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Judgment No. SC 16/05
Civil Appeal No. 90/04

THE B. S. LEON TRUST v LETWINA MADZIVANYIKA

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & MALABA JA
HARARE, FEBRUARY 24 & JUNE 13, 2005

P C Paul, for the appellant

The Respondent in person

ZIYAMBI JA: This is an appeal from a judgment of the Labour Relations Tribunal (now the Labour Court), hereinafter referred to as "the Tribunal", ordering the appellant to pay to the respondent damages in lieu of reinstatement as well as damages to cover future earnings. The facts forming the background of this appeal are as follows:

The appellant, on 24 July 1997, made an application to the Minister in terms of s 3(d) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985, S.I. 371/85, for authority to dismiss the respondent on grounds of insubordination. The letter reads in part;

> "The sister-in-charge of the hospital reported, together with the Junior Sister, to the Matron's office on the morning of Monday 21 July that the senior staff could no longer tolerate Mrs Madzivanyika's destructive behaviour to the smooth running of the Hospital. It was reported by the Sister-in-Charge that she is extremely insolent, both verbally and non-verbally, either ignoring the Sister's instructions by remaining silent or answering the Sister back. She displays complete insubordination to senior staff right across the board.
>
> When called to the Matron's office to explain her behaviour to the three Matrons present she further displayed insolence, was extremely rude, both verbally and by demeanour, and answered all three back. She displayed no sense of dignity and respect to her peers what-so-ever. The Chairman of the Executive Committee was called into the office and after discussions with the Matrons he suggested she be suspended with a request to your offices that we dismiss her from our staff.
>
> Mrs Madzivanyika has been displaying a severe attitude problem to senior staff ever since the commencement of her employment with the B S Leon Trust. As far back as 1988 the Executive Committee warned her in a letter that they had received adverse reports from the Matron on the standard of her work and that she was uncooperative and unwilling to carry out the duties allotted to her. This has not changed to date.
>
> The B S Leon is run efficiently by Professional people who are dedicated to their work and to the smooth running of the Home. Mrs Madzivanyika has shown no interest throughout her employment in participating in the team work required in running a hospital, indeed her attitude to her work has been most disruptive.
>
> We, therefore, in view of the foregoing, formally request that we may dismiss Mrs Madzivanyika with immediate effect".

On the day of the hearing, 11 December 1997, the respondent was in default despite having been duly notified of the hearing date. The Labour Relations Officer, Nyazika, conducted a hearing and, after considering the merits of the application, granted authority to the appellant to dismiss the respondent. There was no appeal against this order. However on 5 February 1998, the appellant received a further notification to appear before the Labour Relations Officer on 7 April 1998 for a further hearing of the matter. This notice, signed by A.G. Nyazika, stated:

> "I have decided to set the matter down again to ensure that Letwina is present - she says that she did not get the first date right and alleges she was disadvantaged."

Needless to say, the Labour Relations Officer was *functus officio* and had no jurisdiction to set aside his own judgment and entertain the matter afresh. However, despite protestations by the appellant to that effect, the appellant received, on 10 July 1998, a 'determination' ordering the appellant to pay to Letwina the sum of $3450,09 "in wages and terminal benefits… within two weeks of receipt of the determination". The date of the determination is illegible. Nyazika had reversed his previous decision.

Before an appeal could be lodged by the appellant, as it intended to do, it received notification of an appeal to the Senior Labour Relations Officer by Letwina dated 20 July, 1998. Her grounds of appeal were that the notification given to her of the initial hearing date before Nyazika, cited 14 December – a Sunday, as the date of hearing.

The appeal was heard on 13 October 1998, by Mrs Mombeirere ('Mombeirere'), a Senior Labour Relations Officer. The respondent admitted at that hearing that she had had proper notice of the initial hearing which took place on 11 December 1997.

Notwithstanding the above admission, the appellant received a letter from Mombeirere stating that Nyazika did not abide by the principles of natural justice in that he did not afford the appellant time to be heard and that accordingly the matter was being reopened.

The objections made by the appellant in a letter dated 30 November 1998, namely, that there was no violation of the principles of natural justice since the respondent was given the opportunity to attend the hearing and ignored it, were ignored and the matter was referred by Mombeirere to another Labour Relations Officer, Ganyani, purportedly in terms of s 95 (1)(b) of the Labour Relations Act [Chapter 28:01] (now the Labour Act).

Ganyani held a hearing on 7 July 1999 and found that whilst the respondent may have been "generally rude" and had habitually refused to take instructions from her superiors, however "B. S. Leon Trust did not dismiss her procedurally thereby violating the provisions of s 3 of SI 371/85. The employer did not seek ministerial approval in terminating Madzivanyika's services".

Of course this finding was wrong for, as I have recounted above, the appellant sought, and obtained, the necessary approval for dismissing the respondent. Nevertheless, Ganyani ordered the appellant to pay $14 400 to the respondent by way of damages.

The respondent was, strangely enough, not content with the determination. She applied on 20 July 1999 for reference of the matter to a Senior Labour Relations officer. The grounds of this application were:-

"I was not given a chance to be heard and my side of the story was not discussed."

The matter was referred back to Mombeirere who, on 29 September 1999, made a determination in favour of the respondent without, apparently, dealing with the merits of the application. The appellant was ordered to pay to the respondent $23 472,00 – as "damages equivalent to two years salary". This order was arbitrary as there was no evidence led and therefore no basis for it.

Aggrieved by this determination, the appellant appealed to the Tribunal. The respondent also cross appealed praying for payment of her terminal benefits and "any other money due to her as a result of her long service with the appellant".

The Tribunal wrongly concluded that the respondent had been dismissed without a hearing and upheld the respondent's cross appeal. It awarded her damages equal to the salary she would have earned had she remained in employment with the appellant until her 60th birthday when she was due to retire. In doing so, the Tribunal ignored the respondent's evidence that she had worked since her dismissal and would in all probability have continued to earn an income.

Not only did the Tribunal misdirect itself in failing to take into account that the appellant had applied for ministerial approval and that the respondent was dismissed after a hearing by the Labour Relations Officer, Nyazika, but the award which it proceeded to make was arbitrary and unreasonable without any regard to the legal principles applicable in the awarding of damages for wrongful dismissal as to which, see *Clan Transport Company (Private) Limited* v *Clan Transport Workers Committee* SC

1/02; *Gauntlett Security Services (Private) Limited v Leonard* 1997 (1) ZLR 583(S); *Ambali v Bata Shoe Company Limited* 1999 (1) ZLR 417 (S).

In view of the numerous misdirections and incompetent orders set out above the appeal can only succeed.

Accordingly the appeal is allowed with costs and the determination of the Tribunal is set aside and substituted by the following:

"The appeal is allowed.

The dismissal of the respondent by the appellant is confirmed.

The respondent's cross appeal is dismissed".

SANDURA JA: I agree.

MALABA JA: I agree.

Wintertons, appellant's legal practitioners