HEYWOOD INVESTMENTS (PRIVATE) LIMITED t/a GDC HAULIERS vs PHARAOH ZAKEYO

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GARWE JA & GOWORA JA
HARARE, FEBRUARY 4 & JULY 9, 2013

A Mugandiwa, for the appellant
No appearance for the respondent

GOWORA JA: After hearing counsel for the appellant in this matter, we allowed the appeal with costs and ordered that the matter be remitted to the court *a quo* for the application placed before it by the respondent to be determined on the merits. The respondent, despite having been served with a notice of the hearing through his legal practitioners of record, was not represented. It was indicated that reasons would follow in due course. These are they.

The respondent was employed by the appellant as a security sergeant. On 23 March 2006 he was dismissed from employment on allegations that he had been involved in theft of diesel from a vehicle parked in the premises he was guarding. He successfully appealed to the Labour Court against the dismissal. The Labour Court ordered that the respondent be reinstated to his former position with full benefits, and that should reinstatement be no longer possible, he be paid damages in lieu thereof. In the event of the parties failing to agree on the damages they were free to approach the Labour Court for

quantification of the damages. The appellant then appealed to the Supreme Court which upheld the decision of the Labour Court on 18 January 2010.

The appellant chose not to comply with the order of reinstatement. On 19 March 2010 the respondent filed a court application with the Labour Court for an order for the quantification of damages on the grounds that the appellant had failed to reinstate him into employment. His claim for damages was calculated as follows:

a) Leave days from the date of dismissal being 20 March 2006 to 18 January 2010.
b) Transport and housing allowances at 20% of monthly salary from 20 March 2006 to 18 January 2010.
c) Salaries and annual bonuses from date of dismissal to date of reinstatement at USD300 per month.
d) Shift allowances at 17.5% of monthly salary.
e) Gratuity at 3 months for every year of service.
f) Damages equivalent to five years salary.

On 1 April 2011 the Labour Court gave an order in the respondent's favour and ordered the appellant to pay damages as follows:

1. Three months leave pay at USD245 per month.
2. Leave days for three years at 3 times 36 days (108) days (sic) at USD245 monthly.
3. Salary for the period February 2009 till date of payment at US$245 per month.
4. Gratuity -3 months salary per year worked at USD245 per month.
5. Damages 18 months salary at USD245 per month.

The appellant was not satisfied with the result and appealed to this Court on a number of grounds. The first ground was that the application by the respondent was fatally defective for want of form, in that it failed to comply with the requirements of the Labour Court Rules, S.I. 59/2006 (the Rules).

The appellant is correct that s 14 of the Rules requires that an application to the Labour Court in terms of s 89(2) (b) (c) or (d) of the Act be in Form LC 1. Contrary to this provision the respondent filed a court application. The learned President held that the appellant had no basis for objecting to the manner in which the application was filed. The court *a quo* was of the view that the appellant could not raise a defect on the papers presented by the respondent as a defence to the application when the appellant itself had failed or refused to comply with the order directing it to reinstate the respondent.

The court said:

> "The order of this court directs the employer to reinstate the employee (sic). I am not sure where the notion of non compliance with rules arises from when the obligation is upon the employer to comply with the order of this Court. In the circumstances I find no basis for the employer to raise any objections to the application. The court will therefore proceed to consider the application for quantification of damages."

It is correct, as contended by the appellant, that the court *a quo* misdirected itself in its finding that the appellant was not entitled to raise the issue of the respondent's failure to comply with the rules because the appellant itself had allegedly not complied with the order to reinstate the respondent. It seems to me that the court *a quo* failed to appreciate the legal issue raised by the point *in limine.* It is incumbent upon a court before which an application is made to determine it. A court before which an interlocutory application has

been made should not proceed to determine a matter on the merits without first determining the interlocutory application.

In Grain Marketing Board v Martin Muchero SC 59/07 GARWE JA stated as follows at p 6-7 of the cyclostyled judgment:

> "Once the application to uplift the bar had been made, the court became seized with the matter. The court was enjoined to make a determination on that application. It did not do so. Instead it proceeded on the basis that there was no such application before the court. In this regard the court erred.
>
> I am satisfied that the trial judge erred in disregarding the oral application and proceeding as if none had been made."

The Labour Court was obliged to consider the question whether in view of the provisions of s 14 requiring an application to be in form LC 1, the failure to comply with the provisions of the rule was such as to render the application fatally defective. That issue had to be considered in isolation of the alleged failure by the appellant to comply with the order of reinstatement. The refusal by the court to determine the point *in limine* is a misdirection on a point of law.

It seems to me that it would be appropriate for this court to remit the matter to the Labour Court for a determination of the interlocutory application. Indeed, Mr *Mugandiwa* made a concession to the effect that this court should order that the matter be remitted to the Labour Court for the determination by that court of the application before it. He did not pray for a dismissal.

The next ground of appeal was that the court *a quo* misdirected itself in finding that the appellant had not furnished any evidence to controvert the claim by the

respondent. The appellant also contends that the court misdirected itself by finding that the appellant bore the onus to disprove the respondent's claims.

This is what the court said:

> "The respondent suggests that salary for persons in applicant's category is one hundred and ninety (USD$190) per month. No supporting document has been provided to show that this is the position. Applicant is asking for US$300 per month which the court accepts as evidence under oath. Even though there is no proof from the applicant in support of the suggested US$190.00, the court is of the view that in the interests of fairness the average between what is claimed and what was suggested on behalf of the respondent would meet the justice of the case. The average between the two figures is US $245.00."

and later on at p 4:

> "On the claims the respondent position (sic) is that the applicant ought to have submitted proof in support of claims like transport and pension. I agree. The applicant cannot just pluck a figure from the air without support and expect that an unsupported claim will be granted. But again it has to be noted that the applicant supplied an affidavit in support of his application. On the other hand the respondent has not made any effort by way of documents of affidavit to contradict the applicant's claim. The respondent as the applicant's former employer should have documents in support of its offer. In the absence of such proof from the respondent the court will be guided by the applicant's affidavit."

The application was filed in terms of s 14 of the rules of the Labour Court. The rules do not provide for the filing of affidavits by either party to the dispute. The finding by the learned President that the appellant omitted to file affidavits to counter the assertions of the respondent clearly amounts to a misdirection.

It was incumbent upon the respondent to adduce evidence in support of his claim for damages.The court placed an onus upon the appellant to counter what it clearly found was not evidence. The Labour Court is obliged in terms of s 90A (4) of the Act, to ascertain facts in any proceedings before it and where necessary, to call parties to give

evidence. It is further empowered to examine any witness appearing before it. What the court is not empowered to do is to award damages in the absence of any evidence in support of such award.

In *Redstar Wholesalers v Edmore Mabika* SC 52/05 ZIYAMBI JA at p 6 of the cyclostyled judgment said:

> "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 utilise its powers in terms of s 89 (2) of the Labour Act by calling evidence in order to resolve the issue."

In *casu*, the position before the court *a quo* was not that the parties had led insufficient evidence on the issue of damages. The application had attached to it an affidavit in which the respondent made assertions as to the basis upon which he sought to claim damages. There was, however, no evidence placed before the court on the specific heads under which the respondent sought an order of damages. The court's reasoning that the appellant should have filed documents or affidavits to contradict the respondent's claim can only be described as being grossly unreasonable.

In *First Mutual Life Assurance Limited v Muzivi* 2007 (1) ZLR 325 (S), CHEDA JA at p 328C-D said:

> "The suggestion that the employer failed or refused to furnish the respondent with the appropriate salary scale suggests a wrong approach to the issue.
>
> It is the respondent who had the onus to prove his claims.

> If he was dismissed when he was in a certain grade, it was for him to tell the court what salary scale applied to him at the time of his dismissal. He could not just claim that he was a certain grade whose salary scale he did not know. This would suggest that he did not know what he was claiming."

The Labour Court was wrong in the approach it adopted in this matter. The learned President was alive to the fact that the respondent had failed to furnish evidence regarding the salary scale at which the damages had to be assessed. When the respondent was dismissed his salary was pegged in Zimbabwe dollars. At the time the application was filed in 2010, the preferred currency in use in the country was admittedly the United States dollar. The applicant pegged his salary at USD$300.00 per month but did not adduce evidence to establish that a person employed by the appellant of equivalent rank and experience to him at the time he was dismissed earned that amount. The appellant suggested that the sum was much lower than that, but that currently it was pegged at USD100.00 per month. The court decided on the sum of USD245.00 per month as being the average sum between what was claimed and what was offered.

The reasoning of the court that the suggested average was in the interest of fairness and justice was grossly unreasonable and a misdirection on the law. In *Aaron's Whale Rock Trust v Murray and Roberts Ltd and Another* 1992 (1) SA 652 at 655 BERMAN J said:

> "Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the Court to quantify his damages and to make an appropriate award in his favour. The Court must not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the Court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss."

The Labour Court clearly fell into error by importing in its calculation of damages a rate of pay which was completely divorced from what the respondent was in receipt of at the time that the court ordered his reinstatement, that is, 29 October 2008. The court further misdirected itself by finding that the appellant had suggested that employees in respondent's grade were earning US$190.00 and using this figure to arrive at what it referred to as the average.

The evidence of what the rate of earnings applied to an employee in the respondent's grade was readily available to the respondent under collective bargaining agreements which therespondent could easily have obtained. The damages were consequently capable of assessment with exact mathematical precision. The court *a quo*, instead, embarked upon conjecture and plucked a figure out of the air in so far as the rate of pay was concerned. In *Ebrahim v Pittman N.O.* 1995 (1) ZLR 176, BARTLETT J quoted with approval the remarks by BERMAN J in *Aarons Whale Rock Trust case (supra)* at 656D where the learned judge said:

> "……it is not competent for a court to embark upon conjecture in assessing damages where there is no factual basis in evidence, or an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of the loss could have been made."

None of the amounts awarded to the respondent by the court *a quo* was supported by evidence. The court also made an order for back pay which could not be justified on the facts before it. It ordered that the respondent be paid salary and benefits from February 2009 to date of payment. The judgment upon which the respondent had based his claim for damages had ordered his reinstatement without loss of benefits, or, in the alternative damages in lieu of reinstatement. The judgment was dated 29 October 2008.

Back-pay cannot legally be awarded in respect of a period after the date of the order of reinstatement is granted. This principle was applied by SANDURA JA in *Chiriseri & Anor v Plan International* 2002 (2) ZLR 261 at 265D-G where he stated:

> "As this co**u**rt stated in *Leopard Rock Hotel Co (Pvt) Ltd v Van Beek*, supra, at 254H-255A:
>
> > "…… 'back-pay' and 'damages' are indeed different concepts, but only in the sense that 'damages' is a wider concept. It will normally include back-pay, but may include, for example, compensation for loss of promotion prospects, interest, and other elements as appropriate.
>
> 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, each appellant is entitled to (a) net back-pay and benefits from 20 July 1994 to 29 March 1995, a period of about eight months and (b) net salary and benefits for eighteen months."

In addition, an award of damages should take into account the question of tax. In *Chiriseri & Anor v Plan International* (supra) SANDURA JA went on to say:

> "The next issue to consider is whether this matter should be remitted to the Tribunal for the calculation of the damages payable to each appellant. As the record of proceedings in the Tribunal shows the gross salary and benefits of each appellant, and gives no indication of the net salary and benefits, I was initially tempted to remit the matter to the Tribunal. However, I am concerned that that course would unduly delay the finalisation of this matter."[1]

In my view, the court *a quo* misdirected itself in various respects on questions of law and its decision cannot stand. The appeal therefore succeeds. It is ordered as follows:

1. The appeal is allowed with costs.

2. The judgment of the court *a quo* is set aside.

[1] At 265H-266B

3. The matter is remitted for the court to determine the point *in limine* raised by the appellant, namely that the respondent had adopted the wrong procedure in respect of the quantification of damages. In the event that the point *in limine* fails, the court should then proceed to properly quantify the damages due to the respondent.

MALABA DCJ: I agree

GARWE JA: I agree

GOWORA JA: I agree

Wintertons, appellant's legal practitioners