

ANATOS MPOFU
versus
COMMISSIONER OF POLICE
and
POLICE SERVICES COMMISSION

HIGH COURT OF ZIMBABWE
KARWI J
HARARE, 29 September 2010

Opposed Application

P. Kawonde, for applicant (partly)
Mr Pashapa, for respondent

KARWI J: The applicant in this matter was charged with and convicted of assault in July 1999. He was fined \$400 or in default of payment ordered to serve two months in prison. He was further sentenced to imprisonment for one month, all of which was suspended for five years on certain conditions. He successfully appealed against both conviction and sentence.

Following the appellant's conviction and before his appeal was heard, the first respondent summarily dismissed the applicant from the service of the Zimbabwe Republic Police in terms of s 48(a) of the Police Act. Following his success in the appeal against both conviction and sentence, the applicant requested to be reinstated in his job, but his request was turned down. He then appealed to the second respondent against the decision to dismiss him. The second respondent dismissed his appeal on the basis that his appeal was out of time. Applicant was dissatisfied with the decision of the second respondent and sought to have it set aside on review by this court on 17 October 2003. This court dismissed the application for review. He then appealed to the Supreme Court. The Supreme Court set aside the dismissal as unlawful and remitted the matter to this court for purposes of determining whether following the dismissal of applicant he should be reinstated or paid damages in lieu of reinstatement.

In referring the matter to this court, the Supreme Court had this to say;

“Having concluded that the dismissal of Mpofu was unlawful, I hold the view that on the facts of this case, in particular the fact that this is essentially a labour dispute and the time that has elapsed since the dismissal of Mpofu, and the nature of the employment involved in this case, the parties should have an opportunity to address the issue of reinstatement or payment of damages in lieu of reinstatement. The issue of whether or not Mpofu should be reinstated or paid damages in lieu of reinstatement has

never been addressed, either in court or in the court a quo. In my view, the parties should be given an opportunity to debate that issue before a determination on it is made.”

The matter was then set down by this court and parties made submissions on whether or not Mpfu should be reinstated or paid compensation in lieu of reinstatement and, if so, the quantum of the damages.

With regard to the issue of whether or not the applicant should be reinstated or paid compensation in lieu of reinstatement, the applicant’s initial view as presented by his then legal practitioner was that the preferred option was one of reinstatement. The reason given at the time was mainly that it was difficult to assess or calculate the damages because the bulk of the damages from 1999 to 2009 would have to be computed in Zimbabwe dollars, a currency that was no longer applicable in our country. Awarding the applicant such damages in Zimbabwe currency would effectively amount to no relief to him now. However the applicant’s position changed soon after Mr *Kawonde*, his then legal representative had renounced agency. Applicant’s current position is that he accepts that the best way forward was the payment of damages in lieu of reinstatement. The first respondent also prefers the payment of damages as the best way forward. I must add that I totally agree with respondent’s view in this matter as it is the only choice anyway. Reinstatement is inappropriate, in my considered view because there has been a total breakdown of the working relationship between the parties. It is clear that there is no longer any mutual trust, confidence and integrity. Any absence of those attributes in the Police force or between or amongst its members would make the working relation unworkable. First respondent has also made it clear that it no longer would want to continue employing the applicant. In *Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989(1) ZLR 344 (S) at 349 it was held that:

“It is easy to conceive a situation in which, albeit no blame whatsoever attaches to the employee, the inescapable inference is that the personal relationship between him and the employer has broken down to the extent that trust in one another has been lost. For a court to order reinstatement against a backdrop of animosity and ill- will, solely because an employee unreasonably and out of wounded pride seeks it would be to permit the continuation of an intolerable personal relationship, one which will make it impossible for the employee to perform his duties either to his own satisfaction or that of his employer”

INNES CJ stated the same thing in *Johnson Schrewbury v Birmingham Rly Co* (1853) 22 LJ ch 291 when he had this to say;

“...the inadvisability of compelling one person to employ another whom he doesn't trust in a position which imports a close relationship and the absence of mutuality for no court could compel by its order a servant to perform his work faithfully and diligently.”

MCNALLY J in *Art Corporation Ltd v Moyana* 1989(1) ZLR 304 @ 313 also stressed the same point when he said:

“The obvious remedy for unjustified unfair involuntary termination is re-employment, if the employee so wishes and otherwise compensation. The first remedy is not available at common law, the essentiality reciprocal nature of contractual obligation means that it is impossible to force unwilling party to remain bound to a contract against his will. “

It seems to me therefore that the applicant should be paid damages in lieu of reinstatement.

I shall now proceed to determine the issue of the payment of damages in lieu of reinstatement. The quantification of such damages is not an easy task, particularly where the bulk part of the period within which Applicant was unlawfully out of employment is during the Zimbabwe dollar era.

The principles governing the payment of such damages are well settled in our law. An employee is entitled to be awarded the amount of wages or salary he would have earned save for premature termination of his contract by the employer. He may also be compensated for the loss of any benefit to which he was contractually entitled and of which he was deprived in consequence of the breach. See *Charles Ambali v Bata Shoe Company Limited* SC 56/ 99, *Kuda Madyara v Globe 7 Phoenix Industries (Pvt) Ltd* SC63/02, *Zimbabwe United Passenger Company v Richard Christopher Daison* 87/02 and *Gauntlet Security Services v Leonard* 1997(1) 583 (s). Our law is also settled in that the employee must mitigate his loss. He cannot just sit and do nothing. If he fails to take up other employment when it would have been reasonable to do so, a deduction will be made in respect of the remuneration he would have earned from the substituted employment. Further according to our law, the measure of damages accorded such employee is the actual loss suffered by the employee represented by the sum due to him for the unexpired period of the contract less any sum earned or could have earned during such latter period in similar circumstances.

In an effort to quantify what is due to the applicant, the first respondent approached the Reserve Bank of Zimbabwe with request to quantify what the applicant would be entitled to

during the period 1999 to 2009, using the various exchange rates which were applicable during the different stages along the 10 year period. The Reserve Bank kindly obliged and came up with what I believe is an unrealistic cumulative figure of US \$ 259 014.72 inclusive of salary, bonuses, allowances, leave days and medical aid. A close analysis of the schedules submitted would show that during most of the time the applicant would have been paid an average salary of around US \$600 per month excluding all other allowances. A good example in point is the salary applicable in the schedule for the entire 2002. It is my considered view that there is no way a constable would have been paid over US \$600 per month. It is also my considered view that a realistic salary would have been something akin to the current position, which is a salary of around US\$150 to \$200 per month. If my above view is correct as it is based on the current and true salaries being paid to constables, then it means the applicant would have to be paid a quarter of the figure which was used in most schedules submitted, including that submitted by the applicant.

It must also be mentioned that in an effort to assist the court with the formula to quantify what is due to applicant, the first respondent approached the Pensions office, which indicated that the best way to resolve this matter was to treat Applicant as a retiring member of the Police force, who would be retiring at 50 years of age, and would be entitled to a lump sum payment of US\$6101.57 and a monthly pension of US\$79.00 until he dies. The Pensions Office had used a straight monthly salary of US\$165.

Applicant's position is that he accepts a lump sum payment of a pension of US\$6101.57 and a monthly pension of US\$79.00. He would also want in addition US\$31251.00, being salary, allowances, bonuses, loss of free accommodation, leave days and loss of medical services, making a total of US\$318 552.40. His claim for salary and benefits above was based exactly on the over dramatized and unrealistic schedule drawn up by the Reserve Bank, which I referred to earlier on. Applicant also requested that he be promoted to rank of sergeant for the purposes of pension only. His request was based on his high hopes of promotion at the time based on some examination he had passed. First respondent has indicated that it was unwilling to treat the application as an urgent for purposes of calculation of damages. My considered view is that issues of promotion are best left to be decided by the employer and is not for the court to decide.

It seems to me that, having decided as I have done above that the Reserve Bank of Zimbabwe had assumed high rates of monthly salary of US \$600, in calculating the applicant's

dues, and that the current rates used by the Pensions Office at US\$165 would be appropriate, it follows that the correct figures the applicant is entitled to are a quarter of the figure which was submitted by the parties. When the above figures are applied, this would mean that the applicant is entitled to US\$78 113.00, which figure includes arrear salaries, allowances, bonuses and leave days.

Applicant did not adduce evidence to show that he sourced for alternative employment soon after being unlawfully dismissed from employment. The law requires that he secures alternative employment. He cannot just sit at home for more than 10 years expecting wholesome payment from his employer. In the absence of evidence to show that Applicant obtained alternative employment, it is my considered view that it was reasonable to expect applicant to have serviced for alternative employment. In view of that finding, it is equitable that a deduction be made from his entitlement in respect of the remuneration he would have earned from the substituted employment. A reasonable deduction would have to be based on the same rate of US\$165 per month for a period of ten years. Such deduction would come up to US\$19800.00. When that deduction is considered, it means that the applicant is entitled to US\$58313.00. In addition, he is also entitled to a lump sum pension payment of US\$6101.57 and a monthly pension of US 97.00 (or such other rates as are applicable by the Pension Office to people of the rank of applicant.

After taking all the above into consideration it is ordered as follows;

1. First respondent be is hereby ordered to pay the applicant damages in lieu of reinstatement in the sum of US \$58 131-00 being arrear salaries, bonuses, accommodation, leave days and medical services.
2. First respondent to pay the applicant a lump sum pension of US\$6101.57 and a monthly pension of US\$97.00 until his death.
3. Both respondents to pay cost of suit.

Kawonde & Company, plaintiff's legal practitioners
Civil Division of the Attorney General's Office respondents' legal practitioners