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Judgment No. SC 69/06
Civil Appeal No. 264/05

V.I.P. SPORTS BAR v GEORGE KANYOZA

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & MALABA JA
HARARE, SEPTEMBER 12, 2006 & JULY 4, 2007

W P Zhangazha, for the appellant

The respondent in person

SANDURA JA: This is an appeal against the Labour Court's quantification of the damages payable to the respondent ("Kanyoza") by the appellant ("the Sports Bar") in lieu of Kanyoza's reinstatement as a bar manager.

The factual background is as follows. Kanyoza was employed by the Sports Bar at Chitungwiza as a bar manager from 30 November 2001 to February 2003. He was then dismissed for allegedly committing an act of misconduct. It was alleged that he had taken his employer's motor vehicle without the employer's permission, driven it when he was not licensed to drive motor vehicles, and damaged it in an accident.

Subsequently, the matter came before an arbitrator who, on 31 August 2004, ruled that Kanyoza had been unlawfully dismissed because the Sports Bar had

dismissed him without the approval of the Minister of Labour, which was required in terms of s 2(1) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985, published in Statutory Instrument 371 of 1985 (now repealed).

Accordingly, the arbitrator ordered the Sports Bar to reinstate Kanyoza from the date of the unlawful dismissal without loss of salary and benefits, or pay him damages for the unlawful termination of his employment. The quantum of the damages payable was to be agreed upon by the parties.

After the Sports Bar had elected to pay damages in lieu of reinstatement, the parties failed to agree on the quantum of the damages. Kanyoza, therefore, filed an application in the Labour Court seeking a quantification of the damages payable to him.

Thereafter, on 26 August 2005, the Labour Court made the following order:

> "Damages are therefore granted as follows –
>
> 1) Back pay 6 747 287.83 (*sic*)
>
> 2) Leave pay 3 738 957.64 (*sic*)
>
> 3) Damages in the sum equivalent to 18 months' salary at today's rates of the NEC Grade 13 employee.
>
> 4) Interest at the prescribed rate with effect from date of judgment till date of full payment."

Aggrieved by that order, the Sports Bar appealed to this Court.

The first issue which I ought to deal with is whether this appeal raises any question of law. The issue is important because in terms of s 92D of the Labour Act [*Cap. 28:01*] ("the Act") an appeal from the Labour Court lies to this Court only on a question of law. A ruling by the Labour Court on the quantum of damages is a ruling on fact unless it is wholly unreasonable.

Thus, in *Leopard Rock Hotel Company (Pvt) Ltd v Van Beek* 2000 (1) ZLR 251 (S) at 256 B-C McNALLY JA said:

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

In the present case, I am satisfied that the Labour Court misdirected itself in quantifying the damages payable to Kanyoza. I say so because it assessed the damages on the basis of the salary of a Grade 13 employee, covered by the Collective Bargaining Agreement: Catering Industry (General Conditions), published in Statutory Instrument 330 of 1995 ("the Collective Bargaining Agreement"), when there was no evidence that Kanyoza was a Grade 13 employee. This was wholly unreasonable.

In addition, the Labour Court quantified the damages on the basis of the salary payable to a Grade 13 employee on 26 August 2005, the date when the Labour Court assessed the damages. This was clearly wrong because, assuming that Kanyoza

had been a Grade 13 employee, the damages for the premature termination of his employment should have been calculated on the basis of the salary payable to him on 31 August 2004, when the arbitrator ordered that he be reinstated or paid damages, and when the Sports Bar elected to pay damages in lieu of reinstatement.

In the circumstances, I am satisfied that the appeal raises a question of law and is, therefore, properly before this Court.

In the Labour Court Kanyoza claimed the sum of $65 382 941.15, which was made up as follows –

1.	Back pay	$6 747 287.83
2.	Leave pay	$3 738 957.64
3.	Damages for the unlawful termination of employment	$54 896 695.68
	TOTAL	$65 382 941.15 .

That sum was calculated on the basis of the salary of a Grade 13 employee under the Collective Bargaining Agreement, and on the basis that the time within which Kanyoza could not reasonably have been expected to find alternative employment was four years.

The Sports Bar was not prepared to pay the sum claimed by Kanyoza because the sum was considered excessive. It was, however, prepared to pay him back-pay and damages calculated on the basis of the salaries it had paid the new bar manager during the relevant period.

It was submitted on behalf of the Sports Bar that if Kanyoza had not been dismissed, he would have been paid the salaries that the new bar manager who had replaced him had been paid during the relevant period.

It was common cause that the salary paid to Kanyoza for the month of February 2003 was $40 000.00.

The salaries paid to the new bar manager from March 2003 to 31 October 2004 were as follows –

1	March 2003	$40 000.00
2	April 2003	$50 000.00
3	May 2003	$50 000.00
4	June 2003	$50 000.00
5	July 2003	$65 000.00
6	August 2003	$65 000.00
7	September 2003	$65 000.00
8	October 2003	$65 000.00
9	November 2003	$400 000.00
10	December 2003	$400 000.00
11	January 2004	$400 000.00
12	February 2004	$400 000.00
13	March 2004	$400 000.00
14	April 2004	$500 000.00
15	May 2004	$500 000.00
16	June 2004	$500 000.00
17	July 2004	$600 000.00
18	August 2004	$600 000.00
19	September 2004	$600 000.00
20	October 2004	$600 000.00
	TOTAL	$6 350 000.00

It seems to me that the calculation of the back-pay, leave pay and damages payable to Kanyoza on the basis of the salaries paid to the new bar manager during the relevant period would be more realistic and reasonable than placing reliance upon the salary paid to a Grade 13 employee in terms of the Collective Bargaining Agreement. I say so for two reasons.

The first reason is that Kanyoza was not a Grade 13 employee governed by the Collective Bargaining Agreement. He had to negotiate his salary with the Sports Bar, and after such negotiations his salary for February and March 2003 had been fixed at $40 000.00 per month. When the new bar manager was later appointed he too accepted as reasonable the salary of $40 000.00 for the month of March 2003, and thereafter his salary was gradually increased.

And, secondly, although a Grade 13 employee governed by the Collective Bargaining Agreement was said to be subordinate to a bar manager, it was common cause that in March 2003 his salary was $42 448.90 which was higher than that negotiated and accepted by Kanyoza. Placing reliance upon the salary of a Grade 13 employee was, therefore, wholly inappropriate and unreasonable.

I now wish to consider what back-pay, leave pay and damages ought to have been paid to Kanyoza. Although damages normally include back-pay and leave pay (see *Leopard Rock Hotel Company (Pvt) Ltd v Van Beek supra* at 254H-255A), for

the purpose of the present exercise I shall consider the three items separately, as the Labour Court did.

BACK-PAY

It was common cause that back-pay was payable for the period extending from March 2003 to 31 October 2004. The only issue between the parties was whether the back-pay was to be calculated on the basis of the salary of a Grade 13 employee under the Collective Bargaining Agreement, or on the basis of the salaries which the Sports Bar had paid to the new bar manager during the relevant period.

As already indicated, the back-pay ought to have been calculated on the basis of the salaries paid to the new bar manager during the period in question. This means that the back-pay should have been $6 350 000.00.

LEAVE PAY

Regrettably, the record does not have much information on the question of leave. However, in the interest of finalising this matter, this Court should rely upon the formula on the basis of which Kanyoza calculated his leave pay, but substituting the salary of $600 000.00 (i.e. the salary paid to the new bar manager at the end of October 2004) for the salary payable to a Grade 13 employee under the Collective Bargaining Agreement at the end of October 2004.

The formula used by Kanyoza in the calculation of his leave pay is set out in a document which he produced as an exhibit in the court *a quo* when he gave evidence on the quantification of his damages. The formula is as follows - $1 143 681.16 x 85 ÷ 26; where $1 143 681.16 was the salary of a Grade 13 employee under the Collective Bargaining Agreement at the end of October 2004, 85 must be the number of leave days due to Kanyoza, and 26 was the number of working days in October 2004, excluding Sundays. The accuracy of this formula was not challenged when Kanyoza was cross-examined by the legal practitioner appearing for the Sports Bar, except to the extent that it was made clear to the Labour Court that the salary of a Grade 13 employee under the Collective Bargaining Agreement did not apply to Kanyoza.

Substituting the salary of $600 000.00 for the salary of $1 143 681.16 in the formula, the result is as follows - $600 000.00 x 85 ÷ 26 = $1 961 538.40. In the circumstances, Kanyoza was entitled to the sum of $1 961 538.40 as leave pay.

DAMAGES FOR UNLAWFUL TERMINATION OF EMPLOYMENT

The real issue here is the period within which Kanyoza could not reasonably have been expected to find alternative employment. According to Kanyoza, that period was four years, but according to the Sports Bar it was four months.

When Kanyoza appeared before the court *a quo* in July 2005, about twenty-eight months after his dismissal, he stated that he had looked for alternative employment but had not been successful. That evidence was not seriously challenged.

On the other hand, a representative of the Sports Bar who gave evidence in the court *a quo* stated that the time within which Kanyoza could not reasonably have been expected to find alternative employment was about four months. To support that opinion he produced three unsworn statements from persons who claimed to be experts in matters relating to human resources, but as the statements were not made under oath they were of no value.

In the circumstances, the learned President of the Labour Court, facing the real evidence that Kanyoza had not found alternative employment for twenty-eight months, decided that Kanyoza should not have taken more than eighteen months to find alternative employment. That was a finding of fact which, in my view, cannot be described as grossly unreasonable.

The period of eighteen months does not appear to be unreasonable when compared to periods accepted in other cases. In addition, the learned President of the Labour Court determined the issue in the exercise of her judicial discretion. I am not, therefore, prepared to interfere with that determination.

The damages for the unlawful termination of the employment contract should, therefore, have been arrived at by multiplying the salary paid to the new bar manager at the end of October 2004 (i.e. $600 000.00) by 18. The result is

$10 800 000.00, and that is the sum which should have been paid to Kanyoza as damages for the unlawful termination of his employment.

For the avoidance of any doubt, the back-pay, leave pay and damages awarded to Kanyoza are in terms of the dollar before it was revalued.

Finally, as far as the costs of the appeal are concerned, my view is that each party should bear its own costs.

Consequently, Kanyoza was entitled to the following –

(a)	Damages in lieu of reinstatement:	$10 800 000.00
(b)	Back-pay:	$6 350 000.00
(c)	Leave pay:	$1 961 538.40
	TOTAL:	$19 111 538.40

In the circumstances, the following order is made –

1. The appeal is allowed, with each party bearing its own costs.

2. The order of the court *a quo* is set aside and the following is substituted -

   "(a) The respondent shall pay to the applicant the sum of $19 111 538.40, together with interest at the prescribed rate from 31 October 2004 to the date of payment in full.

(b) The respondent shall pay the applicant's costs."

ZIYAMBI JA: I agree.

MALABA JA: I agree.

Chinamasa, Mudimu & Chinogwenya, appellant's legal practitioners