company 1991 (1) ZLR 417 (S)*). Applying the legal principles in the above case to the facts of the case at hand, there is no evidence of what the applicant did to mitigate his loss apart from bald allegations that the economy is dry and he has not been able to get a job.

In the same light even though the criminal component is divorced from the civil component it would not be outrageous to accept the respondent's argument that the applicant could be failing to get a job, due to his criminal conviction.

In any event a reading of other decided cases demonstrates that nowhere in the history of awards even in a retrenchment setup has one been awarded damages at the rate of the totality of the period worked as equating to the complete award. In the instant case where the applicant worked for around two years a twenty four months award would be to say the least outrageous. It is the court's considered view that the offer for three months' salary for the two years worked would in the court's view be just. In the result the applicant is awarded three months damages in place of reinstatement.

IT IS ORDERED THAT

The application for quantification of damage being with merit it be and is hereby granted with costs as appears hereunder:

- 1) Basic salary and back pay

\$300 x 16 months	=	\$4 500-00
2) Notice pay \$300 x 3	=	\$900-00
3) Damages \$300 x 3 months	=	\$900-00
Total award	=	<u>\$6 300-00</u>

Hamunakwadi, Nyandoro & Nyambuya, applicant's legal practitioners