DISTRIBUTABLE (43)

JACOB BETHEL CORPORATION
v
EMMANUEL CHIKUYA

SUPREME COURT OF ZIMBABWE
MAKARAU JA, GOWORA JA & BERE JA
HARARE: OCTOBER 11, 2018, & JUNE 3, 2019

T Mpofu & *S M Hashiti* for the appellant

F Mahere for the respondent.

MAKARAU JA

> "This matter demonstrates the challenges which emerge from parties pursuing the same issue before different judges who may each be seized with different aspects of their appeals. The result is divergent judgments from the same court.
>
> Whereas CHIVIZHE J made a finding that bonus is payable at the discretion of the employee and is not an entitlement, I made the decision that, in this case, it was a contractual entitlement given the circumstances of the case. ……."

The above remarks, made by the court *a quo* in its ruling granting the appellant leave to appeal in this matter, aptly summarises the situation that arises in this appeal. Two conflicting judgements were handed down by the Labour Court regarding whether or not the appellant is liable to the respondent for the payment of bonus and damages related to bonus. The two judgments were given on different dates. One was given in an appeal against an award by an arbitrator on the merits of the award. The other was given in a judgment quantifying the

award. The latter, handed down on 3 June 2017, quantifying and awarding a bonus shortfall and damages in respect of the bonus to the respondent, is the subject of this appeal.

The facts giving rise to this appeal are largely common cause. In 2008, the respondent was employed by the appellant as a sales and marketing manager. On 1 June 2010, he was moved to operations as a manager. Feeling side-lined and demoted by this move, he reported the matter to a labour officer. Failing conciliation, the matter was referred to arbitration. On 11 October 2011, the arbitrator ordered inter alia, that the respondent "suspends the demotion exercise" and negotiate a new contract with the respondent. He further ordered that in the event that the parties failed to negotiate a new contract, they were to negotiate the quantum of damages payable to the respondent in lieu of reinstatement to his former position as sales and marketing manager. Quite separately and as a substantive order, the arbitrator ordered that the respondent be paid as a bonus, an amount equivalent to 30 percent of his salary, less any payments made over the period of employment as a 13th cheque.

The appellant appealed against the substantive award of a bonus to the respondent, arguing that the respondent was not entitled to a bonus. Whilst that appeal was pending, the respondent approached an arbitrator for quantification of the damages due to him in terms of the entire award. This he did on the basis firstly, that the parties had failed to agree on both the terms of a new contract and the damages payable and secondly, that the appellant had not applied for an order suspending the operation of the award after filing the appeal. He contended that he was within his rights to have the damages awarded quantified notwithstanding the noting of the appeal against the award of the bonus.

Agreeing with him, the court *a quo* quantified the damages due to the respondent in the sum of US104 829.52. The appellant noted an appeal against this second award. On 4 July 2014, the award was set aside in part. The part of the award finding the appellant liable to pay the bonus and damages in relation to the bonus was upheld. The exact amount payable under this head was to be calculated at a given rate and in the event that the parties failed to agree on the quantum, they were to approach the court for quantification. The parties failed to agree and as invited in the order, approached the court *a quo* for quantification.

At the hearing of the application for quantification, it was brought to the attention of the court *a quo* that the appeal against the first award on the merits had been successful. In particular, it was brought to the attention of the court a quo that the appeal court had determined that the appellant was not liable to pay the respondent a bonus.

Proceeding in the face of this advice, the court *a quo* quantified the unpaid bonus and damages related to the unpaid bonus and ordered the appellant to pay to the respondent the sums of $31 134,86 and $23 022,16 as bonus shortfall and damages respectively.

Aggrieved by the above order, the appellant noted this appeal attacking the court's decision to order payment of the bonus shortfall and damages in respect of the bonus when the liability to do so had been set aside by the appeal court.

The sole and crisp issue that falls for determination in this appeal is whether or not the court *a quo* was correct to proceed to quantify the un- paid bonus and damages related to the bonus in the face of an earlier judgment finding that the respondent was not entitled to these.

In making the order that it did in the circumstances of the matter, the court a quo had this to say:

> "*The judgment by my sister CHIVIZHE J is not binding on me. My decision of 4 July 2014 is extant. It was not successfully appealed against. It is the basis for this quantification.*"

It is apparent from the above that the court *a quo* believed firstly that, the judgment by CHIVIZHE J, the appeal court, absolving the appellant from liability to pay the bonus was not binding on it and secondly, that it had properly and competently made an order regarding the liability of the appellant to pay a bonus to the respondent on 4 July 2014. In consequence, it further believed that since its order in this regard was still extant and had not been appealed against, it could competently proceed to quantify the bonus shortfall and the attendant damages.

An appropriate starting point would be to note in passing that a judgment does not belong to the judge who authors it. It is a judgment of the court to which the judge is appointed. Once it is correctly viewed that judgments are passed by the institution and not the individual members who constitute the court, sentiments tending to denote personal claims to judgments as are to be discerned in the judgment *a quo* become clearly misplaced.

Further, had the *court a quo* correctly viewed the judgment as belonging to the institution and not as belonging to the individual judge, this would have taken away the personal affront that the court *a quo* clearly felt when it was advised that the court, sitting on appeal on the merits of the award, had ruled that the respondent was not entitled to a bonus, contrary to its own views and contrary to what it believed was its own finding.

Whilst the court *a quo* did not articulate the reason why it believed that the judgment by the appeal court was not binding on it, the argument was advanced on appeal and

on behalf of the respondent that both courts enjoyed parallel jurisdiction and therefore the previous decision of one was not binding on the other. Reliance in this regard was placed on the provisions of the rules of the Labour Court 2006 which were in use when the judgment was written, and which in rule 35 provided:

> "Where a case similar or identical to the one being heard by the court has been previously decided, any principle by the case shall have persuasive authority."

This rule in effect reinforced the principle of *stare decisis* in its horizontal application.

With respect, the situation that was before the court *a quo* did not fall to be resolved by the application of the principle of *stare decisis* either horizontally or hierarchically. The situation before the court a quo was not an instance where one court of parallel jurisdiction was being called upon to adopt or apply a principle that had been discovered and applied by an earlier court. It could not and was not suggested that the labour court sitting on appeal against the merits of the award was higher in ranking than the court *a quo.* It was not conceivably the situation that the two courts were determining similar issues and were being called upon to be consistent in their findings unless there was a basis for departing from the earlier finding. This, in essence and very briefly, is what the doctrine of the *stare decisis* postulates. To the contrary, the situation that was before the court *a quo* was simply an instance where the same court was being called upon to make pronouncements at different times, on two components of the same cause of action. The one dealt with the issue of liability whilst the other was supposed to deal with the quantification of that liability, only in the event that liability was established.

Reliance for the argument advanced on behalf of the respondent was also sought from the decision in *Matanhire v BP Shell Marketing Services* SC 5/05 where this Court was

faced with two conflicting decisions of the same court over the same issue. In resolving the issue that was before it in that matter, this court applied the basic principle that once a matter has been finalised by a court, that court becomes *functus* and thereby loses authority and competence to adjudicate on the matter again.

Again with respect, the ratio in *Matanhire* supra, is not of assistance to the respondent at all.

An analysis of the two decisions before the court *a quo* shows that the decision of the appeal court absolving the appellant from liability was a stand-alone judgment. It was complete in itself. It was properly and competently sought and obtained. It therefore became extant and was not only binding on the parties to the dispute but on the court itself.

If it is again correctly viewed that judgments belong to courts and not to the individual authors, then it is easy to find that the judgment on liability became binding on the entire Labour Court. This would include the court a quo. On the basis of the ratio in *Matanhire* (*supra*), the Labour Court became *functus* on the issue of the liability of the appellant to pay bonus to the respondent once this judgment was handed down. It follows that the Labour Court as an institution, no matter how constituted, could not pronounce on the issue again. Viewed in this light, the assertion by the court a quo that it was not bound by the earlier judgment loses all colour and must accordingly be rejected.

Quite apart from the above, the judgment by the appeal court judge was binding on the court *a quo* not because of any ranking of the courts but because it resolved the issue of liability whilst the *court a quo* was seized with the quantification of that liability. Liability

always precedes quantification of that liability. Put differently, damages are not payable in a vacuum. They rest on an obligation which in turn gives content to the liability. In the absence of an obligation, there can be no competent order for the payment of damages even if quantification was done prior to a determination of the liability. Therefore, where liability and quantification of that liability are determined at different times as in *casu,* the judgement on liability will precede and be binding on the court seized with quantification. This is logical and is akin to placing the proverbial horse in front of the cart. The judgement by the appeal court was always the horse and no matter how late it arrived at the scene, the cart, represented herein by the court a quo, had to recognise and yield to it.

It stands to reason and calls for no authority to hold that once the appeal court had decided and held that the appellant was not liable as alleged, there was not liability to be quantified by the court *a quo* or any other court for that matter.

A judgment on liability will always take precedence over and trump where necessary, the judgment quantifying the damages due to the claimant not because of any ranking of the courts but because the one aspect naturally and logically precedes the other to complete the cause of action under the law of damages.

From its *ratio decidendi,* it is easy to establish where the court *a quo* fell into error. It viewed the decision of the court on 4 July 2014, which it appropriated as its own, as a judgment on the liability of the appellant. It was not.

It is common cause that on 4 July 2014, the court *a quo* sat as an appeal court against the award quantifying the damages due to the respondent. At that time, the appeal

against the award on its merits regarding the respondent's entitlement to bonus had been noted and was pending before another court of competent jurisdiction. Quantification of the award, including quantification of parts of the award that had been appealed against proceeded notwithstanding the noting of the appeal as this is permissible at law in this jurisdiction.

It is not in dispute that at all times the court *a quo* was seized with the quantification of the award. At no stage was it seized with the appeal against the award on its merits.

In July 2014, when it handed down the judgment that it sought to rely on, the court was not called upon to determine and did not determine the liability of the appellant to pay the respondent a bonus. It was called upon to determine the correctness or otherwise of the various amounts that the arbitrator had ordered the appellant to pay to the respondent under various heads.

It is also common cause that in its order of 4 July 2014, the court *a quo* specifically upheld the award of the arbitrator granting bonus to the respondent. This it did as stated above, sitting on appeal against the quantum of such an award.

The point that may seem to cloud issues is whether or not the court *a quo* sitting as an appeal court on the quantum of the award could also determine the merits of the matter and find as it believes it did, that the order by the arbitrator finding the appellant liable for bonus payments to the respondent was correct. Clearly it could not. The court *a quo* could not make such a decision as there was no appeal before it on the merits of the matter. That appeal was properly before another court. The "finding" of the court *a quo* confirming the correctness of the arbitrator's finding on liability was of no legal import for want of jurisdiction.

Consequently, the court a quo could not rely on this to base its purported quantification of a non-existent obligation or liability.

On the basis of the foregoing, it is my finding that there is merit in the appeal. I am in total agreement with the sole ground of appeal raised in this appeal. The court *a quo* erred at law and misdirected itself by holding that in the face of the judgment of the appeal court absolving the appellant from liability, it could still make an award in favour of the respondent.

Accordingly, I make the following order:

1. The appeal is allowed with costs.
2. Paragraphs 3 and 4(b) of the judgment *a quo* are hereby set aside.

GOWORA JA **:** I agree

BERE JA **:** I agree

Ziumbe & Partners, appellant's legal practitioners.

Matsikidze& Mucheche, respondent's legal practitioners.