

IN THE LABOUR COURT OF ZIMBABWE

JUDGMENT NO.

LC/MS/02/2014

MASVINGO, 21 MARCH 2014

CASE NO.

LC/MS/02/13

& 25 APRIL 2014

In the matter between:-

GREAT ZIMBABWE UNIVERSITY

Appellant

And

GRACE MATEMA

Respondent

Before The Honourable P. Muzofa, Judge

For Appellant - **Mr. M. Jaravaza (Legal Practitioner)**
For Respondent - **Mr. S.T. Mutema (Legal Practitioner)**

MUZOFA J:

This an appeal against an arbitral award made in favour of the Respondent.

Before the matter proceeded into the merits, the Respondent raised two points *in limine*. The first point in limine being that the grounds of appeal 1,2,3, 4 and 6 do not comply with section 98 (10) of the Labour Act Chapter [28:01] (The Act). Since they did not raise any question of law. The second point *in limine* being that the Appellant failed to comply with the arbitrator's award is in contempt and therefore is barred until it purges its contempt. I will deal with the points *in limine* in turn.

Section 98 (10) of the Act provides

“An appeal on a question of law shall lie to the Labour Court from any decision of an arbitrator appointed in terms of this section.”

The courts have had opportunity to explain what a question of law is, primarily it is a question as to what is the law as regard certain issues, See *Mutsuta and Another v Cagar (Pvt) Ltd* 2009 (1) ZLR. In that case the court also extended the meaning to include a misdirection on the facts that is so gross to defy logic. In the case of a misdirection on the facts there must be an allegation that the misdirection is so unreasonable that no sensible person who applied his or her mind to the facts would have arrived at such a decision.

Bearing in mind the law on this aspect I will address each ground of appeal. The first ground of appeal is that the arbitrator misdirected himself in finding that Appellant varied terms of the employment contract with the Respondent. For the appellant it was submitted that this is a question of law as it interrogates at what stage a contract can be said to have been varied, what constitutes a variation of contract considering the facts. The Respondent did not illuminate how this ground of appeal is said to be a question of fact. In my view the allegation that the Appellant varied the terms of the contract raises the question, at law what is a variation of contract? and does the Appellant's conduct fall within that category. In other words in dealing with this ground of appeal the court would consider what amounts to a variation of a contract at law. In my view this ground of appeal raises a question of law.

The second ground of appeal is that the arbitrator misdirected himself in finding that extra duties of conducting lectures, setting and marking examinations were imposed on the Respondent in the absence of evidence of the extent and nature of Respondent's duties at the commencement of the first fixed contract of employment. This ground of appeal raises factual issues on which the arbitrator made a finding. In its heads of argument, Appellant concedes that this is a misdirection on the facts. To the extent that there is no averment that the misdirection is grossly unreasonable this misdirection of fact does not amount to a question of law.

The third ground of appeal is that the arbitrator misdirected himself in regarding Respondent as a Graduate Teaching Assistant whereas Respondent had been employed as a Teaching assistant. This is also a factual finding. The arbitrator considered the facts before him to come up with a factual finding whether the Respondent was a Teaching assistant or not. In this case there is no law to refer to it is purely a factual issue. There is also no allegation that the finding by the arbitrator on this aspect was grossly unreasonable, so again this ground of appeal does not amount to a question of law.

The fourth ground of appeal is that the arbitrator misdirected himself in finding that “respondent becomes a fall (sic) time lecturer when she undertook same (sic) duties performed by Lecturers regardless of Respondent’s ineligibility due to her academic qualifications”. Appellant in its heads of argument concedes that this ground of appeal raise misdirection on the facts. Again appellant does not allege that the misdirection was so unreasonable that no sensible person who applied his or her mind to the facts would have arrived at such a decision to bring it within the ambit of a question of law. To that extent this ground of appeal does not raise a question of law.

The sixth ground of appeal is that the arbitrator erred at law in holding that Respondent was entitled to salary and benefits backdated to September 2007. In my view this ground of appeal raises questions of fact. I say so because the arbitrator having considered the facts before him concluded that the Respondent was entitled to the backdated salary and benefits. In any event this ground of appeal is subsumed in the fifth ground of appeal relating to legitimate expectation. The fifth ground of appeal is a direct consequence of the finding on legitimate expectation. This also is a ground of appeal that does not raise a question of law.

The first point *in limine* partly succeeds in that the 2, 3rd and 6th grounds of appeal donot raise questions of law, only the first ground of appeal raises a question of law.

I will proceed to address the second point *in limine* raised by the Respondent. The second preliminary point being that in terms of Section 92E (2) of the Act an appeal does not suspend the operations of the decision appealed against. In response it was submitted that, the award by the Honourable Arbitrator ordered reinstatement and in lieu thereof payment of damages. The Appellant was clear that reinstatement was not an option that left the payment of damages as the only alternative. There was no amount to be paid, Respondent did not seek for quantification therefore the order was incapable of compliance at that stage so it was submitted the Appellant did not have any dirty hands.

The position of the law is clear, an appeal does not suspend the operation of the decision or determination appealed against. The determination by the Honourable arbitrator should be capable of compliance. In *casu* as admitted by the Respondent in its heads of argument after the award was made, 'Respondent tendered service but the Appellant did not accept'. Clearly from the time that Appellant communicated that reinstatement was no longer an option it was in the interests of the Respondent to pursue the issue of damages. It was therefore upon the Respondent to make sure that the award in so far as the damages are concerned was made to sound in figures for it to be capable of compliance. I am persuaded by the arguments forcefully made on behalf of the Appellant. The appellant was not in contempt of court the award required some further steps to be taken before it became legible for compliance.

In view of the foregoing the following order is made.

1. The first point *in limine* be and is hereby upheld to the extent that the 2nd, 3rd, 4th and 6th grounds of appeal do not raise questions of law.
2. The second point *in limine* be and is hereby dismissed.

There shall be no order as to costs.

Dzimba, Jaravaza & Associates, Appellant's legal practitioners
Messrs Gunje & Chasakara, Respondent's legal practitioners