

DISTRIBUTABLE (18)

Judgment No. S.C. 1/02

Civil Appeal No. 227/00

CLAN TRANSPORT COMPANY (PRIVATE) LIMITED

v

CLAN TRANSPORT WORKERS COMMITTEE

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & MALABA JA
HARARE, JANUARY 22 & MAY 16, 2002

E K Mushore, for the appellant

F G Gijima, for the respondent

ZIYAMBI JA: This is an appeal against an assessment of damages made by the Labour Relations Tribunal (“the Tribunal”).

It was common cause that the respondents were unlawfully dismissed by the appellant on 26 September 1994. On 1 December 1994, the Tribunal made an interim order that they be paid half of their wages pending the hearing. The outcome of the hearing was that the appellant was ordered to reinstate the respondents. The Tribunal ordered the matter to be set down for the purpose of making an assessment of the damages due to the respondents.

The matter was set down four-and-a-half years later and on 4 November 1999 the parties filed heads of argument on the strength of which – on

19 September 2001 – the Tribunal made the determination which is the subject of this appeal. Full back-pay from the date of dismissal to the date of assessment was awarded as well as leave pay, annual bonuses over the entire period and a long service award.

Ms *Mushore*, for the appellant, took issue with the award on the ground that the principles enunciated in *Ambali v Bata Shoe Company Ltd* 1999 (1) ZLR 417 (S) were not followed by the Tribunal.

The award is one of damages in respect of unlawful termination of a contract of employment. The general rule governing the measure of damages in such cases is that:

“the employee is entitled to be awarded the amount of wages or salary he would have earned save for the premature termination of his contract by the employer.”

Gauntlett Security Service (Pvt) Ltd v Leonard 1997 (1) ZLR 583 at 586.

In *Ambali v Bata Shoe Company Ltd supra* this Court ruled that:

“Where a person has been wrongfully dismissed (rather than wrongfully suspended) from his employment, and seeks damages rather than reinstatement, he is entitled to be awarded the amount of wages or salary he would have earned had his contract not been prematurely terminated. He may also be compensated for any loss of benefit to which he was entitled and of which he was deprived as a result of the wrongful termination. But he must mitigate his loss immediately. He must look for alternative employment; he is not entitled to sit around and do nothing. If he does not look for alternate employment, his damages will be reduced. He will only be compensated for the period between his dismissal and the date when he could reasonably have been expected to find alternative employment.”

(See the headnote).

It was submitted on behalf of the appellant that, in the absence of any evidence that the respondents had obtained or made efforts to obtain alternate employment, the award of full back-pay up to the assessment date was a grave misdirection.

It is clear from the passage quoted above that there was a duty on the respondents to mitigate their loss. They were not entitled to sit around and do nothing and if they did it was at their own peril. The fact that there is no evidence of such mitigation on the part of the respondents of their loss is justification for interference by this Court with the award made – See *Gauntlett Security Services (Pvt) Ltd v Leonard* supra. In that case this Court observed at page 588:

“Since the respondent's contract of employment was not one of fixed duration or terminable by the appellant upon notice given, I consider it was incumbent upon the Tribunal to call for evidence as to the reasonable period it would take a person in the position of the respondent (disregarding the injury) to obtain similar employment. And having made the necessary finding, then to deduct from the monthly wages paid by the appellant, the amount the respondent actually earned or could reasonably have earned during such period. It follows that the Tribunal's calculation of the damages suffered was badly flawed. Even the award of back pay as a separate item was wrong. Only a single indivisible sum was to be specified as damages.”

Turning to the present case, the Tribunal misdirected itself in making the award that it did.

The following considerations should have been applied -

(i) Back Pay

The respondents were only entitled to the salary they would have earned from the date of dismissal to the date by which they could reasonably have obtained alternative employment. It was incumbent on the Tribunal to call for evidence on that aspect of the matter.

(ii) Leave Pay

The entitlement under that head is in respect of the period referred to in para (i) above.

(iii) Annual Bonus

The respondents were not entitled to an award under this head since bonus is usually performance related unless evidence led reveals the contrary and no such evidence was led.

(iv) Long Service Award

Such an award is usually at the discretion of the employer and, in the absence of evidence to the contrary, the respondents were not entitled to an award under this head.

In addition, from any award made must be deducted income tax and any amounts already paid to the respondents.

In the result, the appeal is allowed with costs. The order of the court *a quo* is set aside. The matter is remitted to the Tribunal in order to reassess the quantum of damages after the requisite evidence has been adduced before it.

SANDURA JA: I agree.

MALABA JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

F G Gijima & Associates, respondent's legal practitioners