Judgment No. SC 52/05
Civil Appeal No. 271/04

REDSTAR WHOLESALERS vs EDMORE MABIKA

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE, MAY 24 & OCTOBER 24, 2005

N Moyo, for the appellant

No appearance for the respondent

ZIYAMBI JA: This appeal is against an award of damages made in favour of the respondent by the Labour Court.

The respondent was unlawfully dismissed from his employment with the appellant on 12 February 1999. On 9 July 1999, the Local Joint Committee for the National Employment Council for the Commercial Sectors through its designated agent ordered his reinstatement with full salary and benefits. This ruling was confirmed by the Negotiating Committee and subsequently by the Labour Relations Tribunal (now the Labour Court) which issued the following order:

"It is therefore ordered that:-

(a) the appeal be and is hereby dismissed.

(b) Appellant be and is ordered to reinstate respondent to his original position without loss of salary and benefits from date of dismissal to date of this order and damages if reinstatement is no longer possible. The damages are to be agreed between the parties but in the event of a deadlock either party is free to approach the Tribunal for quantification".

The parties having failed to reach an agreement on the quantum of the damages payable, approached the Labour Court for quantification of the damages. The Order issued by the Labour Court and which is the subject of this appeal is as follows:

"In the circumstances it is ordered as follows:-

1. Respondent pays Applicant:-

- Back pay at grade six rates calculated from February 1999 to 7 January 2003.
- Overtime due to 473 hours at grade six rates then applicable.
- Cash in lieu of leave.
- 1 x 10 kg sugar per month calculated from month of introduction of benefit to 7 January 2003.
- twenty four months salary at 7 January 2003 salary rate as damages for loss of employment.
- Interest at the prescribed rate.

Respondent is to take into account the prescribed statutory deductions".

The appellant based its appeal on the following grounds:

"1. It being common cause that the respondent was suspended on 12 February 1999 and the order for reinstatement was issued by the designated agent on 9 July 1999, the court *a quo* erred in law in ordering the appellant to pay back pay and benefits from the date of suspension (12 February 1999) to 7 January 2003 being the date that the court *a quo* heard and determined the appeal. In this respect, the court *a quo* ought to have ordered back-pay and benefits only for the period of 12 February 1999 to 9 July 1999.

2. The court *a quo* further erred in law and misdirected itself in ordering the appellant to pay for damages for loss of employment calculated at the salary rate applicable as at 7 January 2003. In this respect the court *a quo* ought to have ordered such damages to be paid at the rate which was operative as at the date of the first determination ordering reinstatement namely 9 July 1999.

3. It being common cause that the "sugar benefit" was introduced on 24 February 2004 and further that the first determination ordering reinstatement was made by the designated agent on 9 July 1999, the court *a* quo erred in law and misdirected itself in ordering the appellant to accord this benefit to the respondent up to 7 January 2003.

4. In any event, the order of twenty four months' salary as damages coupled with back-pay and benefits for nearly six years is without factual basis and grossly excessive as to amount to a misdirection and warrants intervention by this Honourable Court".

The appellant prayed that the order of the court *a quo* be set aside and substituted with the following order, namely, that the appellant pays to the respondent:

"(a) Back-pay and benefits at the then operative scale for the period 12 February 1999 to 9 July 1999;

(b) Overtime due of 463 hours at the then applicable rate;

(c) Cash in lieu of leave;

(d Twelve months salary from 9 July 1999 as damages for loss of employment;

(e) Interest at the prescribed rate.

Appellant is to take into account the prescribed statutory deductions".

I turn to address the grounds of appeal.

The Issue of Back-Pay and Benefits

The entitlement of the respondent to back pay was not in issue. It was common cause that the reinstatement ('being with full salary and benefits') was to have retrospective effect. See *Oliver Chiriseri v Plan International* SC 56/2002; *Kuda Madyara v Globe & Phoenix Industries (Private) Limited t/a Renco Mine* SC 63/2002. What is in issue is the date to which the back-pay was payable. It has been decided by this Court that the relevant date, namely the date to which back-pay should be payable is the date on which the order of reinstatement is made. In the *Chiriseri* case, *supra*, this Court stated at p 7 of the cyclostyled judgment:

> "However, there is no basis for awarding the appellants back-pay and benefits in respect of the period after 29 March, 1995, the date on which the order of reinstatement was issued."

Accordingly the order for back-pay in the instant case should be payable to 9 July 1999, the date on which the order of reinstatement was made.

The Issue of Damages

Two questions arise for determination under this head, namely, the period - twenty four months – for which damages were ordered; and the rate of salary to be used in computing the damages.

It was contended by the appellant that there was no factual basis for the award of 24 months salary as damages. There was, it was submitted, no evidence led on which the court *a quo* could have been persuaded that two years salary would adequately compensate the respondent for the loss of his employment with the appellant.

The principle established in cases like *Ambali v Bata Shoe Co Ltd 1999* (1) ZLR 417 (S) and *Zimbabwe United Passenger Company* v *Richard Christopher Daison* SC 87/2002 is that damages for wrongful dismissal are calculated on the basis of the length of time, calculated from the date of dismissal, which it would reasonably take the dismissed employee to find other employment. The employee is entitled to his salary for that period which must be ascertained by the court on the basis of the evidence before it.

The respondent told the court *a quo* that by June/July 2000, he had successfully applied for two jobs. However, when it was discovered by the prospective employers that there was a pending case against him, the offer was, in each case, withdrawn. This evidence in itself suggests that the respondent could reasonably have obtained employment within twelve months after his dismissal. However, the court *a quo* found:

> "With regards (to) the quantum of damages, I am persuaded by the applicant's submission that two years salary will meet the justice of the case"… (My underlining)

and, later in the judgment:-

> "Except for the mere say so, respondent proffered no further evidence of how within twelve months applicant would have found alternative employment".

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. The fact that the parties have led insufficient evidence to enable the court to arrive at an informed conclusion does not absolve the court from its duty to utilize its powers in terms of s 89(2)(a)(i) of the Labour Act by calling evidence in order to resolve the issue.

It is clear from what has been stated above that the respondent was able to obtain offers of employment within one year of his dismissal. Both Holiday Inn and N&R Enterprise offered him employment although they later withdrew the offers because of his pending case. In the circumstances, the evidence before the court *a quo* supported an award of one year's salary – which was what the appellant offered to pay to the respondent. The arbitrary award by the Labour Court of two years' salary as damages is grossly unreasonable and cannot, therefore, be supported.

The Labour Court awarded to the respondent 24 months salary at 2003 rates. It has been shown above that on the evidence, the respondent was entitled to one year's salary calculated from the date of his dismissal namely, 18 February 1999. The appellant submitted that the respondent ought to be paid his salary from the 18 February

1999 to 28 February 2000 at the rate pertaining at the date of the order for his reinstatement which is 9 July 1999. It seems to me that the appellant's proposition is sound. No legal basis has been advanced, nor is any established on the record, for using a rate of salary pertaining at the date of the appeal judgment four years from the date of dismissal. Thus the respondent should be paid his salary for twelve months at the rate pertaining on 9 July 1999.

The Sugar Benefit

This benefit was introduced in October 2002 some three years after the first determination ordering the respondent's reinstatement was made. The order by the court *a quo* that this benefit should be paid to the respondent up to 2003 was without legal foundation and therefore, grossly unreasonable. This is because the benefit had not been introduced during the period of the respondent's employment with the appellant and, in any event, it did not form part of the respondent's contract of employment. It is therefore not a right flowing from his contract of employment.

Accordingly, the appeal is allowed with costs. The order sought by the appellant is hereby granted as prayed.

CHIDYAUSIKU CJ: I agree.

MALABA JA: I agree.

Coghlan Welsh & Guest, appellant's legal practitioners