

IN THE LABOUR COURT OF ZIMBABWE JUDGMENT NO LC/H/41/2014

HELD AT HARARE, 15 JANUARY 2014 & CASE NO LC/H/505/2013
31 JANUARY 2014

In the matter between:-

ERNEST MLAMBO

APPELLANT

Versus

ZAMBEZI GROCERIES (PVT) LIMITED

RESPONDENT

Before the Honourable L M Murasi : Judge

For the Appellant Mr C Mucheche (Legal Practitioner)

For the Respondent Mr T Sibanda (Legal Practitioner)

MURASI J:

The Appellant got engaged in the Respondent's employ on 1 September 2012 after signing the offer letter on 16 July 2012. The letter specified that the Appellant was to begin work on 1 September 2012. The Appellant was given another contract to sign when he was already in employment. The Appellant refused to sign it and this began the legal tortuous route leading to his dismissal culminating in arbitration proceedings and finally to this Court. The Arbitrator ordered payment of damages in lieu of re-instatement. The Appellant is dissatisfied with the award and the Respondent is equally unhappy and has cross-appealed.

The Appellant's grounds of appeal are as follows:-

1. That the Arbitrator grossly erred and seriously misdirected herself on a question of law as she did not specify that order of re-instatement was with effect from date of unfair dismissal.
2. That the Arbitrator grossly erred and misdirected herself on a question of law by quantifying damages without hearing oral evidence.

3. The Arbitrator grossly erred and misdirected herself on a question of law by unilaterally proceeding to quantify damages in lieu of re-instatement where the employer did not discharge the onus to prove that re-instatement was untenable.
4. The Arbitrator did not specify that in the event re-instatement was not possible, parties should agree on damages in lieu of re-instatement failure of which the parties were to revert to the Arbitrator for quantification.

In the cross-appeal, the Respondent relied on the following grounds:-

1. The Arbitrator erred and misdirected herself on a point of law in proceeding to assume jurisdiction in the matter. Matter had been prematurely and improperly referred to the Labour Officer.
2. The Arbitrator erred and misdirected herself on a point of law in failing to hold that the so-called “appeal to the labour officer” was in any event out of time.
3. The Arbitrator erred and misdirected herself on a point of law in failing to uphold that the conduct of an employee who declines to formally sign a contract – repudiates the employment contract.
4. The Arbitrator erred and misdirected herself on a point of law by failing to find that the common law concept of probation and effect of the same applied to the employee which justify termination of the job offer on notice.
5. The Arbitrator erred and misdirected herself on a point of law when she did not consider that the offer letter was subject to a suspensive condition being compliance with the company policy.
6. The Arbitrator fundamentally erred and misdirected herself both in law and in fact by finding that the offer letter was the whole exclusive contract between the parties.
7. The Arbitrator fundamentally erred and grossly misdirected herself on the facts by not finding that the claimant was to blame for his own misdeed and consequent circumstances and by proceeding to reward such misdeed through a hefty order of damages. Such gross misdirection on the facts was utterly outrageous in its defiance of logic which no tribunal applying its mind on the facts could have come to that conclusion. The gross factual misdirection constituted a point of law.

Before going into the merits or demerits of the grounds of appeal, I have to deal with a point in *limine* raised by the Appellant’s Counsel.

It was submitted on behalf of the Appellant that the Respondent should be barred for failure to comply with the Rules. The Respondent had not filed documents within the stipulated timeframe. The submissions by the Respondent do not amount to an application to the Court to condone the non-compliance with the Rules. In fact, the Respondent does not apologise but seeks to shield in submissions that the Labour Court should not be bogged down on technicalities as it is a Court of equity. This view is regrettable. Previous judgments on the matter have drawn the attention of legal practitioners to the fact that the Labour Court has Rules which have to be complied with. Legal Practitioners should not cite case law intended to support their shortcomings when they have failed to exercise reasonable professional competence and diligence in the pursuit of their clients' instructions. This Court shares the sentiments of ADAM J in *HPP Studios (Pvt) Ltd v ANZ (Pvt) Ltd* 2000 (1) ZLR 318 at 334 where he stated thus-

“These rules of court are made in order to prevent delay or injustice being done owing to this delay and a bar should not be uplifted as a matter of course, it should not be done merely for the asking, otherwise the rules may as well be torn up.”

The Court notes with trepidation an increase in the number of legal practitioners who do not abide by the Rules and then make submissions that this is a Court of equity which should not be bogged down on technicalities. Such behaviour on the part of legal practitioners is deplorable and, will only have the effect of prejudicing their clients. This Court allowed for submissions on the merits to be made to ensure finality of the matter. To his credit, the legal practitioner had apparently rushed to correct his mistake after this had been brought to his attention by the Appellant's Counsel. The Court allowed the matter to proceed.

Turning to the grounds of appeal, the Court will consider the Appellant's grounds of appeal first before the cross-appeal. The first point raised by the Appellant is that the Arbitrator seriously misdirected herself on a question of law as she did not specify that (the) order of re-instatement was with effect from the date unfair dismissal. Without delving into semantics, the Court is of the view that the Appellant is engaging in unnecessary splitting of hairs. The Act of “re-instatement” itself means being put into the former position as at the date of dislodgement. The Appellant, therefore, was being placed at the position that he was as at the date of dismissal. This is what the Court understands as “re-instatement”. It would have been superfluous for the Arbitrator to go on and add that this was with effect from date

of unlawful dismissal. The Court finds no misdirection in the wording of the Arbitrator and this ground must fail.

The second ground of appeal is that the Arbitrator went on to quantify the damages without hearing oral evidence. The Court notes that no evidence was adduced before the Arbitrator before she came up with the figures on the award. The Arbitrator was not entitled to pluck at any figure without hearing evidence. (See *Redstar Wholesalers v Edmore Mabika* SC- 52-05 per ZIYAMBI JA). This ground of appeal therefore succeeds.

The third ground of appeal is that the Arbitrator, erred and misdirected herself by unilaterally proceeding to quantify damages in lieu of re-instatement. This ground is clearly linked to the second ground above and the sentiments expressed above apply.

The fourth ground avers that the Arbitrator did not clearly spell out the procedure where re-instatement was not possible. It should be remembered that, this is an appeal in terms of section 98 (10) of the Act and should be on points of law. The question is, does this ground of appeal amount to a point of law? A point of law, as stated in the celebrated *Muzuva* case, should be one where the question for argument and determination is what the true rule of law is. In my view, this ground of appeal is not on a point of law. What the Appellant could have done in the circumstances is seek clarification from the Arbitrator. This ground fails.

I now turn to the cross-appeal. The first ground is that the Arbitrator erred in assuming that she had jurisdiction. Certainly the issue of jurisdiction is not a ground of appeal but of review. This ground fails on that score.

The second ground of the cross-appeal is that the Arbitrator erred in failing to hold that the appeal to the labour officer was out of time. Was this a point of law or a factual matter for determination by the Arbitrator? It required computation by the Arbitrator as to whether the appeal was within the prescribed time or not. The Arbitrator's was a factual finding. Was there a gross misdirection? This Court is of the view that this question must be answered in the negative.

The third ground of appeal in the cross-appeal avers that the Arbitrator erred by not upholding that the conduct of an employee who declines to formally sign a contract repudiates the employment contract. The Arbitrator made an analysis of the facts. The

Arbitrator found that the Appellant signed a contract on 16 July 2012 and the Respondent should have included all contractual provisions in that document. It was a finding on the facts. The Court is of the view that no matter how the grounds of appeal are couched, if it is on the facts as found, they do not mutate into points of law. This ground, being on the facts, must fail.

The fourth ground of cross-appeal is that the Arbitrator failed to find that the common law concept of probation should apply in the matter. This Court must register its displeasure at litigants who pluck “grounds of appeal” out of nowhere with no regard to the contents of the record. It is trite that appeals are on the record. The record shows how the Arbitrator dealt with the issue of probation. The Arbitrator clearly referred to the provisions of section 12 of the Act which relates to the issue of probation. It clearly states that it is incumbent on the employer to inform an employee “upon engagement” on the terms of probation. The Respondent, in the cross-appeal, does not state that the Arbitrator’s interpretation of the statute is erroneous but goes on to refer to the common law. The Court does not find fault in the Arbitrator’s finding on this point and this ground must fail.

The fifth ground of cross-appeal states that the Arbitrator failed to appreciate that the letter of 16 July 2012 had a suspensive condition. Again; the Arbitrator made a factual finding that the letter of 16 July 2012 was the contract the Appellant signed. The alleged “suspensive condition” was analysed by the Arbitrator whose view was that there was no link ...

“between the extract from the offer letter ‘per company policy’ to the detailed contract and job description later issued to the Claimant.”

The Arbitrator was therefore alive to the issue. She was analytical of the submissions made before her. NDOU J had this to say in *Jona Ndalama v Chief Superintendent Happymore Sigauke & Anor* HB-153-11 on page 2 of the cyclostyled judgment-

“There has to be something grossly irregular in the proceedings to warrant such interference. The appellate court must never overlook that the trial officer’s living through a drama of a case is in a unique position to evaluate the evidence in its proper perspective.”

The Court shares the above sentiments and is of the view that the Arbitrator’s finding cannot be faulted and this ground must fail.

The sixth ground of cross-appeal is that the Arbitrator erred in finding that the offer letter was the whole exclusive contract between the parties. As alluded to earlier, appeals made in terms of s 98 (10) of the Act should be on points of law. This ground does not satisfy the test and must fail.

The last ground of cross-appeal is couched differently but has similar implications with the Appellant's second ground of appeal. The cross-appeal does not clearly spell it out but the point being that the Arbitrator erred in proceeding to quantify the damages without hearing evidence. As already stated elsewhere in this judgment, this was an error on the part of the Arbitrator and this ground on cross-appeal must succeed.

It is trite that the Court should warn itself that it is not called upon to re-assess the case and come up to a conclusion. The Court is merely being called upon to scrutinise the decision to ensure that it is reasonable in the circumstances.

In the final analysis, the Court finds that the first and fourth grounds of appeal as enumerated in this judgment are without merit and are dismissed. The second and third grounds of appeal as enumerated in this judgment succeed. The first six grounds of cross-appeal as enumerated in this judgment are dismissed whilst the last ground of cross-appeal succeeds.

In the result the Court orders as follows:

1. The appeal is dismissed in respect of grounds one and four and succeeds in respect of grounds two and three.
2. The cross-appeal is dismissed in respect of all other grounds with the exception of ground number 7.
3. The quantum of damages in the award by the Arbitrator be and is hereby set aside.
4. The matter is remitted to the same Arbitrator to hear evidence from both parties on quantification and determine the quantification within 30 days of receipt of this order.
5. There is no order as to costs.

Matsikidze & Mucheche, appellant's legal practitioners

Chinawa Law Chambers, respondent's legal practitioners