Judgment No. SC 107/04

Civil Appeal No. 279/02

TRIANGLE LIMITED v KHUMBULANI PHIRI

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE, SEPTEMBER 23 & DECEMBER 16, 2004

G Mamvura, for the appellant

D T Mwonzora, for the respondent

ZIYAMBI JA: The appellant appeals against an assessment of damages made by the Tribunal in this matter.

On May 23 2001 the Tribunal ordered the appellant to "reinstate the respondent with no loss of salary or benefits". In the event that reinstatement was no longer an option the appellant was ordered to pay to the respondent damages, the quantum of which the parties were to agree upon, failing which either party could set the matter down before the Tribunal for quantification of the damages payable.

The matter was argued before the Tribunal which ordered that the respondent be paid:

> " … all salary and benefits from the date of the unlawful dismissal to the date of judgment (19 June 2001) together with interest at the prescribed rate."

The unlawful dismissal took place on 21 February 1996.

The main ground of appeal advanced by the appellant is that the Tribunal erred in law in making an assessment of damages in the absence of any evidence that the respondent had made efforts to obtain "alternative employment". It was contended that the Tribunal ought to have called for evidence as to "the reasonable period that it would take a person in the position of the respondent to obtain similar employment". It was submitted that the oral submissions made by the respondent's legal practitioner did not qualify as evidence for this purpose.

In making its assessment of the damages due, the Tribunal relied on submissions made by the respondent's legal practitioner to the effect that the respondent had tried to mitigate his loss by seeking alternative employment without success. By relying on those submissions without having heard evidence to substantiate them, the Tribunal misdirected itself.

In *Clan Transport Company (Private) Limited* v *Clan Transport Workers Committee* SC 1/02, it was held at p 3 of the cyclostyled judgment that:

> "The fact that there is no evidence of such mitigation on the part of the respondents of their loss is justification for interference by this Court with the award made."

See *Gauntlett Security Services (Private) Limited v Leonard* 1997 (1) ZLR 583.

In that case this Court observed at p 588:

> "Since the respondent's contract of employment was not one of fixed duration or terminable by the appellant upon notice given, I consider it was incumbent upon the Tribunal to call for evidence as to the reasonable period it would take a person in the position of the respondent (disregarding the injury) to obtain similar employment. And having made the necessary finding, then to deduct from the monthly wages paid by the appellant, the amount the respondent actually earned or could reasonably have earned during such period. It follows that the Tribunal's calculation of the damages suffered was badly flawed. Even the award of back pay as a separate item was wrong. Only a single indivisible sum was to be specified as damages."

In view of the misdirection by the court *a quo*, the order cannot be allowed to stand.

Accordingly the appeal is allowed with costs. The order of the Tribunal is set aside. The matter is remitted to the Tribunal for assessment of the quantum of damages after hearing evidence.

CHIDYAUSIKU CJ: I agree.

MALABA JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

Mwonzora & Associates, respondent's legal practitioners