

REPORTABLE (55)

ERICKSON MVUDUDU
v
AGRICULTURAL AND RURAL DEVELOPMENT AUTHORITY

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GWAUNZA JA & PATEL JA
HARARE, MAY 19 & OCTOBER 20, 2015

F. Girach, for the appellant

L. Uriri, for the respondent

PATEL JA: This is an appeal against a judgment of the Labour Court dismissing an appeal against an award rendered by an arbitrator. That arbitral award quantified the damages payable to the appellant pursuant to an earlier award ordering his reinstatement into the service of the respondent.

Background

The respondent is a statutory body established under the Agricultural and Rural Development Authority Act [*Chapter 18:01*]. The appellant was employed by the respondent in January 2008 as its Chief Executive Officer *cum* General Manager. On 26

February 2009 he was sent on special leave and on 19 May 2009 he was notified by the respondent of its decision to terminate his employment.

The matter was then referred to an arbitrator. On 26 January 2010 the arbitrator found that the appellant had been unlawfully dismissed and ordered his reinstatement with effect from the date of his purported dismissal. Thereafter, negotiations for reinstatement having failed, the matter was again referred to the arbitrator.

On 27 October 2010 the arbitrator quantified his award for damages *in lieu* of reinstatement. He based his award on a monthly salary of US\$1,009 in accordance with documentary evidence furnished by the respondent. He then ordered the respondent to pay the following amounts: \$ 19,384 as back-pay and benefits from the date of dismissal to the date of his first award; cash *in lieu* of leave; \$60,540 being sixty months salary as damages for loss of employment; a further \$60,540 being sixty months salary as punitive damages for failure to reinstate; and interest at the prescribed rate on all of these amounts.

The appellant, being dissatisfied with the arbitrator's award, appealed to the Labour Court on several grounds pertaining to the question of his reinstatement, the date of termination of his employment, his correct monthly salary and his entitlement to contractual benefits. The respondent in turn cross-appealed, defending the propriety of its decision not to reinstate the appellant, and challenged the arbitrator's award of punitive

damages and his failure to deduct certain amounts allegedly owed by the appellant to the respondent.

Decision Appealed

The court *a quo* dismissed the appeal and partially allowed the cross-appeal for the following reasons. It found, having regard to the relevant correspondence, that the possibility of reinstatement was not part of the arbitrator's mandate. The effective date of termination of employment was 4 February 2010, when the respondent opted to pay damages, and not when the Labour Court ruled against the appellant's reinstatement. The court also found that the arbitrator's reliance on a monthly salary of \$1,009 was based on irrefutable evidence and more in accordance with reason, as compared with the figure of \$5,000 claimed by the appellant. As regards the appellant's claim for contractual benefits, no documentary or other evidence was placed before the arbitrator to substantiate that claim. Again, his claim for punitive damages was neither placed before the arbitrator nor substantiated by any supporting evidence. Similarly, the respondent's claim to deduct certain amounts owed by the appellant was not raised before the arbitrator. In the event, the court *a quo* dismissed the appeal and allowed the cross-appeal to the extent of setting aside the arbitrator's award of punitive damages.

The issues raised in the notice of appeal herein are largely identical to those before the Labour Court and may be summarised as follows:

- Whether the question of reinstatement was an issue before the arbitrator, in addition to the quantification of damages *in lieu* thereof.

- What was the effective date of termination of employment? (This issue was not pursued by counsel for the appellant and appears to have been abandoned).
- What was the correct amount of the appellant's monthly salary?
- Was the appellant entitled to his claim for contractual benefits?
- Whether the claim for punitive damages was properly before the arbitrator and correctly awarded by him.

Reinstatement and Quantification of Damages

At the hearing of this matter, Adv. *Girach*, for the appellant, largely focused his argument on the question of reinstatement. He submits that damages are only payable if reinstatement is not tenable. This is not a matter for the employer's election but, as envisaged in ss 89 (2) (c) and 97 (2) of the Labour Act [*Chapter 28:01*], a matter of fact to be alleged and proved by the employer. There must first be an inquiry as to whether reinstatement is no longer tenable and the employee remains employed until that inquiry is finalised. Despite the appellant's submissions on this point, the arbitrator proceeded on the basis that he was only dealing with quantification. Similarly, although this was raised before the court *a quo*, it misdirected itself in not upholding this ground of appeal. The matter should therefore be remitted to that court to determine this question.

Adv. *Uriri*, for the respondent, submits that s 89 (2) (c) of the Act does not give the Labour Court the power to order reinstatement without damages. The same applies to an arbitrator by virtue of s 98 (9). The alternative of damages *in lieu* of

reinstatement must be stipulated. This codifies the common law position enunciated in *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S).

For the purposes of this case, it only becomes necessary to consider and interpret the provisions of the Act adverted to by counsel if it is found that the question of reinstatement was properly and squarely before the arbitrator in the first instance. If it was not, there would be little point in embarking on an abstract and academic exercise of no present significance.

In addressing this aspect, it is necessary to consider the relevant correspondence between the parties' legal practitioners. This shows that on 4 February 2010 the respondent opted to pay damages *in lieu* of reinstatement because "*reinstatement is no longer tenable given the clear irretrievable breakdown of the relationship between the parties*". It took the position that "*the only course that remains open is the quantification of damages*".

The appellant's lawyers replied without prejudice on 8 February 2010. They did not challenge the respondent's assertion of irretrievable breakdown, but instead noted "*that your client is not willing to have ours reinstated. This then brings us to the issue of damages*". They then indicated that their client's proposals on damages would be served shortly and that, in the meantime, the respondent should pay all of the appellant's back-pay and benefits up to 4 February 2010 "*when you made an election that our client would not be reinstated*".

There followed further correspondence without prejudice between the legal practitioners extending from February to May 2010. This evinced marked disagreement between the parties as to the appellant's monthly salary and, consequently, his entitlement to back-pay and benefits as well as the *quantum* of damages payable *in lieu* of reinstatement. Eventually, by letter dated 24 May 2010, the appellant made a stark turnabout and disagreed that reinstatement was no longer an option. In the absence of agreement between the parties, he called for the matter to be referred to the arbitrator for adjudication.

It is clear from the foregoing that the appellant had initially accepted the respondent's election and taken the position that his reinstatement was not in issue. He was perfectly happy to proceed with the matter on the basis that his entitlement to the payments due be quantified, either by agreement or by arbitration. The fact that this position was taken in a letter written without prejudice does not detract from its significance. The ambit of protection from the admissibility of evidence conferred by the "without prejudice" rule is not unqualified. Thus, an admission made in correspondence without prejudice is admissible where the facts sought to be established thereby do not relate to the substance of the negotiations contained in such correspondence. See *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 678H-670A and the authorities there cited. In the instant case, what was being negotiated without prejudice by the parties was not the appellant's reinstatement but his back-pay and benefits and the *quantum* of damages payable *in lieu* of reinstatement. The appellant only resuscitated the

question of reinstatement over three months later when the negotiations between the parties failed to produce any definitive agreement.

There is a further and more important aspect of this case that must be considered in relation to the events preceding the second arbitration. On 14 July 2010, both parties received the arbitrator's notification to attend arbitration proceedings in "*the matter concerning quantification of damages in lieu of reinstatement*". On the date scheduled for the hearing, *i.e.* 21 July 2010, the appellant's legal practitioners wrote to the arbitrator seeking a postponement of the hearing because the lawyer handling the matter was engaged in a continuing trial. The arbitrator proceeded to hold a pre-arbitration hearing on the same date and issued an interim order setting out the timelines for the filing of submissions by the parties and a fresh date for the hearing of the matter. Paragraph 1 of this order explicitly stated that "*the Claimant shall file his submissions on quantification of damages in lieu of reinstatement with the Arbitrator*". Subsequently, the arbitrator issued a further notification to the parties to attend arbitration proceedings on 26 August 2010, again in "*the matter concerning quantification of damages in lieu of reinstatement*".

As is evident *ex facie* the interim order, the pre-arbitration hearing was attended by the claimant (the appellant) in person and by the respondent's counsel and instructing legal practitioner. The written order itself appears to have been acknowledged as having been received by both parties on 23 July 2010. It is abundantly clear from all of the foregoing that the appellant and his legal practitioners were fully aware of the purpose

of the arbitration proceedings in question and the sole issue for determination by the arbitrator, *i.e.* the quantification of damages *in lieu* of reinstatement. Despite that awareness, they did nothing to disabuse the arbitrator or the respondent of the notion that this was the sole issue for determination. Nor did they take any steps to have the interim order revised to incorporate the question of reinstatement. In these circumstances, the arbitrator cannot be faulted for having disregarded that question in the proceedings before him and in the terms of the award that he rendered. By the same token, the court *a quo* cannot be found to have misdirected itself in holding that the arbitrator did not err in confining himself to the issue of quantification of damages and that he had no mandate to consider whether or not reinstatement was still possible.

In the premises, I find that the question of reinstatement was not an issue before the arbitrator, in addition to the quantification of damages *in lieu* thereof. In the light of this finding, as I have already stated, it becomes unnecessary to address the larger question as to whether the viability of reinstatement must first be determined before proceeding to consider the alternative of damages. In any event, it follows that the first ground of appeal cannot be sustained and must accordingly fail.

Correct Monthly Salary and Contractual Benefits

In his submissions before the arbitrator and the court *a quo* the appellant's position was that his salary before the termination of his employment was in the region of US\$5,000.00 per month. Both the arbitrator and the court rejected this position and

adopted the figure of US\$1,009.00 as the basic monthly salary, having regard to the documentary evidence adduced by the respondent.

At the hearing of this appeal, Adv. *Girach* did not, quite correctly in my view, pursue the grossly inflated figure initially contended for by the appellant. Instead, he submitted that the figure that should have been used in assessing damages is not the basic salary of US\$1,009.00 but the net salary of US\$1,032.54 as appears from the monthly computation presented by the respondent. Adv. *Uriri* did not challenge this position and I see no basis for disallowing the amount of US\$1,032.54 as the net monthly salary for the purpose of calculating the terminal payments due to the appellant.

Insofar as concerns the contractual benefits payable to the appellant, these appear from his letter of appointment, dated 7 November 2007, enumerating the multifarious allowances and benefits offered to him as part of his total remuneration package. Adv. *Girach*, in his submissions, confined himself to the housing allowance, being 20% of basic monthly salary, and professional and club membership allowance, being 2% of annual salary.

Having regard to the amounts reflected in the monthly computation that I have alluded to above, it is clear that the housing allowance of 20% was already factored into the appellant's pay structure in arriving at his net monthly salary. However, the professional and club membership allowance was omitted and must obviously be incorporated in calculating the contractual benefits due to the appellant.

In the premises, I find that the sums payable to the appellant (in respect of backpay and benefits, cash *in lieu* of leave and damages for loss of employment) as quantified by the arbitrator and endorsed by the Labour Court, are to be recalculated on the basis of a monthly salary of US\$1,032.54 (as opposed to US\$1,009.00) and with the addition of 2% of annual salary for the professional and club membership allowance.

Claim for Punitive Damages

The basis for awarding punitive damages to the appellant was justified by the arbitrator as being the respondent's refusal to reinstate the appellant without proffering any reason for its refusal. In so doing, the arbitrator relied on the discretion conferred upon him by proviso (iii) to s 89 (2) (c) (iii) of the Labour Act. He accordingly awarded punitive damages equivalent to 60 months salary, over and above 60 months salary as damages *in lieu* of reinstatement. Adv. *Girach* submits that the arbitrator correctly exercised his discretion in this regard and that the court *a quo* erred in overruling the arbitrator on the ground that the appellant had failed to prove the exact quantum of punitive damages.

Adv. *Uriri* counters that the Labour Court correctly set aside the award of punitive damages. He submits that punitive damages under proviso (iii) are only payable where the order made relates solely to damages as opposed to an order for reinstatement and damages *in lieu* of reinstatement. In any event, a claimant for punitive damages must substantiate such damages and the court *a quo* correctly rejected the appellant's claim as it had not been adequately substantiated.

In awarding punitive damages, the arbitrator sought to reinforce the primacy of reinstatement as the most appropriate remedy for unlawful dismissal. He considered that the respondent had expressly refused to reinstate the appellant without giving any cogent reason why reinstatement was not possible. This stance could not be condoned and it was for that reason that he decided to award punitive damages over and above damages *in lieu* of reinstatement, in order to protect the primary remedy of reinstatement from being eroded by errant employers like the respondent. In setting aside the award of punitive damages, the Labour Court did not specifically address the arbitrator's reasoning *per se* but proceeded on the basis that the appellant had failed to adduce any evidence to substantiate his claim for punitive damages.

Section 89 (2) of the Labour Act, in its relevant portions, provides as follows:

“(2) In the exercise of its functions, the Labour Court may—

- (a)
- (b)
- (c) in the case of an application made in terms of subparagraph (ii) of subsection (7) of section *ninety-three*, make an order for any of the following or any other appropriate order—
 - (i) back pay from the time when the dispute or unfair labour practice arose;
 - (ii) in the case of an unfair labour practice involving a failure or delay to pay or grant anything due to an employee, the payment by the employer concerned to the employee or someone acting on his behalf of such amount, whether as a lump sum or by way of instalments, as will, in the opinion of the Labour Court, adequately compensate the employee for any loss or prejudice suffered as a result of the unfair labour practice;
 - (iii) reinstatement or employment in a job:

Provided that—

- (i) any such determination shall specify an amount of damages to be awarded to the employee concerned as an alternative to his reinstatement or employment;

- (ii) in deciding whether to award damages or reinstatement or employment, onus is on the employer to prove that the employment relationship is no longer tenable, taking into account the size of the employer, the preferences of the employee, the situation in the labour market and any other relevant factors;
- (iii) should damages be awarded instead of reinstatement or employment as a result of an untenable working relationship arising from unlawful or wrongful dismissal by the employer, punitive damages may be imposed;
- (iv) insertion into a seniority list at an appropriate point;
- (v) promotion or, if no promotion post exists, pay at a higher rate pending promotion;
- (vi) payment of legal fees and costs;
- (vii) cessation of the unfair labour practice;
- (d)
- (e)

My reading of provisos (ii) and (iii) to s 89 (2) (c) (iii) is that different considerations apply under these provisos in determining the untenability of the employment relationship in question. Where the question to be decided is whether to award damages or reinstatement, the onus is on the employer to prove such untenability, taking into account the size of the employer, the preferences of the employee, the situation in the labour market and any other relevant factors. These criteria relate to the practicability of reinstatement and the continuation of the employment relationship as assessed from an objective economic or commercial standpoint. However, once it is decided that reinstatement is no longer feasible by dint of any one or more of the specified factors and that damages should be awarded instead, the sole criterion to be applied is whether the untenable employment relationship arose from the unlawful or wrongful dismissal of the employee by the employer. What is relevant at that stage is the employer's fault in the manner or circumstances in which he dismissed the employee and

the extent of his blameworthiness in causing the irretrievable breakdown of the employment relationship. It is only in this situation that the question of punitive damages comes into play and where the discretion to award such damages may be exercised in order to penalise the employer for his culpable conduct.

Furthermore, proviso (iii) to s 89 (2) (c) (iii) does not, in my view, envisage the award of double damages, *i.e.* punitive damages in addition to damages *in lieu* of reinstatement. Rather, what may be imposed is an award of damages *in lieu* of reinstatement that is punitive in nature and effect. In other words, what is contemplated is a single award of punitive damages that exceeds what would ordinarily be awarded as damages *in lieu* of reinstatement, *i.e.* in the absence of any aggravating circumstance occasioned by the manner in which the employer dismissed the employee.

It follows from the foregoing that the arbitrator *in casu* misconceived the basis and scope of his discretion under proviso (iii) to s 89 (2) (c) (iii). He relied upon the respondent's refusal to reinstate the appellant rather than the untenability of the employment relationship arising from the dismissal of the appellant. He thereby applied the wrong test and consequently misdirected himself in that regard. Moreover, he also erred by awarding punitive damages in addition to damages *in lieu* of reinstatement.

Finally, there is the ground that was quite correctly relied upon by the court *a quo* for reversing the arbitrator's award of punitive damages, *i.e.* the absence of any evidence in computing those damages in the sum of US\$60,540.00 equivalent to 60 months salary.

The arbitrator appears to have plucked this figure from the air without relating to any evidence adduced before him to substantiate the appellant's claim. Although it is trite that damages need not be quantified with mathematical precision, there must be some evidentiary basis for calculating damages, even if they be punitive damages.

Thus, in *Ruturi v Heritage Clothing (Pvt) Ltd* 1994 (2) ZLR 374 (S), where no evidence was led as far as the award of damages was concerned, it was held that it was necessary for the Labour Relations Tribunal to hear evidence in order to assess the damages. As was aptly observed by Gubbay CJ, at 380E:

“For these reasons, the award must be set aside, for to quantify damages, or indeed make any finding, on no evidence, is to err in law.

Disposition

In the result, the appeal succeeds to the very limited extent that I have indicated in relation to the monthly salary and contractual benefits that are due to the appellant. Consequently, the correct net monthly salary of US\$1,032.54 (instead of US\$1,009.00) and an additional 2% of the basic annual salary for professional and club membership allowance (*i.e.* 2% of US\$1,009.00 X 12) are to be applied in recalculating the amounts payable to the appellant in respect of backpay and benefits, cash *in lieu* of leave and damages for loss of employment. I should add that the resultant adjustments are considerably smaller than would have been the case had the appellant succeeded in his wholly insupportable claim to peg his salary in the region of US\$5,000.00 per month.

In all other respects, which constitute the bulk of the issues before this Court, the appeal cannot be sustained and must therefore be dismissed. Given the virtually inconsequential extent of the success enjoyed by the appellant, it seems appropriate that he should bear the costs of this appeal.

It is accordingly ordered that:

1. The appeal is partially allowed as regards the salary and allowance figures to be applied in calculating the amounts payable by the respondent to the appellant.
2. The appeal be and is hereby dismissed in all other respects.
3. The appellant shall pay the costs of this appeal.

MALABA DCJ: I agree.

GWAUNZA JA: I agree.

Mbidzo, Muchadehama & Makoni, appellant's legal practitioners

Mlotshwa & Company, respondent's legal practitioners