REPORTABLE (107)

Judgment No. SC. 110/04
Civil Appeal No. 9/03

TEL-ONE (PRIVATE) LIMITED v KUYUMANI ZULU

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & ZIYAMBI JA
HARARE JUNE 1, 2004 & FEBRUARY 14, 2005

H. Zhou, for the appellant

S. Mabuye, for the respondent

CHIDYAUSIKU CJ: The respondent in this case was an employee of the appellant at the relevant time. The appellant suspended the respondent on allegations of misconduct on 21 February 1996. The letter of suspension reads as follows:

> "A cheque book went missing from Security Stores when you were in charge and responsible for the Security Stores at the material time. Three cheques from the cheque book totaling $44 289.03 were cashed with your assistance.

The Corporation is suspecting you of misconduct in terms of the PTC Code of Conduct Part III Section 7(2), (3), (9) (a), (10) and (11) as read with the Conditions of Service (Employee) Rules Section 15(b),(c),(h),(i) and (j). You are hereby suspended from duty with effect from 21 February 1996.

Please note that the period of suspension is without pay or all other benefits. The *onus* is on you to meet your financial obligations such as medical aid and pension

contributions normally covered by deductions from your salary."

On 1 September 1997 the respondent found a job at Zimnat and was employed there until he was dismissed on 12 February 1998. Thus, he worked at Zimnat for a period of approximately four-and-a-half months.

A determination by the labour relations officer was made on 19 March 1998. In terms of that determination the appellant was authorised to dismiss the respondent with effect from the date of suspension. The respondent appealed against the determination of the labour relations officer authorising his dismissal. The appeal was heard by a senior labour relations officer, who confirmed the determination of the labour relations officer.

The respondent then appealed to the Labour Relations Tribunal (now the Labour Court) ("the Tribunal") against that determination. At the Tribunal the appellant conceded that the dismissal of the respondent was unlawful and was willing to pay damages as reinstatement was not possible at that point in time. It is also apparent from the record that at the time the matter came before the Tribunal the appellant was employed by BIMCO. After making a concession that the respondent had been unlawfully dismissed, the parties requested the Tribunal to assess the damages payable to the respondent. The Tribunal ordered that:

> "The respondent (the appellant in this case) pays the applicant his salary and benefits from 21 February 1996 to 14 June 1999 less the earnings from Zimnat.

The respondent pays applicant damages calculated from 14 June 1999 to 31 May 2002 plus interest at the prescribed rate."

The appellant was dissatisfied with this assessment of damages and now appeals to this Court. The question of damages is an issue on fact. See *Leopard Rock Hotel Company (Pvt) Ltd v Van Beek* 2000 (1) ZLR 251 (S). In that case McNALLY JA had this to say:

> "The ruling by the Tribunal on damages is a ruling on fact and thus is not appealable unless it can be categorised as wholly unreasonable. This may (but must not) be the situation where the Tribunal has misdirected itself on the law as to the criteria to be taken into account in assessing damages."

The appellant, in its notice of appeal, contends that the Tribunal misdirected itself in making a distinction between back-pay and damages and computing the respondent's entitlement on that basis. It was argued for the appellant that the concept of damages necessarily includes back-pay and that the Tribunal should not have differentiated between the two as it did and that as a result of the failure to properly treat back-pay as damages the Tribunal erred in law. It was also argued that the Tribunal erred in not applying the rule requiring an aggrieved party to mitigate his damages. The appellant further argued that the Tribunal erred in holding that the respondent's contract of employment with the appellant subsisted until 14 June 1999 when he took up employment with BIMCO. The appellant contended that the respondent repudiated his contract of employment with the appellant when he took up employment with Zimnat on 1 September 1997.

I am satisfied that the Tribunal did misdirect itself in calculating the period forming the basis of damages and, also, in failing to appreciate that back-pay is part of damages and treating the two separately.

This misdirection relates to principles applicable in the calculation of damages. Consequently it is a misdirection on a point of law, and this Court can entertain this appeal.

The Labour Relations Tribunal, in arriving at the period it used to calculate damages for the respondent, reasoned as follows:

> "The appellant is claiming back-pay and benefits from the date of dismissal (21.2.96) to the date when he was permanently employed by a company known as

> BIMCO i.e. on 14 June 1999. He is claiming a further 36 months as damages calculated from 14 June 1999.

It is common cause that the applicant did not just sit back but tried to mitigate his loss by looking for alternative employment. He managed to secure alternative employment with ZIMNAT on 1 September 1997. This employment was short-lived as ZIMNAT terminated it on 12 February 1998 on the ground that the respondent had advised ZIMNAT that the applicant was still their employee. The letter of termination by ZIMNAT dated 12 February 1998 (exhibit 2) reads in part:

> > 'Please be advised that your contract of employment as a Stationery Controller has been terminated with immediate effect. This has been necessitated by the advice we received from PTC Human Resources Department that you are still employed by them. They also advised that you are on an indefinite suspension'.
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> In view of the above, even if it was to be accepted that the applicant by joining ZIMNAT had the intention to repudiate his contract with the respondent, I find that this was frustrated by the respondent. Therefore his employment with ZIMNAT was on a temporary basis.

On 17 June 2002 before this Court the respondent made the concession that the dismissal cannot be sustained due to the non-availability of expert evidence, and the election to pay damages as reinstatement was no longer possible.

Under the circumstances I find that the applicant is entitled to back pay calculated from the date of dismissal 21 February 1996 to the date of repudiation of his contract of employment with the respondent. He repudiated his contract with the respondent by getting permanent employment with BIMCO on 14 June 1999, less what he earned at ZIMNAT. See the case of *Kuda Madyara v Globe and Phoenix Industries t/a Ran Mine* SC-63-02."

The learned member of the Tribunal further stated:

> "In 1999 the applicant effectively repudiated his contract with the respondent. He argues that had it not been for the premature and unlawful termination of his contract with the respondent, he would have been earning $72 000.00. He submitted that he is currently earning $23 000.00 with BIMCO.

He is therefore entitled to damages from 14 June 1999 up to the date the respondent made the election not to reinstate him i.e. 31 May 2002. The damages will be the difference between what he was getting at BIMCO and what he could have been earning at PTC during that period."

The Tribunal thereafter issued the order set out above.

It is clear from the reasoning of the learned member of the Tribunal that she misdirected herself in several respects in determining the quantum of damages payable to the respondent.

Firstly, the Tribunal failed to appreciate the distinction between an employee who is on suspension and an employee who has been dismissed, whether unlawfully or lawfully, and the different legal obligations pertaining to the different employees. An employee who is on suspension is under a legal obligation to avail himself for duty to his employer during the period of suspension and that if such employee takes employment during the period of suspension he repudiates his contract of employment. See *Zimbabwe Sun Hotels (Pvt) Ltd v Lawn* 1988 (1) ZLR 143 (S). In that case GUBBAY JA (as he then was) said at p 150:

> "The effect of informing an employee that he is suspended was considered by FEETHAM J in *Gladstone v Thornton's Garage, supra* at 119. This is what was said:
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> > 'When an employee is "suspended" it appears to me that apart from any express instructions he must hold himself available to perform his duties if called upon; though for the time being he is debarred from doing his work. It appears to me that that is distinct from dismissal - the use of the term "suspended" is an indication that, while he is not to perform his duties, he must still remain bound to his employer under his contract of service.'
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> See also *van der Merwe v Colonial Government* (1904) 14 CTR 732 at 737; *Boston Deep Sea Fishing and Ice Company v Ansell* (1888) 39 ChD 339 at 352.

Plainly the obligation of an employee who is placed under suspension to hold himself available to performing his duties if called upon to do so, is one which arises by operation of law. It is of no consequence therefore that no provision in that regard is contained in the contract of service; and it is not necessary for the employer at the time of suspension to so inform the employee.

But does the fact that the employee is suspended without pay in fundamental breach of both the common law and s 5 of the Employment (Conditions of Service) Regulations, rid him of the obligation to hold himself at the disposal of his employer? I think not. Such a breach by the employer will not automatically end the contract. It will serve only to vest the employee with an election either to stand by the contract and enforce his rights to the payment of his salary, or to accept the repudiation, terminate the contract and sue for damage. See (1888) 39 ChD 339 at 352."

An employee who has been dismissed, whether lawfully or unlawfully, is under a different legal obligation from an employee who has been suspended. A dismissed employee is under an obligation to mitigate his damages as quickly as possible and failure to do so might cause him to be denied damages. See *Ambali v Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S). In this regard McNALLY JA had this to say at p 419:

> "There are also those, and Ambali is one of them, who seem to believe that they must on no account look for alternative employment; that so long as their case is pending they must preserve their unemployed status; that if they look for and find a job in the meanwhile they will destroy their claim.

It cannot be emphasised too strongly that this is wrong. There may be some confusion arising out of cases which deal with wrongful suspension rather than wrongful dismissal."

The learned judge went on further to state:

> "But if an employee is wrongfully dismissed his duty to mitigate his loss arises immediately. If he is offered a good job the day after he is dismissed he must take it or forfeit any claim for damages. If he is offered a good job only after he has been unemployed for six months, he must take it. If in the meantime he has instituted proceedings for reinstatement, he may continue there, but his claim for damages will usually then be limited to his loss over the six month period."

The principle that emerges from the above authorities is that an employee who is on suspension has a legal obligation to be available for employment by his employer. He cannot take up employment while on suspension as that has the effect of terminating his previous employment. On the other hand, an employee who has been dismissed is under an obligation to look for alternative employment almost immediately upon dismissal in order to mitigate his damages.

The respondent in this case, as I have stated, was placed on suspension on 21 February 1996. As the respondent was on suspension he could not, unlike a dismissed employee, take up employment during the suspension without terminating his former employment. He obtained employment with Zimnat on 1 September 1997. The determination, in terms of which he was dismissed, was on 19 March 1998. At the time the respondent took up new employment on 1 September 1997, he was on suspension. In my view, the fact that the dismissal was back-dated to the date of the suspension does not in any way affect the conduct of the respondent in accepting employment with Zimnat on 1 September 1997. By taking up employment with Zimnat, the respondent repudiated his contract of employment with the appellant on that day. That repudiation terminated the contract of employment between the appellant and the respondent. The suggestion that the repudiation was frustrated by the respondent is illogical. The respondent took up employment with ZIMNAT and worked for six months before his employment was terminated. The act of accepting employment with ZIMNAT is what terminated the respondent's previous employment.

The Tribunal concluded that the employment with Zimnat was on a temporary basis. There is nothing on the record to indicate that the respondent took employment with Zimnat on a temporary basis. If anything, the indications are that he took the job on a permanent basis and lost it through the interference of the appellant. It may well be that the respondent has a cause of action against Zimnat for unlawful termination of employment or against the appellant for inducing the breach of contract of employment. I leave that matter entirely open. I am satisfied, however, that the respondent's acceptance of employment with Zimnat was a repudiation of the employment contract with the appellant.

The appellant conceded that the dismissal of the respondent from employment was unlawful. How then should damages be assessed for that unlawful dismissal from employment?

I have concluded that the respondent repudiated his contract of employment with the

appellant on 1 September 1997, the date he accepted employment with ZIMNAT. The respondent therefore can only claim arrears of salary and benefits up to that date.

It is on this basis that the appeal should succeed.

In the result the appeal succeeds and the order of the Tribunal is set aside and substituted by the following order -

> "It is ordered that the respondent be paid his salary and benefits from the date of dismissal, which is, 21 February 1996 to the date he took up employment with Zimnat, which is, 1 September 1997."

CHEDA JA: I agree

ZIYAMBI JA: I agree

Coghlan, Welsh & Guest, appellant's legal practitioners

Mabuye & Co, respondent's legal practitioners