

**IN THE LABOUR COURT OF ZIMBABWE      JUDGMENT NO LC/H/36/2014**

**HARARE, 17 JANUARY 2014 &  
31 JANUARY 2014**

**CASE NO LC/H/715/2013**

In the matter between:-

**ASSOCIATED NEWSPAPERS OF ZIMBABWE  
(PRIVATE) LIMITED**

**APPELLANT**

Versus

**SIMBA KUNEDZIMWE**

**RESPONDENT**

Before the Honourable L Murasi      :      Judge

**For the Appellant**

**H Chitima (Legal Practitioner)**

**Respondent**

**In Person**

**MURASI J:**

The Respondent was employed by the Appellant as a Freelance Sales Representative with effect from 20 August 2012. The Respondent subsequently received a letter from the Sales and Advertising Manager on 11 March 2013 terminating such employment. The matter was referred to an arbitrator by the National Employment Council of the Printing, Packaging and Newspaper Industry. The terms of reference were as follows:

- (a) Whether or not Simbarashe (Kunedzimwe) is owed by Daily News (ANZ) for the work done;
- (b) Whether or not there was an employer-employee relationship for the period he did this work (payment in dispute); and
- (c) To determine the quantum of the amount owed to Simbarashe (Kunedzimwe).

The Arbitrator found against the Appellant in that:

“Management of the Respondent created a legitimate expectation in the Claimant that indeed he had been transferred and had finally risen up the ranks and that he would be working as a supplementary writer.”

The Appellant was ordered to pay \$4000-00 within thirty days of the award.

The Appellant was not satisfied and appealed to this court. In its grounds of appeal, the Appellant avers mainly that:

- (a) The Arbitrator erred in law and fact that the contract signed between the parties was preparatory to any other contract to come;
- (b) The Arbitrator erred in holding that the Respondent had been misled into believing that his role had changed;
- (c) The Arbitrator erred in holding against the Appellant that the e-mail from Pilate Machado amounted to a conclusive offer;
- (d) The Arbitrator erred in holding that the Appellant created a legitimate expectation to the Respondent to be engaged as an employee; and
- (e) The Arbitrator erred in ordering the Appellant to pay the Respondent the sum of \$4000-00 as there was no basis for such an award.

In summary, these are the grounds of appeal the Appellant relies upon. The Court will deal with these points of appeal in that order.

The first ground of appeal states that the Arbitrator erred in law and fact that the contract signed between the parties was preparatory to any other contract to come. The way this ground of appeal is phrased is completely at variance with the stated findings of the Arbitrator. The Arbitrator does not state that the “signing of the contract” was a prelude to another contract. In fact the record shows that the Arbitrator actually stated that:

“In fact this gives credence to the claimant’s belief that the termination of that contract meant to pave way for the new one. This belief has not been adequately rebutted.”

Therefore, the Appellant’s ground of appeal is premised on a non-existent finding by the Arbitrator. The Arbitrator did not refer to the “signing” of the contract, rather to its termination. Appeals are based on the record and the record does not contain the finding allegedly made by the Arbitrator. The ground of appeal therefore becomes baseless and must fail.

The second ground of appeal is that the Appellant alleges the Arbitrator erred in holding that the Respondent had been misled into believing that his role had changed. It should be made clear that this was a factual finding made by the Arbitrator. The Arbitrator

had the opportunity to analyse the evidence adduced before him. He had recourse to the various e-mail messages produced by the Respondent coupled with the oral evidence from the Respondent. In fact, a reading of the e-mail messages produced by the Respondent shows that he was involved in writing for the Appellant. The Appellant's Counsel was invited by the court to address on this point. It was submitted on behalf of the Appellant that the duties that the Respondent had undertaken as shown by the e-mails could be extra duties assigned to him by his supervisor. There was further evidence that indeed the Respondent had been moved from the 9<sup>th</sup> floor which was the Advertising section to the 8<sup>th</sup> floor which was the editorial department.

It is trite that an appellate court should not interfere with an exercise of discretion by a lower court or tribunal unless there has been a clear misdirection on the part of the lower court. (See *Innskor Africa (Pvt) Ltd v Letron Chimoto* SC-6-2012). This Court is of the view that there was no misdirection on the part of the Arbitrator on this point. This ground of appeal must also fail.

The third ground of appeal is premised on the Arbitrator's finding that the e-mail from Pilate Machado amounted to a conclusive offer. This again is a factual finding. The Arbitrator refers to the fact that the Appellant also suggested that the e-mail could have originated from the Respondent and the Arbitrator discards the allegation. The Arbitrator, in his analysis of the evidence weighs the possibilities each against the other. As alluded to in the *Innskor* case (*supra*) the Court finds that there was no misdirection on the Arbitrator's part to warrant interference and this ground must fail.

The fourth ground of appeal states that the Arbitrator erred in holding that the Appellant had created a legitimate expectation to the Respondent to be engaged as an employee. The Arbitrator weighed the evidence and referred to case law on legitimate expectation. He did not find in favour of the Appellant. This Court is of the view that there is no misdirection by the Arbitrator and this ground must also fail.

The last ground of appeal is that the Arbitrator erred in ordering the Appellant to pay the respondent the sum of \$4000-00 without justifying it. The award merely states that the Respondent is to be paid \$4 000-00 without stating how that figure is arrived at. In fact, the Arbitrator states:

“... and the Respondent (now the appellant) should not have qualms about paying it because in the light of my finding had the claimant (“now the respondent”) asked for much more he would have likely received it.”

This Court has sifted through the record and the figures that are near this amount are contained in the Respondent’s submissions where he states he wants to be paid \$3900-00 for the seventy-four articles done plus \$500-00 for airtime and transport. The quantification of the figures by the Arbitrator is patently unsatisfactory. The Arbitrator seemingly “plucked a figure out of the air” (see *Heywood* case SC-207-11) which was not competent and this amounted to an approximation of the amount due to the Respondent. The Respondent did not avail tangible evidence upon which a proper assessment could be made of the amount due to him. (See *Ebrahim v Pittman N O* 1995 (1)ZLR 176). The Appellant succeeds on this ground and the amount arrived at by the Arbitrator must be set aside.

In the result, the Court makes the following order:

- 1) The appeal fails on the first four (4) grounds as enumerated in this judgment.
- 2) The appeal succeeds in respect of the fifth ground as enumerated in this judgment and the order by the Arbitrator for the Appellant to pay the Respondent the sum of \$4 000-00 is set aside.
- 3) The matter is remitted to the same Arbitrator to hear evidence from both parties on the quantum to be paid to the Respondent within thirty days of receipt of this order.
- 4) There is no order as to costs.

*Mbidzo, Muchadehama & Makoni*, appellant’s legal practitioners