

REPORTABLE (38)

MADHATTER MINING COMPANY
v
MARVELLOUS TAPFUMA

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GOWORA JA & HLATSHWAYO JA
HARARE, OCTOBER 31, 2013 & JULY 25, 2014

Advocate *T Magwaliba*, for the appellant

Advocate *R Chingwena*, for the respondent

GWAUNZA JA: This is an appeal against the whole of the judgment of the Labour Court given at Gweru on 13 January 2012.

The application in the court *a quo* was brought by the respondent against the appellant and was for quantification of damages following a consent order dated 20 September 2006. The terms of the order were:

1. That the appellant's termination of the respondent's contract of employment on 11 February 2003 be set aside;
2. That the appellant would pay to the respondent all his arrear salaries and benefits together with interest at the legal rate to 30 September 2006;
3. That the appellant would pay to the respondent damages in *lieu of* reinstatement which must be agreed between the parties, failure of which the matter would be set down for assessment.
4. That each party would pay its own costs.

The court *a quo* noted that on 14 November 2006 the appellant paid to the respondent, through his erstwhile legal practitioners, his arrear salary, benefits and interest for the period March 2003 to September 2006. Despite the respondent's assertion that the appellant had not paid him cash *in lieu* of leave, the court *a quo* found, based on schedule B to the papers before it, that the appellant had in fact made payment in this respect, for the period December 2003 to September 2006. The court *a quo* accepted the appellant's argument that since the respondent was not going to work for the period in question, he was not entitled to a transport allowance as this was paid for a specific purpose. The court further accepted the argument that the respondent was not entitled to a housing allowance for that period.

As negotiations between the parties had stalled by the end of 2007, the respondent proceeded to file an application for quantification of damages *in lieu* of reinstatement. He claimed seventy two (72) months' salary as damages, which he translated into an amount of US\$50000.00. The court *a quo* partially granted his application and ordered as follows:

- (i) that the appellant *in casu* pays the respondent 36 months' salary as damages *in lieu* of reinstatement on the basis of the September 2006 salary scale, which was Z\$587 444 085.88 per month;
- ii) that the total amount be converted to US dollars using the exchange rate of Zimbabwe Dollar to United States Dollar equivalent obtaining on 30 September 2006;
- (iii) payment of interest at the prescribed rate from the date of the judgment to date of payment in full.

The court stated as follows in support of its determination that the respondent was entitled to damages *in lieu* of leave:

“This court takes judicial notice of the fact that the decline of the Zimbabwean economy was at its peak during the period 2006-2009. Therefore, applicant’s chances of securing alternative employment in that harsh economic turmoil were bleak. This was exacerbated by lack of professional qualifications. Consequently, I find that applicant is entitled to damages *in lieu* of reinstatement.”

It is evident from the above that the learned judge *a quo* took the position that damages *in lieu* of reinstatement were to be reckoned from September 2006 up to 2009. Thus according to the court, the damages became due to the respondent from 30 September 2006, the date upon which the appellant could have reinstated the respondent in terms of the consent order.

The appellant challenges this finding and the reasoning behind it and submits that any damages payable to the respondent must be reckoned from the date of his unlawful dismissal, that is 11 February, 2003. The appellant argues as follows in its heads of argument;

- ‘1. The Court *a quo* erred in law, alternatively grossly misdirected itself in fact-such misdirection amounting to a misdirection in law, in finding that the respondent was entitled to damages for loss of employment, and such damages being 36 months in that:-
 - 1.1 to the extent that by operation of law the obligation to seek alternative employment arises from the date of unlawful dismissal, *id est*, 11 February 2003; and
 - 1.2 to the further extent that by operation of law, the measure of damages is the period within which a wrongfully dismissed employee would have reasonably been expected to find alternative employment, such period reckoned from the date of unlawful dismissal, *id est*, 11 February 2003; and
 - 1.3 to the further extent that by our law back pay is an integral part of damages for loss of employment; and

- 1.4 to the even further extent that, on the facts the respondent had been paid back pay for the period up to September 2006, and
- 1.5 to the further extent that the court *a quo* found that the measure of damages would have been due to the respondent was 36 months, which thirty six months reckoned from the 11 February, 2003 would have lapsed on the 10th February, 2006.

The legal obligation to pay damages had been satisfied.’

Mr *Chingwena* for the respondent, on the other hand agrees with the finding and reasoning of the court *a quo* and argues that the dispute before the court was not one on the import or applicability of the judgments and trite authorities like *Ambali v Bata Shoe Company Limited* 1999 (1) ZLR 417(S), *Gauntlet Security Services Private Limited v Leonard* 1997 (1) ZLR 583(S) and others. The dispute in his view concerned the correct interpretation of the consent order agreed to by the parties, in particular, paragraph 3 thereof. Mr *Chingwena* further argues that the appeal and indeed the application in the court below were premised on that order. In this respect, the following submission is made in the respondent’s heads of argument:

“... Analogous to the *Ambali* case, the parties agreed that respondent herein be remunerated back pay to the date of suspension. That is the import of the order by consent. Then, as from 1st October 2006 i.e. past the 30 of September 2006, respondent herein became entitled to damages *in lieu* of reinstatement.” (the underlining is mine)

Flowing from this, it is the respondent’s further contention that the question of mitigation arose as from 1 October 2006 since his contract of employment had been ‘terminated’ the previous day.

That the dispute falls to be determined within the four corners of the consent order agreed by the parties is in my view beyond dispute. What is at issue is the parties’ conflicting interpretation of paragraphs 2 and 3 of the consent order. That dispute appears to

me to be two pronged. The first prong relates to the question of whether or not the salary arrears and benefits paid to the respondent encompassed any damages *in lieu of* reinstatement. Assuming that the damages were not included in the payments already made, the second prong of the dispute relates to the period from which such damages are to be reckoned. In other words should it be 11 February, 2003, the date on which the respondent was unlawfully dismissed, or should it be 1 October 2006, the date on which the reinstatement (or payment of damages *in lieu* thereof) ordered by the court could have taken place?

The appellant takes the position that damages being an integral part of arrear salary and benefits, the appellant had, by paying these to the respondent, discharged its obligation to pay damages for his loss of employment. It is also the appellant's argument that in any case such damages were to be reckoned from the date of the respondent's wrongful dismissal, that is, 11 February 2003.

I find that the appellant's argument relating to the discharge of its obligation to pay the respondent damages for loss of employment is not supported by the terms of the consent order agreed between the parties. The order, in its paragraph 2 and 3, clearly distinguishes, and separates the payment of arrear salary and benefits on the one hand, and of damages *in lieu of* re-instatement on the other. Such distinction could have been influenced by the fact that the calculation of arrear salary, benefits and interest would be premised on verifiable figures or amounts, while the assessment and *quantum* of damages was to be negotiated and agreed between the parties. Only if this failed would resort be had to the court. I do not find anything in the terms of the consent order in question, to suggest that the undertaking by the appellant, as set out in paragraph 2 of the consent order, was to pay the respondent a consolidated amount constituting salary arrears, benefits, interest and damages

in lieu of reinstatement. Had that been the understanding of the parties, there would have been no need to add paragraph 3. The fact that it was not only added but that it also specifically implored the parties to negotiate and reach agreement on the assessment and *quantum* of the damages, in my view clearly suggests an exercise separate and distinct from that envisaged in paragraph 2 of the order. The appellant has in any case not argued or shown that a specific part of the amounts of money paid to the respondent as arrear salaries and benefits, represented damages. Nor has the appellant indicated how such an amount would have been arrived at.

As correctly argued for the appellant, there is a plethora of case authorities that have laid down the factors to be considered in assessing damages for wrongful dismissal. See for instance, *Ambali v Bata Shoe Company Limited and Gauntlet Security Services Private Limited v Leonard (supra)*. These factors include the efforts taken by the respondent to mitigate his loss, whether or not such efforts yielded success and if so when that may have happened following the loss of employment and how much the respondent could have earned and so on. The purpose of all these considerations would be to determine the extent, if any, to which the damages could be reduced. Since negotiations between the parties in relation, *inter alia*, to damages are said to have broken down, it follows that the factors that would normally have been taken into account in assessing damages, were not considered, negotiated nor agreed by the parties as required by paragraph 3 of the consent order. In other words the parties failed to reach agreement on the *quantum* of damages. Accordingly, the appellant cannot be heard to say that the respondent was paid his dues in terms of damages *in lieu* of reinstatement.

In the result, the part of the dispute that relates to the payment of damages for the respondent's loss of employment must be determined against the appellant and in favour of the respondent.

I will now consider the second prong of the dispute, which relates to the date from which the damages if any, due to the respondent *in lieu* of reinstatement, are to be reckoned.

The respondent's interpretation of paragraph 3 of the consent order, which is captured in the excerpt quoted above, is that the obligation by the appellant to pay the respondent damages *in lieu* of reinstatement arose from 1 October, 2006, being the date when the appellant could have, but did not, reinstate the respondent. This is the argument that found favour with the court *a quo*, hence its order for the payment of thirty-six (36) months' damages, reckoned prospectively from 1 October 2006. The appellant's position, on the other hand, is that any damages outside of the salary arrears and benefits already paid to the respondent, must be calculated retrospectively from the date on which reinstatement was ordered, to the date of the his wrongful dismissal. Since the answer to the question as to the correct date from which to reckon the assessment of damages due to the respondent, if any, is not apparent *ex facie* the stated terms of the consent order, I am satisfied that resort to and guidance from, established case authorities would be appropriate.

In this respect counsel for the appellant cited the case of *Gauntlet Security Private Limited v Leonard (supra)* where GUBBAY CJ affirmed the position that an employee who has been wrongfully dismissed must not sit around and do nothing. He must mitigate his loss and accept any reasonable offer of alternative employment, such

employment to be sought and secured within a reasonable period of time. Failure to do so would result in a deduction made in respect of the remuneration he would have earned from the substituted employment. Similarly, in the case of *Ambali v Bata Shoe Company (supra)* it was held thus:

“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 to which he was entitled, of which he was deprived of as a result of the wrongful termination.”

The appellant argues that the consent order agreed between the parties is not to be read differently in terms of its effect, from the principle of law established and confirmed in a long line of authorities on the subject of damages in *lieu of* reinstatement.

The principle in question is set out in s 89(2)(c)(iii) of the Labour Act (*Chapter 28:01*) which states that damages may be awarded to the employee concerned as an alternative to his reinstatement or employment.

An analysis of the authorities referred to suggest to me as follows;

- (1) a person is wrongfully dismissed;
- (2) he or she successfully petitions the court for reinstatement or where that is no longer possible for any reason, damages *in lieu of* reinstatement.
- (3) such damages would consist of salary arrears or wages for the relevant period reckoned from the date of the wrongful dismissal and may also include compensation for any loss to which he was entitled, which he was deprived of as a result of the wrong termination.

What is eminently clear from this analysis is that damages *in lieu* of reinstatement become due and are to be reckoned from the date of an employee's wrongful dismissal. Further, that in relation to the period from and during which the damages are to be assessed, no distinction is made between the salary arrears and benefits on the one hand, and damages proper on the other. All must be assessed within the same period *albeit* varying time periods and considerations peculiar to the assessment in question may apply.

The respondent argues that damages *in lieu* of reinstatement must be reckoned prospectively from the date on which such reinstatement, by order of the court, could have taken place. By arguing thus, the respondent is effectively urging this court to separate the periods during which salary arrears and benefits on the one hand, and any damages on the other, are to be assessed. As stated above, this approach would run counter to and does not find support in the law and established authorities on this subject. In particular, the approach that the respondent advocates and which the court a quo adopted, effectively suggests that until a dispute of this nature is finally resolved, no matter how long it might take, the employee is not obliged to do anything to mitigate his loss. The authorities are very clear on the point that the employee is legally obliged to mitigate his loss by looking for a job from the date of his unlawful dismissal. (See for instance, *Madyara vs Globe and Phoenix Industries Pvt Ltd*) 2002 (2) ZLR 269 (S)). The point is emphatically stressed in the following terms in *Ambali's* case (*supra*), pages 418-419;

“I think it is important that this court should make it clear, once and for all, that an employee who considers, whether rightly or wrongly, that he has been unjustly dismissed, is not entitled to sit around and do nothing. He must look for alternative employment.... There are those also, 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 strongly that this is wrong.if an employee is wrongfully dismissed his duty to mitigate his loss arises immediately. (Emphasis added).

The respondent argues further that because the respondent was not reinstated on 1 October 2006, the date of his wrongful dismissal was thereby 'shifted' from 11 February 2003 to 1 October 2006. This latter argument demonstrates that the respondent was cognisant of the need to reckon a claim for damages *in lieu* of reinstatement, from the date of wrongful dismissal.

I do not find merit in the respondent's contentions in this respect. The date of his wrongful dismissal was 11 February 2003. As a matter of fact, and like any date that has passed, it is fixed in history and immutable. It is not capable of being shifted, even metaphorically. Thus the assessment of any damages to which the respondent might have been entitled to, could only be reckoned from 11 February 2003 up to the date of reinstatement.

I find in the result that the respondent has failed to prove a case for an interpretation of paragraph 3 of the consent order that is at variance with established law and case authorities on this matter. Accordingly, this part of the dispute must be determined in favour of the appellant.

I have determined that the parties failed to reach agreement on the *quantum* of damages and that the respondent was therefore not paid any such damages in the manner set down in paragraph 3 of the consent order. Having further determined that the assessment of such damages must be reckoned from the date of the respondent's wrongful dismissal that is

11 February 2003, what must be considered next is the question of how such damages are to be assessed. This is both in terms of the factors to be taken into account in this respect, and the appropriate formula to be employed in the actual computation of the damages.

Albeit reckoning this period prospectively from 1 October 2006, the court *a quo* determined that thirty-six (36) months would have been a reasonable time for the respondent to find reasonable employment. The court *a quo* considered the same factors as would have been considered had the period in question been reckoned prospectively from 11 February 2003. Apart the court's reference to the country's economic meltdown between the period 2006 – 2009 and the upturn in the economy after that, I find that its consideration of and reasoning in relation to, the appellant's obligation to show that the respondent earned or should have earned some money following his unlawful dismissal, remain valid and can be applied to the same effect, to the period 11 February 2003 to 30 September, 2006.

In casu the court *a quo*, significantly, noted the appellant's concession that at some point before the date of reinstatement, the respondent had shown that he was not sitting idly by, but had properly taken the effort to find alternative employment. The appellant made this concession on the basis of the respondent's request for a referral letter made in 2004. As already stated, an employee is required to start looking for alternative employment from the date of the unlawful termination of his employment. As correctly stated by the court *a quo*, no concrete evidence was placed before the court to prove that indeed the respondent was engaged in a lucrative transport business and therefore, was earning much more than he would have earned had he not been dismissed. The court *a quo* in my view correctly found that such evidence was speculative. In the result the court's finding that the respondent was entitled to damages *in lieu* of reinstatement, cannot be faulted.

Despite the fact that the court *a quo* prospectively calculated the relevant period for measuring the damages in question from September 2006, and not retrospectively from the same date, I do not find that the period of thirty-six (36) months was justified on the facts. The respondent stated that he tried for a period of over three (3) years to secure alternative employment, and did not succeed in his efforts. His evidence was that his efforts to secure employment that was related to his skills had been hampered by two main factors;

- (i) that the appellant had terminated his employment before he could complete his three (3) years training as a journeyman, fitter and turner and
- (ii) that the Zimbabwe economy suffered “a contraction” of between 59 – 74% between 2006 and 2010.

The court *a quo* was persuaded by these arguments and took judicial notice of the fact that the decline in the Zimbabwean economy was at its peak during the period 2006-2009. While the inhibiting circumstance of not being professionally qualified was properly accepted by the court *a quo*, the same in my view cannot be said of the second argument, relating to the economic meltdown. I have determined that the relevant period for the assessment of any damages suffered by the respondent is that from February 2003 to September 2006. This period, on the respondent’s own evidence, came before the onset of the economic meltdown. My view is that during that period, even without professional qualifications, the respondent, with diligence, should have been able to secure some form of unskilled employment.

Having been paid his salary arrears and benefits, for that same period and taking these as part of his damages for the unlawful termination of his employment, it can be said that the remnant damages would relate to what is referred to in the *Ambali* case, as

compensation for any loss to which he was entitled, of which he was deprived as a result of the wrongful termination. I consider that the loss suffered by the respondent should include the housing and transport allowances that he forfeited by virtue of his wrongful dismissal. In addition, I am persuaded that the unlawful termination of the respondent's employment before he could complete his three (3) years of skills training, constituted a lost opportunity that appropriately qualifies as a 'loss' for purposes of damages *in lieu* of re-instatement. The probabilities are in my view high, that had he gone into the employment field armed with a skills-based qualification, the respondent would have been able to secure alternative (and better paying) employment within a reasonable time. Such time would have likely been shorter than the time it might have taken him to secure any unskilled employment.

I find in the result that damages constituting 12 months' salary would adequately compensate the respondent for the loss of his employment.

The court *a quo* having determined the period for which in its view the respondent was to be paid damages *in lieu* of reinstatement, considered the parties' arguments on whether or not it was competent for the court to convert such damages from Zimbabwe dollars to United States dollars. The court acknowledged the complexity of the issue, particularly in view of the fact that as of that date, the Supreme Court had not given guidance on the matter. The court *a quo* also correctly noted that the various cases that the respondent had cited in support of his argument for an assessment of the damages in United States dollars were "nowhere near the heart of the matter". In stating that these cases do not bar the court from making judgments sounding in foreign currency, the court *a quo inter alia*¹relied

¹Kwindima v Mvunduma HH 25/09, Makwindi Oil Procurement Private Limited v National Oil Company of Zimbabwe 1989 (3) SA 199

on a passage from a High Court judgment, *Gift Bob David Samanyau and 38 others v Fleximail Private Limited* 2001(1) ZLR 529H.

The first point to note, whatever the merits or demerits of the observations in the *Samanyau* case, is that this was a High Court decision and this court is not bound by decisions of a lower court. Secondly the decision has since been set aside on appeal, this court having determined that the High Court had no jurisdiction to hear the matter – a labour dispute – in the first place. The matter should have properly been determined by the Labour Court. Thirdly and most importantly, the setting aside of the *Samanyau* judgment has negated the court *a quo*'s reliance on the *dictum* cited above. In other words, the basis given by the court for its order to convert the damages *in lieu* of reinstatement in this case, from Zimbabwe dollars to United States dollars, has been discounted. No other legal basis was pronounced, for the court's order that the damages it awarded to the respondent in Zimbabwe dollars should be converted, firstly, to United States dollars and secondly, at the specific rate prevailing at the end of September 2006. Nor did the court, it seems, apply its mind to the question of whether the resultant United States dollar amount would have given true value, to the respondent, of the damages that he was entitled to. In other words, a value that would neither over compensate the respondent, nor inadequately do so. These are in my view pertinent considerations for any court that has to make a determination of this nature.

It should be noted that in 2006 there were two main Zimbabwe dollar to United States dollar exchange rates in force, *i.e.* the official and the unofficial rates. The former rate had much smaller denominations compared to the latter. It is quite possible that had the official rate prevailing in September 2006 been used to convert the Zimbabwe dollar amount awarded to the respondent by the court *a quo* as damages, an inflated amount with no

relationship to the appropriate and meaningful compensation due to him would have been the result. Such an outcome would clearly have been both unrealistic and a mockery of justice.

This Court, in two recent judgments that dealt with the same taxing question, remitted the cases to the Labour Court and gave directions as to how and why that court should determine the issue. The cases are *Fleximail (Pvt) Ltd vs Gift Bob Samanyau and Thirty Eight Others*, SC 21\14 and *Horace Nzuma and 2 Others vs Hunyani Paper and Packaging*, SC 137/11. In the *Nzuma* case the court issued an order in these terms:

‘The matter is remitted to the court *a quo* to exercise its equitable jurisdiction in determining the question of conversion of back pay into foreign currency, and the applicable rate.’

The effect of the orders given in these two cases was to emphasize the position that it is the Labour Court - and not the Supreme Court - which is endowed with jurisdiction to apply principles of equity in its determination of labour disputes. The labour Court’s jurisdiction to determine labour disputes on the basis, *inter alia*, of equity can be gleaned from the import of s 2A of the Labour Court Act, which is quoted in full below;

2A Purpose of Act

- (1) The purpose of this Act is to advance **social justice and democracy** in the workplace by—
- (a) giving effect to the fundamental rights of employees provided for under Part II;
 - (b)
[Paragraph repealed by section 3 of Act 7 of 2005]
 - (c) providing a legal framework within which employees and employers can bargain collectively for the improvement of conditions of employment;
 - (d) the promotion of fair labour standards;
 - (e) the promotion of the participation by employees in decisions affecting their interests in the work place;
 - (f) **securing the just, effective and expeditious resolution of disputes and unfair labour practices.**

- (2) This Act shall be construed in such manner as best ensures the attainment of its purpose referred to in subsection (1).
- (3) This Act shall prevail over any other enactment inconsistent with it.' (**My emphasis**)

The principles of equity and social justice as well as the imperative for the Labour Court to secure the just and effective resolution of labour disputes, are all called into question when it comes to determining the basis and formula for computing a debt (e.g. damages) suffered in Zimbabwe dollars but claimed in foreign currency. This is particularly so where such damages, being owed to an employee, can no longer be paid in Zimbabwe currency realistically or in a way that gives due value to the employee. The undeniable fact is that a debt is not wiped out by the mere fact that there has been a change to the realisable currency. Equity would demand that a formula be found to give effect to the employee's entitlement to payment of, and the employer's obligation to pay, the debt in question.

Accordingly I will, *in casu*, do no more than be guided by the recent authorities on this matter that, have been cited above.

In doing so however, I will note that I fully appreciate and do not in any way underestimate the complexity of the exercise to compute - from Zimbabwe to USA dollars - and for value, the damages awarded to the respondent in this appeal. This is particularly so given the intermittent changes to the worth of the Zimbabwe dollar that were occasioned by the removal of zeros from that currency during the hyper-inflationary era of 2006-2009. I would accordingly venture to suggest to the Labour Court that it considers enlisting the services of an appropriately qualified expert in financial matters, in order to work out a formula for calculating the damages in question. Such formula should give fair value, in

USA dollars, to the damages - denominated in Zimbabwe dollars - that have been awarded to the respondent in this case.

In the result, I make the following order;

1. The appeal succeeds in part;
2. Paragraphs (i) and (ii) of the order of the court *a quo* be and are hereby set aside and substituted with the following;
 - (a) the appellant shall pay the respondent 12 months' salary as damages *in lieu of* reinstatement on the basis of the September 2006 salary scale which was Z\$587 444 085.88 per month, calculated as at 30 September, 2006,
 - b) The damages shall be paid together with interest at the prescribed rate, from the date of the Labour Court judgment (13 July 2012) to the date of payment in full;
 - c) The amounts referred to in paragraphs a) and b) *albeit* computed in Zimbabwe dollars, shall be converted to foreign currency in the manner and at the rate determined by the Labour Court in terms of paragraph 3 of this order,
3. The matter is remitted to the Labour Court for a determination, in the exercise of its equitable jurisdiction, of the question and the applicable rate of conversion into foreign currency, of the damages due to the respondent in terms of paragraph 2 above.
4. Each party shall bear its own the costs.

GOWORA JA:

I agree

HLATSHWAYO JA:

I agree

Danziger and Partners (Gweru), appellant's legal practitioners

Musunga and Associates, respondent's legal practitioners