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Judgment No S.C. 80\2001
Civil Appeal No 378\2000

BULAWAYO BOTTLERS v LEONARD ZIKITI

SUPREME COURT OF ZIMBABWE
McNALLY JA, SANDURA JA & MALABA JA
HARARE SEPTEMBER 13 & OCTOBER 2, 2001

P. Nherere, for the appellant

E.W.W. Morris, for the respondent

SANDURA JA: This is an appeal against a judgment of the Labour Relations Tribunal ("the Tribunal") which ordered the appellant to pay to the respondent his salary and benefits from the date when he was unlawfully dismissed, i.e. 11 February 1997, to the date when he would attain the age of early retirement, i.e. 55 years. It was common cause that the respondent turns 55 in December 2005.

The background facts are as follows. The respondent was employed by the appellant. On 11 February 1997 he was dismissed, but that dismissal was subsequently declared unlawful by the Tribunal. Having set aside the dismissal, the Tribunal ordered the appellant to reinstate the respondent or pay him damages in lieu of reinstatement.

The appellant opted to pay to the respondent damages, but the parties could not agree on the *quantum* of the damages. An application for the quantification of the damages was, therefore, filed in the Tribunal.

The Tribunal subsequently ordered the appellant to pay to the respondent his salary and benefits from the date when he was unlawfully dismissed to the date when he would attain the age of early retirement on the ground of ill health. The respondent had sustained a leg injury whilst at work.

Aggrieved by the Tribunal's decision the appellant appealed to this Court.

The main ground of appeal relied upon by the appellant was that the Tribunal erred when it concluded that because of his injury the respondent suffered from a disability which made any reasonable prospects of obtaining alternative employment virtually non-existent.

In my view, the finding by the Tribunal which is being challenged on appeal is a finding of fact. Such a finding cannot be attacked on appeal because, in terms of s 92(2) of the Labour Relations Act [Chapter 28:01], the right of appeal from any decision of the Tribunal is confined to questions of law only. See *Muzuva v United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S) at 219-220.

However, there is one qualification to that principle. Where the finding of fact is so outrageous in its defiance of logic or of accepted moral standards

that no sensible person who had applied his mind to the question to be decided could have arrived at it, such a finding of fact would be a valid ground of appeal. See *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670C-E; and *PF-ZAPU v Minister of Justice (2)* 1985 (1) ZLR 305 (S) at 326E-G.

The question which now arises is whether the finding by the Tribunal falls within that category. I do not think so.

The Tribunal relied upon a medical report compiled by an orthopaedic surgeon, and on its own observation of the respondent. According to the report, the injury sustained by the respondent was a compound fracture of the left tibia. The relevant part of the report reads as follows:-

> "He has a healed scar in the front of the left leg. He has a leather lagging attached to a plastic cock up splint. He has a foot drop due to a lateral popliteal nerve palsy. The leg aches after walking a kilometre and in cold wet weather. He cannot stand for prolonged periods. The graft site is itchy and bulges out with pain when he coughs or strains.
>
> This man's injuries affect his duties. The pain in the leg starts in the morning when he commutes to work.
>
> He has a permanent eighteen percent disability (18%)."

After observing the respondent the Tribunal concluded as follows:-

> "The Tribunal had the benefit of seeing the applicant (now respondent) and can confirm from its own observation that the medical report of Doctor Vera is accurate. On the facts, the Tribunal's opinion is that the applicant (respondent) is almost an invalid. Having regard to the prevailing harsh economic climate, it is highly unlikely that he would be able to compete with able bodied better educated men on the tight job market.

> For that reason, the Tribunal believes the applicant (respondent) when he says there are no reasonable prospects of him being able to secure alternative employment before reaching retirement age."

Having seen the respondent when this appeal was argued, and bearing in mind the contents of the medical report, I cannot say that the Tribunal's conclusion is outrageous in its defiance of logic in the sense already indicated. On the contrary, it seems to me that the Tribunal's conclusion is correct.

The respondent is about 51 years old. This means that the period remaining before he attains the age of early retirement, i.e. 55 years, is about 4 years.

In my view, it is not unreasonable in present circumstances, with a high level of unemployment, to say that the respondent is not likely to find alternative employment within the four year period.

The main ground of appeal, therefore, falls away.

However, that is not the end of the matter. Mr *Nherere*, who appeared for the appellant, raised two other issues which were not part of the appellant's grounds of appeal set out in the notice of appeal. As these are issues of law, I shall deal with them.

He submitted that the Tribunal erred in that in its award it did not make provision for a deduction for contingencies, such as the possibility that the respondent may die before attaining the age of 55 years. He also submitted that a further deduction should have been made in respect of the benefit of the accelerated payment

of future earnings. In other words, he submitted that the award should have been a sum which when properly invested would have increased in such a way that when the respondent turned 55 it would have yielded a sum equal to the total amount which he would have received had he retired at that age.

Mr *Morris,* who appeared for the respondent, *in forma pauperis*, submitted that bearing in mind the fact that the time left before the respondent attains the age of 55 years is short, and the fact that the country is presently experiencing an unprecedented level of hyperinflation, with every indication that the situation will get worse rather than better, no deductions should be made for contingencies or for the benefit of the accelerated payment of future earnings. I find the argument very persuasive.

Nevertheless, the principles relied upon by Mr *Nherere* in the submission that deductions should be made for contingencies and for the benefit of the accelerated payment of future earnings are well established. See, for example, *Minister of Defence & Anor v Jackson* 1990 (2) ZLR 1 (S).

However, the exact percentages to be deducted, if any, shall be determined by the parties or, if they cannot agree, by the Tribunal in terms of paragraph 3 of its order.

In the circumstances, and subject to the above qualification, the appeal is dismissed with costs.

McNALLY JA: I agree

MALABA JA: I agree

Scanlen & Holderness, appellant's legal practitioners