

REPORTABLE (34)

DELTA BEVERAGES (PRIVATE) LIMITED
v
KUDAKWASHE MURANDU

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, HLATSHWAYO JA & CHIWESHE AJA
HARARE, JUNE 23, 2014 & JULY 2, 2015

F. Mahere, for the appellant

S. Kampira, for the respondent

GWAUNZA JA: This is an appeal against the entire judgment of the Labour Court which upheld an award made by the arbitrator, in favour of the respondent.

The facts of the matter are set out in the judgment of the court *a quo* and have been amplified with details from the appellant's heads of argument and the arbitrator's award. The additional details are necessitated by the need to consider a point *in limine* raised for the first time on appeal by the appellant.

The undisputed facts are these. On 2 August 2000 the respondent, who was in the appellant's employ, was suspended from work for alleged misconduct pending the determination of an application by the appellant to dismiss him¹. On 12 July 2002, a labour officer found that there were no grounds for the respondent's dismissal and ordered his reinstatement without loss of salary or benefits. Alternatively the labour officer ordered that

¹ *Application made in terms of SI 37/85 which was then applicable.*

the respondent be paid an agreed exit package as cash *in lieu* of reinstatement. A dispute thereafter arose over both the payment and quantification of the damages ordered. The dispute was initially placed before an arbitrator who sadly passed on before it could be resolved. In 2011 the matter was finally taken over by another arbitrator, who on 12 March 2012 awarded the respondent back pay and benefits from the date of suspension (2 August 2000) to the date reinstatement was ordered (12 July 2002). The arbitrator in addition awarded the respondent 36 months' damages *in lieu* of reinstatement, which were denominated in Zimbabwe dollars. The arbitrator went on to convert this amount and the amount representing back pay and benefits, at the rate of 1 USD – ZIM \$55.04 and came up with a combined total of USD28,154.26. This is the award that the court *a quo* upheld, and against which this appeal has been filed.

The point *in limine* raised by the appellant is to the effect that the respondent's claim has prescribed. The court heard argument on this point but reserved its judgment on it. The parties then proceeded to argue the merits of the matter. I will deal first with the point *in limine*, and the court's ruling on this point will determine whether or not it is necessary to consider the merits of the dispute.

1. Prescription

The appellant contends that the respondent's claim for damages prescribed on 12 July, 2005, 3 years after the "cause of action" arose.² It is the appellant's submission that the relevant cause of action arose on 12 July 2002 when a labour officer ordered that the respondent, unless reinstated, be paid damages *in lieu* of reinstatement. Further, that although the respondent initiated quantification proceedings in relation to these damages before a

² Section 15 of the Prescription Act [Chapter 8:11]

labour officer in October 2003, he had not waited for completion thereof but went to his rural home in Buhera. He had only re-surfaced on 1 September 2011 to institute fresh quantification of damages proceedings.

The respondent challenges the point *in limine*, and prays that it be dismissed.

I will start with a consideration of whether or not the point in *limine* meets the requirements for being raised for the first time on appeal. The appellant correctly avers that a point of law may be raised for the first time on appeal where the point;

- (i) is covered by the pleadings,
- (ii) there would be no unfairness to the other party;
- (iii) the facts are common cause and
- (iv) no further evidence would be required to support the point.

(See *Austerlands (Pvt) Ltd v Trade and Investment Bank Ltd & Ors* 2006 (1) ZLR 372(H).

1.1 Was the point covered in the pleadings?

The point *in limine* was raised for the first time in the appellant's heads of argument before this Court. It is not in dispute that in all the post July 2002 proceedings in this protracted dispute, no mention was made – directly or indirectly – of the prescription issue. In reality, the question of who between the parties contributed to the delay in the finalisation of the matter was raised and canvassed in relation to the date up to which any damages due to the respondent were to be paid, and not in relation to prescription. The

respondent took the opportunity to respond to the appellant's contention on this issue, in its own heads of argument. The court has not been pointed to anything in the documents on record, that suggests that the question of prescription was ever raised in the pleadings. My own perusal of the record does not reveal any mention in any of the pleadings, of this issue. I accordingly find that beyond listing the requirements for the raising of a point of law for the first time on appeal, the appellant has not proffered sufficient evidence to substantiate its averment that this first requirement was met. The court was thus not been able to properly determine this matter.

Accordingly this point is determined against the appellant.

1.2 *Unfairness to the other party*

The appellant in its heads of argument has not advanced any argument to support a finding that the introduction of the point of law in question for the first time on appeal would cause no unfairness to the other party. The respondent has also not been helpful in this respect, having only stated in his heads of argument that the issue of prescription "has no basis". I take the time to point out that parties are expected to argue their cases so as to persuade the court to see the merit, if any, in the arguments advanced for them. They are not expected to make bold, unsubstantiated averments and leave it to the court to make of them what it can. In as much as the court is handicapped in terms of being able to properly determine this point, so too is the respondent. He has not been given enough detail to enable him to understand, and properly defend, the case posed against him in this respect. The effect of this, in my opinion, is to visit unfairness on the respondent. The appellant bore the burden to prove its case on this point but lamentably failed to do so.

This point too is determined against the appellant.

1.3 Are the facts common cause?

I have indicated that the facts outlined above were undisputed. This is however, not the case with the specific facts on which the point *in limine* is premised. The appellant avers that after the labour officer set aside the respondent's dismissal and ordered that he be reinstated and paid back pay and benefits, alternatively damages *in lieu* thereof, he approached a labour officer seeking the payment of damages on 16 October 2003.

Further, that the respondent had thereafter not pursued the issue of quantification of damages because he was in his rural home, Buhera. Neither party has enlightened this Court as to the exact nature of the respondent's non-pursuance of the issue of quantification of damages. Did he withdrew the matter, did it lapse of want of prosecution, or also importantly, did the appellant for its part, seek to have the matter dismissed for that reason? The answers to these questions would have been of assistance to the Court. The lack of answers might also explain why neither the arbitrator nor the Labour Court made an issue out of the alleged filing of an earlier case by the respondent for quantification of damages. The respondent in any case contends that any prescription that could be said to have operated against him, was interrupted by the appellant's filing of an appeal. He elaborates on this averment as follows in his heads of arguments:

“Page 84 (of the record) will show that the delay in finalising the matter between the parties was caused by the appellant herein. The appellant filed an appeal which they did not prosecute. The respondent was resident in his rural home and when he decided to check with the court he discovered that the appeal had not been prosecuted and decided to take up this matter.”

As can be seen from this statement, the respondent has not given an indication as to when this appeal might have been filed, nor against what and for what relief. The appellant in its turn has made no submission, nor commented, on this alleged appeal, especially considering that it was raised before the arbitrator and might therefore, conceivably, have had a bearing on its point *in limine*. This Court again finds itself incapacitated in any effort to determine whether or not the alleged prescription was, in fact interrupted. More importantly, it cannot be said, in view of all this, that all the facts in this matter were common cause.

This point is also determined against the appellant.

1.4 Is further evidence required?

My determination on the disputes of fact surrounding the issue of delays in finalising this matter, which has a bearing on the point *in limine* relating to prescription has, in my view settled the point on whether further evidence is required. Further evidence would indeed be required to support the arguments on the point *in limine*.

This point is, once more, determined against the appellant.

I find in the result, that the appellant has failed to establish the requisite basis for raising the point of law in question, for the first time on appeal.

The point *in limine* is accordingly dismissed.

2. Merits

I will now turn to the merits of the appeal.

The appellant raises two main grounds of appeal, as follows;

- i) The Labour Court grossly misdirected itself in upholding the arbitrator's award of 36 months' damages to the respondent when, in fact, there was no evidence on record to support this finding.
- ii) Whether the respondent was entitled to damages *in lieu* of reinstatement (including back pay) denominated in US Dollars when the lawful currency of Zimbabwe at the date the order of reinstatement or payment of damages was made (July 2002) was Zimbabwe dollars, and further, when the cause of action arose, and the alleged damages were suffered, in Zimbabwe dollars.

It is evident from the appellant's grounds of appeal that it does not take issue with the award, *per se*, of back pay and damages to the respondent. The appellant does not question the amounts cited as representing the respondent's salary for the period August 2000 to July 2002, nor that the latter should be the cut-off date for calculating both the back-pay and damages. Rather, the appellant's concerns are centred on the period of 36 months awarded in terms of damages and the conversion of both amounts from Zimbabwe to United States dollars. Accordingly, the arbitrator's award to the respondent in terms of back – pay and benefits from August 2000 to July 2002, stands uncontroverted. This amount according to the arbitrator's calculations on page 90 of the record, adds up to Z\$446,442.00. The court *a quo*'s decision in respect of this amount, will accordingly be upheld.

2.1 *The award of 36 months' damages*

It has already been observed that the appellant initially brought his claim for quantification of damages before a labour officer. It is noted in the arbitrator's award that the matter was subsequently referred to an arbitrator, a Mr *M.T. Vareta* who unfortunately passed on before he could finalise the matter. It is not clear from the record what specific terms regulated the mandate of the arbitrator in *casu*, in relation to the proceedings before the first arbitrator. What is however implied by both parties, through their references to it, is that oral argument on the dispute was heard before Mr *Vareta*. The appellant refers to what was said in cross-examination by the respondent on the issue of mitigation of his loss. The respondent, on the other hand, alludes to the oral proceedings before Mr *Vareta*, and avers that evidence relating to his age, his qualifications and health had been led in relation to the issue of quantification. Whatever the truth of the matter might be, the arbitrator in *casu* makes no direct reference to the evidence placed before Mr *Vareta* nor, specifically, whether he determined the issue pertaining to the quantification of damages *in lieu* of reinstatement based on what had been submitted before Mr *Vareta*. All the arbitrator said was:

“It is of course trite that in considering the amount of damages to be paid, what should be considered is the period of time it would have taken a dismissed employee to find alternative employment and allow him that period's salary as damages. It is my considered view that the claimant could have gotten reasonable alternative employment in 3 years' time (36 months) considering his age, health and qualifications see *Baison Ncube's v Delta Beverages* LC/MT/81/87. Claimant is therefore entitled to 36 months' salary as damages, *albeit* in US dollars.”(my emphasis)

It is pertinent to note that the arbitrator did not specify the respondent's age, health and qualifications that he mentioned. The period of 36 months, according to his award, was to be reckoned from 12 July 2002, the date on which reinstatement or damages *in lieu* thereof, was ordered by the labour officer. While the arbitrator gives the impression that he

considered the respondent's age, health and qualifications in computing the period for which the damages in question were to be paid, it is not in dispute that, with the consent of the parties, he determined the matter on the basis of written submissions from them. In his summary of the respondent's submissions before him, the arbitrator makes no reference to the fact that the respondent had made any allusion to his health, age and qualifications as a basis for his claim for damages. The respondent avers, a fact which is denied by the appellant, that he submitted before Mr *Vareta*, details concerning his age, qualification and health status in relation to the question of damages. It is significant that he does not state that he placed this evidence before the arbitrator *in casu*. I find in view of this that there is merit in the appellant's submission that the arbitrator erred by awarding the respondent 36 months damages *in lieu* of reinstatement without hearing any evidence as to his age, health and qualifications. The court *a quo*, being none the wiser concerning whether or not the arbitrator had direct knowledge of these issues, resorted to speculation and stated as follows in its judgment.

“It is important to observe that, even though the record before the court does not show such, the age, health and professional qualifications of the respondent would have been placed before the arbitrator at the pre-arbitration hearing by the parties concerned.”

I am persuaded by the appellant's submissions that the court *a quo* misdirected itself by going beyond what was placed before it to speculate on what might or might not have been placed before the arbitrator. The parties, as indicated were not in agreement on this point. The arbitrator did not allude to the fact that he had before him, either at pre-arbitration or arbitration level, a record of the incomplete proceedings commenced before the late Mr *Vareta*, nor what details, if any, such record might have contained on the issue. More importantly, whether and on what basis, it would have been proper for him to rely on such evidence. Clearly, there was no basis for the court *a quo* to make, much less rely, on this

particular speculation. Even assuming that the court's speculation was correct, that the arbitrator must have had before him the details in question, this did not absolve the court from its obligation to assess the evidence in question and satisfy itself that the decision of the arbitrator was justified on such evidence. I find that the court *a quo*, as an appellate court, abdicated its responsibility in this respect.

The upshot of all this is that in the absence of any evidence on this point being led before the arbitrator, no reliable evidence was placed before the court *a quo*, nor this court, to support a finding that the arbitrator properly took into account the respondent's health, age and qualifications in assessing the period for which the damages concerned were to be paid. Further to this I find that the appellant is correct in its assertion that the arbitrator compounded his error by not, additionally, considering other factors normally taken into account in making assessments of this nature. Specifically he did not consider whether or not the respondent made any effort to mitigate his loss, nor the economic environment prevailing in 2002 and the prospects, if any, that such environment offered in terms of alternative employment. The arbitrator's approach, which the court *a quo* endorsed, is the type that is described as 'wrong' in the following *dictum* from the case of *Redstar Wholesalers v Edmore Mabika* SC 52/05 and correctly cited by the appellant;

"The Labour Court's approach was wrong and its consequent ruling grossly unreasonable. The court is not entitled to pluck a figure out of a hat because it is of the view that this figure 'meets the justice of the case'. Instead, the court is required to hear evidence as to how long it would reasonably take a person in the position of the dismissed employee to find alternative employment."

These words apply with equal force to an arbitrator seized with a similar matter, and are eminently apposite *in casu*.

While ordinarily the remedy would have been for this court to remit the matter to the court *a quo* for the hearing of evidence on the factors requisite for a proper assessment of the damages in question, I take the view that this is not a proper case for such action. Firstly, this dispute has dragged on for some 15 years and remitting the matter would only lengthen the delay and frustrate efforts to bring finality to this litigation. Secondly, but for the respondent's age and health status, this court has before it the requisite evidence and is in as good a position as any other court to reasonably assess the damages in question.

The appellant argues correctly that the respondent, by his own admission, took no effort to secure alternative employment, but had simply decided to settle into a life of subsistence farming. He had therefore neglected to discharge the duty, as was incumbent upon him, to mitigate his loss. The respondent, in my view properly, did not make the argument that subsistence farming could be viewed as alternative employment for him. The duty to mitigate one's loss has been emphasised in a plethora of case authorities³. It has a direct bearing on the assessment of appropriate damages *in lieu* of reinstatement. The respondent's failure to make the attempt accordingly works to his detriment in this respect.

The appellant also alludes to the economic environment prevailing in 2002 and in my view correctly asserts that it was more conducive in terms of employment prospects than later became the case. It is the appellant's submission, therefore, that the respondent should have been able to secure alternative employment within a period of three months, had he taken the trouble to look for it.

³ See for instance, *Gauntlet Security (Pvt) Ltd 1997 (1) ZLR 417 (S)*; *Ambali v Bata Shoe Company Ltd 1999(1) ZLR 417 (S)*; *Madyara vs Globe and Phoenix Industries (Pvt) Ltd 2002 (2) ZLR 269(S)*

I find that there is merit in these submissions. The record shows that the respondent was a fork lift driver, therefore a skilled worker. This Court takes judicial notice of the fact that in 2002, the economic meltdown of 2006 – 2009, and its devastating effects on employment prospects, wages, salaries and the cost of living generally, was some four years into the future. The economy was in a much more robust state than what it descended into post 2006. My view is that it should have been possible for the respondent, had he been so inclined, to obtain alternative employment within a much shorter period than that assessed by the arbitrator. It follows that 36 months' salary as a measure of damages *in lieu* of damages was not only excessive given the period in question, it resonated more with the turbulent economic environment prevailing in the country after 2006. The arbitrator and the Labour Court appear not to have taken this important dynamic into consideration.

I find, in the final analysis, and despite the fact that the court is in the dark as to what his age or health status was, nor how much experience he had garnered during his employment with the appellant, that the respondent did not prove a case for the 36 months' damages awarded to him by the arbitrator.

I am satisfied on the basis of the factors considered above that an amount representing 6 months' salary would have adequately compensated the respondent for the loss of his employment. I have already determined that the amount will be calculated on the basis of the salary applicable to the respondent's grade on the date on which his reinstatement was ordered by the labour officer, that is, 12 July 2002.

2.2 Appropriate currency denomination

This brings me to the second issue raised by this appeal, which is whether or not the court *a quo* erred in upholding an award for back pay, benefits and damages in favour of the respondent, which was denominated in US dollars. The appellant argues that no basis for such an award was established while the respondent contends to the contrary.

Both the arbitrator and the court *a quo* justified the disputed currency conversion on the fact that any award sounding in Zimbabwe currency would be a *brutum fulmen*. The court *a quo* states as follows in its judgment:

“It is worth noting that the basis upon which the arbitrator was asked to make an award sounding in foreign currency was that if he made an award in Zimbabwe dollars that would be tantamount to coming up with a *brutum fulmen*. This in the court’s view was sufficient ground to ask the arbitrator to make an award sounding in forex as opposed to the Zimbabwe dollar” (my emphasis).

Earlier in its judgment the court *a quo* had correctly cited various authorities that have declared the competency of the court to make awards sounding in foreign currency, in appropriate circumstances⁴. This would be where the party seeking such relief has pleaded or made out clearly that he or she is entitled to relief in foreign currency. The court noted, however that a number of the cases referred to were on appeal to the Supreme Court. This however did not deter the court in making the following determination:

“The court is therefore satisfied that the respondent by raising that argument, did lay before the arbitrator sufficient grounds upon which the arbitrator had to make an award sounding in foreign currency. The court is therefore satisfied that there was no error of law which the arbitrator fell into in respect of these two grounds of appeal.”

Some of the cases that the judge cited as pending on appeal in this Court have since been determined and remitted to the Labour Court for computation and conversion of various Zimbabwe dollar amounts into US dollars. This Court has ruled that the Labour

⁴ See *Gift Bob David Samanyau & 38 Others v Fleximail HH 108/11; Terence Alan Blake & Anor v TABS Lighting (Pvt) Ltd SC 13/10*

Court, as a court of equity, is the only court vested with jurisdiction to perform this task. Thus, contrary to the court *a quo*'s sentiments that there was "no error of law" on the part of the arbitrator in respect of the US dollar denominated award that he made, it is now settled that the question of which court is vested with authority to make the appropriate currency conversions, is one of jurisdiction. Not being vested with such jurisdiction, the arbitrator thus fell into an error of law by seeking to convert the back pay, benefits and damages awarded to the respondent in *casu*, from Zimbabwe dollars into US dollars. The arbitrator compounded his error by settling on a conversion rate whose validity was in doubt.

This Court has, in the case of *Madhatter Mining Company v Marvellous Tapfuma SC 299/12* put the matter beyond doubt when it cited *s 2A of the Labour Court Act* and emphasised its purpose, which is to advance social justice and democracy in the work place. It aims to do this by, among other things, "securing the just, effective and expeditious resolution of disputes and unfair labour practice".

The court in *Madhatter Mining Company (Supra)* then went on to state as follows:

"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."

I find, on the basis of this authority, that there is no merit in the appellant's submission that the respondent, not having 'suffered' the said damages in US dollars, was not entitled to damages denominated in that currency. Neither am I persuaded that the

respondent's damages were "incapable of calculation," nor that only nominal damages were appropriate. I have found that the respondent did suffer loss and was entitled to damages *in lieu* of reinstatement. Failure to award him the damages in a currency that realistically compensates him for the harm suffered, would in my view undermine the advancement of equity, social justice and democracy at the workplace.

In *casu*, the court *a quo* simply endorsed the calculations made by the arbitrator, without questioning his competency to do so under the law. As the authority cited above makes it clear, this was a misdirection. It is on this basis that the matter will be remitted to the Labour Court for a proper computation and conversion to US dollars, of the damages that this Court has determined are properly due to the respondent. The same applies with respect to the back-pay and benefits that were awarded to the respondent.

In the final result, it is ordered as follows:

1. The appeal succeeds in part.
2. The matter is remitted to the Labour Court for a determination of the question and the applicable rate of conversion into foreign currency, of the amounts referred to in paragraph 3(iii), (iv) and (v) below.
3. The judgment of the Labour Court is set aside and is substituted with the following:
 - i) "The appeal is allowed with no order as to costs;
 - ii) The Arbitrator's award be and is hereby set aside;
 - iii) The appellant shall pay the respondent back pay and benefits covering the period 2 August 2000 to 12 July 2002, and amounting to Zimbabwe \$446,442.00;

- iv) The appellant shall pay the respondent 6 months' salary as damages *in lieu* of reinstatement, which shall be calculated in Zimbabwe dollars on the basis of the salary rates obtaining on 12 July 2002;
- v) The amounts referred to in subparagraphs (iii) and (iv) above shall be paid together with interest at the prescribed rate, from the date of the judgment of this Court to the date of payment in full, and
- vi) The amounts referred to in paragraphs (iii),(iv) and (v) above, shall be converted to United States dollars in the manner and at the rate to be determined by this Court in the exercise of its equitable jurisdiction.”

4. Each party shall bear its own costs.

HLATSHWAYO JA I agree

CHIWESHE AJA I agree

Dube, Manikai and Hwacha, appellant's legal practitioners

Dondo and Partners, respondent's legal practitioners