REPORTABLE (15)

Judgment No. SC 20/04

Civil Appeal No. 349/02

HAMPTON FOKOSENI v LOBELS BAKERY

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA, & GWAUNZA JA
HARARE, FEBRUARY 24 & MAY 11, 2004

The appellant in person

E Mushore, for the respondent

GWAUNZA JA: The appellant was formerly employed by the respondent as a "tea maker". He was dismissed from his employment some eight years ago, for misconduct.

The Labour Relations Tribunal (now the Labour Court) found that his dismissal was unlawful, and ordered that he be reinstated, failing which the respondent was to pay him damages in lieu of reinstatement. The parties thereafter failed to agree on the quantum of damages to be paid, and the matter went back to the Labour Court, for quantification of such damages. The court determined that the appellant, despite his somewhat advanced age, had not put enough effort into mitigating his loss, for instance, through engagement in informal income generating activities. The learned President of the Labour Court, who heard the application, then ruled as follows:

> "He (the appellant) thus failed to mitigate his damages and the law says he ought to be penalised. I will therefore deduct one year's salary from what he would have been entitled to. I therefore order that he be paid damages equivalent to his salary and benefits from the day of suspension 8 July 1996 to 26 February 2001 which is one year prior to the date of the determination."

The appellant was aggrieved by this ruling and has now appealed to this Court.

In his heads of argument the appellant submits that he did attempt to mitigate his loss by looking for another job. He was, however, unsuccessful, partly due to the fact that he possessed no special skills and also because of the current harsh economic environment.

He added in evidence that he did at one time secure a casual job cultivating and working in other people's urban fields. He had, however, been forced to stop due to the long distances to be travelled between his house and the fields in question. He averred he had submitted this evidence in the court *a quo*.

Ms *Mushore*, counsel for the respondent, submitted she had no meaningful submissions to make in the light of the appellant's evidence regarding the efforts he had taken to mitigate his loss. She conceded that if such evidence had indeed been placed before the court *a quo*, that court should properly have awarded the appellant damages in the form of salary and benefits for the entire six year period that he had been out of employment. She added that this Court could "invoke its discretion" in the light of this evidence, and award him the six years salary and benefits. I am persuaded by these submissions.

The position is now settled that a person who has been wrongfully dismissed from his employment must mitigate his loss without delay. MCNALLY JA expanded on this principle in *Ambali v Bata Shoe Company Limited* 1999 (1) ZLR 417 (S) as follows at 418 G – 419 A:

> "I think it is important that this Court should make it clear, once and for all, that an employee who considers, whether rightly or wrongly, that he has been unjustly dismissed, is not entitled to sit around and do nothing. He must look for alternative employment. If he does not, his damages will be reduced."

(See also *Gauntlet Security Services (Private) Limited v Leonard* 1997 (1) ZLR 583 (S).

When this principle is applied to the circumstances of this case, it is evident, as the court *a quo* itself noted, that the appellant tried to get employment but was unsuccessful due to the current economic woes. Once it is accepted that the appellant attempted to find employment, it should therefore be accepted that he did not "sit around and do nothing". There is, in my view, a difference between looking for employment, and securing it. The principle enunciated in the *Ambali* case *supra* refers to "looking" for employment. In adopting this approach, which I am satisfied is the correct one, cognisance should be taken of the fact that prospects of securing employment differ from one person to the other, being influenced by such considerations as the prevailing economic climate, the skills (if any) of the person concerned, experience, age and so on. The appellant was, at the time of the appeal, sixty-five years old. He was also unskilled. He attempted to engage in the "informal" activity of working other people's fields. I doubt that, given his age and

lack of any professional skills, he could have done more than this to mitigate his loss.

In my view, the appellant does not fit into the category where, on the basis of the principle enunciated in the *Ambali* and *Gauntlet* cases *supra*, he should be penalised in the manner suggested in those cases.

I find against this background that Ms *Mushore's* concession is properly made. The appeal must therefore succeed. It is in the premises ordered as follows:

1. The appeal be and is allowed with costs.
2. The order of the court *a quo* is set aside and is substituted with the following:

   "(a) The respondent shall pay to the appellant damages equivalent to his salary and benefits from the date of his suspension, 8 July 1996 to 26 February 2002.

   (b) The respondent shall pay the appellant's costs."

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

Atherstone & Cook, respondent's legal practitioners