

REPORTABLE ZLR (79)

Judgment No. SC 99/04

Civil Appeal No. 351/03

PHIBEON CHAWATAMA v UNITED TOURING  
COMPANY

SUPREME COURT OF ZIMBABWE  
CHIDYAUSIKU CJ, MALABA JA & GWAUNZA JA  
HARARE, SEPTEMBER 7 & NOVEMBER 4, 2004

The appellant in person

*C C Mudara*, for the respondent

MALABA JA: On 13 October 2003 the appellant (“Chawatama”) and Ms *Gurure* who represented the respondent appeared before the Senior President of the Labour Court to have damages in *lieu* of reinstatement of Chawatama to employment with respondent quantified in terms of the order issued on 22 November 2001.

Each party addressed the Court on the factors to be taken into account in the quantification of the damages. They then asked to be given until the following day to negotiate an agreement on the quantum of damages. The record of proceedings shows that on the resumption of the hearing on 14 October the following exchanges between each of the parties and the Senior President took place:-

“GURURE: I beg leave to submit what we have come up with (document

with calculations handed in).

MTSHIYA (SENIOR PRESIDENT): Please hand this document to appellant.

CHAWATAMA: I am satisfied with both the back pay and damages.

MTSHIYA: It is by consent hereby ordered:-

1. That the respondent shall pay the appellant as follows:

(a) Back pay	\$404 980,72
(b) Damages	<u>\$ 94 350,00</u>
Total	<u>\$499 330,72</u>

2. That the said total sum of \$499 330,72 shall be paid together with interest at the prescribed rate from the date of this order (i.e 14 October 2003) to the date of payment in full.

3. That there be no order as to costs.”

The order granted by the Labour Court was in essence a recording of the terms of the agreement between the parties contained in the document handed in by the respondent's legal practitioner. Chawatama has sought to appeal against the order granted on the ground that it did not take into account the effect of inflation on monetary value of the damages awarded by consent without denying the fact that he consented to the terms in which the order was granted. Without an allegation and proof of the fact that his consent was obtained by means of fraud the order remained a consent order.

An appeal against an order given by consent is not possible. In *Thambi v Stalka NO & Anor* 1946 TPD 297 ROPER J held on the facts before him that there could be no appeal against a judgment by consent given under the South

African Magistrates Court Act 32 of 1944. He went on to state at p 300 that;

“It is impossible to imagine any circumstances in which a party could appeal against a judgment by consent; he might have good grounds for setting aside or varying such a judgment but he would not and could not appeal against it.”

In other words whilst it is possible to have a judgment by consent set aside on the ground, for example, that consent to it was obtained by fraud or a mistake common to both parties it is not possible to attack the judgment as being wrong on account of a misdirection on a question of fact or law because no such question would have been a subject of decision by the Court.

In this case s 92D of the Labour Relations Act [Chapter 28:01] provides that an appeal shall lie to the Supreme Court from any decision of the Labour Court on a question of law only. A notice of appeal must specify quite precisely the points of law in the ruling of the Labour Court on which it is alleged there was a misdirection. That is not possible where the order was given by consent.

See *Chivero & Ors v Mudzimu Unoyera Apostolic Church* 1994 (2) ZLR 371 (S) at 373 D

The appeal is accordingly struck off the roll with costs.

CHIDYAUSIKU CJ: I agree.

GWAUNZA JA: I agree.

*Chitapi & Associates*, respondent's legal practitioners