

IN THE LABOUR COURT OF ZIMBABWE

JUDGMENT NO LC/H/21/14

HELD AT HARARE 30TH SEPTEMBER 2013

CASE NO LC/H/905/12

& 14TH FEBRUARY 2014

In the matter between:-

UNIVERSITY OF ZIMBABWE

Appellant

And

B.M. SIBANDA

Respondent

Before The Honourable B.S. Chidziva, Judge

For Applicant

Mr S Zingano (Legal Practitioner)

For Respondent

Mr T Thodhlanga (Legal Practitioner)

CHIDZIVA, J:

This is an appeal against the arbitral award by Hon H Nyamupachitu which was handed down on the 29th of October 2012. In this award the Appellant was ordered to pay a total sum of \$120 451.46 within 14 days of signing the arbitral award.

The brief background of this matter is that Respondent was employed as a Chief Technician. A labour dispute between the parties led to the reinstatement of the Respondent by the Supreme Court in 1996. In December 2006 the Respondent stopped reporting for duty and his salary was ceased. On the 16th of December 2007 Respondent was charged for being absent from work without leave or explanation. He was dismissed from employment. After

three years the Respondent referred the matter for arbitration and the Arbitrator found that Respondent had been constructively dismissed. Can the Honourable Arbitrator Nyamupachitu ordered that the Respondent should be reinstated or alternatively be paid damages in lieu of reinstatement. The Arbitrator then awarded the sum of US\$120 451.46 as damages in lieu of reinstatement.

The Appellant has thus appealed against this award on the following grounds:

- 1) The Arbitrator erred at law by not applying the principle of mitigation of damages to the back pay due to Respondent thereby finding that Respondent was entitled to back pay from 2007 to date after having found that the Respondent did not mitigate his loss as required of law.
- b) The arbitrator erred by awarding
 - i) back pay 2007 to January 2009
 - ii) damages in lieu of reinstatement for 18 months
 - iii) three (3) months notice pay
 - iv) bonus payments 2005 – 2006
 - v) medical aid 1997 to 2006 in United States dollars

The Arbitrator erred by disregarding the principle of currency.

nominalisation which means that Respondent was supposed to be paid in Zimbabwean dollar currency. The Appellant told the Court that the Supreme Court decision have stated that where there is unlawful dismissal the rates applicable in respect of payment of damages in lieu of reinstatement and back pay are as at the time of unlawful dismissal.

- c) The Arbitrator erred by refusing to ask Respondent's proposed Reserve

Bank of Zimbabwe official rate of conversion of Zimbabwe Dollars to United States Dollars and went on to use an undisclosed rate.

In view of this the Appellant prayed that this award be set aside and if appropriate substitute its own decision.

The Respondent in response told the court that

- i) The principle of mitigation of damages was applied
- ii) The Arbitrator was right on the merit in converting the Zimbabwe dollar salaries to foreign currency because the local currency is now moribund
- iii) It is admitted that the Arbitrator erred in rejecting the use of the Reserve Bank of Zimbabwe

The claim should apply the Reserve Bank of Zimbabwe official exchange rate.

The Respondent therefore prayed for the dismissal of the Appellant's appeal

The Respondent also noted a cross appeal based on the following grounds;

- i) Having correctly found that it was not practical to order payment in a currency that was not operational the Arbitrator erred by failing to convert the Zimbabwe Dollar figure using the Reserve Bank of Zimbabwe official Exchange rate and using a method which has no basis at law.
- ii) The Honourable Arbitrator seriously misdirected himself on the facts by holding that Respondent did not mitigate his loss when there was conduct of mitigation.

The Respondent therefore prayed that the arbitral award issued by Honourable Nyamupachitu on 29th October 2012 be and is hereby set aside.

- b) That the matter be referred back for quantification

Alternatively

The Respondent's back pay and benefits for the period when the Z\$ was in use shall be calculated at the rate of salaries that were payable at the time the arbitral award was issued.

- i) The 1st ground of appeal is not an issue of law but fact
ii) The Arbitrator erred by converting the amount due to Respondent into foreign currency.
iii) Respondent should have mitigate his loss soon after dismissal

The Appellant therefore prayed for the cross appeal to be dismissed with costs.

This Court will start by dealing with the main appeal.

It has been admitted by the Respondent that the Arbitrator erred by refusing to use the Reserve Bank of Zimbabwe Official Exchange rates in the calculations.

What is to be decided is whether

- i) The principle of mitigation of damages was applied
ii) The Arbitrator was correct in converting the Zimbabwe dollar salaries to foreign currency
iii) The Reserve Bank of Zimbabwe Official Exchange Rate should be used.

The arbitrator awarded back pay for a period of (5) five years

Section 89 (2) (c) (1) of the Labour Act [Chapter 28:01] states that

“an Arbitrator may order back pay from the time when the dispute or unfair labour practice arose

In the case of **BHP Minerals Zimbabwe v Takawira**

1999 (2) ZLR 77 it was stated that

*“back pay is normally awarded from the date of dismissal to the date of reinstatement and is subject to any mitigation as may be applicable in the **Ambali case**”*

In the case of **GauntletSecurity Services(Pvt) ltd v Leonard** 1997 (1) ZLR 583 it was stated that

“the employee is entitled to be awarded the amount of wages or salary he would have earned save for the premature termination of his contract by the employer. He may also be compensated for the loss of any benefit to which he was constructively entitled to which he was deprived in consequence of the breach.

2) *But he must mitigate his loss. He Must look for and accept any reasonable offer of alternative employment. If he fails to take other employment when it would have been reasonable for him to do so, a deduction will be made in respect of the remuneration he would have earned from the substituted employment.”*

The Appellant has told the court that back pay is not paid up to the date of quantification and there is no law to that effect. The Appellant also told the court that the Respondent has not shown us proof of efforts he made to secure alternative employment. The Respondent on the other hand told the court that the onus is on the employer to prove that the employee should have earned something before the order was made.

The Respondent also told the court that 18 months salary will meet the justice of the case.

After the Respondent had been dismissed in 2007 he was supposed to look for alternative employment to mitigate his loss. No proof has been produced to show that Respondent tried to seek alternative employment. This court appreciates that during this period there was economic meltdown. Many people were leaving their jobs or being retrenched and they were migrating to neighbouring countries, to secure employment. 2007 to 2010 is too long a period for the Respondent to secure alternative employment. The period of 18 months was enough for Respondent to secure alternative employment. It is therefore the view of this court that the Arbitrator considered the principle of mitigation when calculating the issue of back pay.

The second issue to be decided is whether the Arbitrator was correct by converting the Zimbabwe dollar salaries to United States dollars.

In the Supreme Court case of **Olivine Industries v Nharara** 2006 (1) ZLR 203 (S) 206 BC the court held that

“The Respondent can only be compensated by an amount that should be calculated at the rates applicable at the time and not at today’s rates or some future unknown rates”

In the cyclostyled judgment of **Gift Bob David Samanyau**

& Ors v Fleximail (Pvt) Ltd HH 108 – 11 the court stated that

“The Applicants are not asking this court to declare that the principle of currency nominalisation no longer has any space in our common law generally. They are simply asking the court to pronounce that following the introduction of mutli-currency regime in January/February 2009 and the concomitant disuse of the Zimbabwe dollar which had become more bund as a result of economic and many other

Circumstances which had conspired to facilitate this major unprecedented conflagration and parliament has remained in a near catatonic state in addressing this occurrence, this court should declare that in the realm of employment relations, the principle of nominalism has for now, no place until economic normalcy has been restored.”

The court went on to state that

“To them give someone such currency which no one nation wide was prepared to accept in any transaction, let alone beyond our borders, as damages in lieu of reinstatement and after having laboured for the employment for periods”

The Zimbabwean dollar is no longer in use since the beginning of the multicurrency system. For the Arbitrator to give the award in Zimbabwe dollars the social justice which the Labour Act is seeking to address will not be done. Such orders will only be academic and will not meet the justice of the case.

The Arbitrator was therefore correct in converting the Zimdollars into United States dollars.

The third issue to be decided is whether the Reserve Bank Exchange Rates that were being used during the hyper inflation period were too high and can result in an award which is too high and does not correspond with the salary which Respondent would have earned had he remained in employment. Applying the rates of salaries which Appellant was paying to its employees at the date of reinstatement will only be fair

In the light of the foregoing the issues that have been raised in the cross-appeal have been answered.

IT IS THEREFORE ORDERED THAT

- a) The arbitral award issued by Arbitrator Nyamupachitu on 29 October 2012 be and is hereby set aside
- b) The matter is referred back to the Arbitrator for quantification with the following orders
 - i) The Respondent's back pay and benefits for the period when the Zimbabwean Dollar was in use shall be calculated at the rate of salaries that were payable at the time the arbitral award was issued.
 - ii) The Respondent's salaries and benefits that accrued after the introduction of the use of multi-currencies shall be calculated using the rates applicable during that period
 - iii) The Respondent's compensation for premature loss of employment shall be calculated at the rate of 18 months salary.

Ziumbe & Partners, Appellant's Legal Practitioners

Thodhlanga & Associates, Respondent's Legal Practitioners