

REPORTABLE ZLR (10)

Judgment No. SC 9/07
Civil Appeal No. 82/06

FIRST MUTUAL LIFE LIMITED v JACKSON MUZIVI

SUPREME COURT OF ZIMBABWE
CHEDA JA, ZIYAMBI JA & MALABA JA
HARARE, JANUARY 23 & MAY 29, 2007

H Zhou, for the appellant

The respondent in person

CHEDA JA: The appellant was the respondent's employer. The appellant dismissed the respondent from its employment. The matter went to the Labour Court and it determined the matter in favour of the respondent in judgment No. LC H/163/04.

The appellant appealed to this Court against the Labour Court's decision.

On 15 March 2004 this Court (CHIDYAUSIKU CJ) in judgment No. SC 62/03 dismissed the appellant's appeal and issued an order, part of which read as follows:

“(1) ...

- (2) That the respondent be and is hereby ordered to reinstate the appellant with no loss of salary and benefits with effect from the date of suspension.

In the event that reinstatement is no longer an option the respondent is ordered to pay the appellant damages in lieu of reinstatement the amount of which the parties may agree upon failure of which the party may refer the issue to the Tribunal for quantification.”

The parties failed to agree on the amount of damages in relation to all the claims raised by Muzivi, the respondent in this appeal.

In May 2004 the respondent filed an application to the Labour Court for quantification of back pay and damages.

The matter was heard by President Hove of the Labour Court, and an order was made listing damages that the Labour Court held should be awarded to the respondent as follows:

The order of the court is therefore that the employer pays to Muzivi the following:

- “(1) Back pay calculated from the date of suspension to 7 April 2004. The salary scale applicable for purposes of calculating back pay is that of a managerial grade as estimated by Muzivi on pages 10 and 11 of his final submissions. These amounts are to be paid together with interest at the prescribed rate calculated from the date each amount fell due to the date of payment in full.
- (2) That the employer pays commission in relation to the sale of two policies each month from the date of suspension to 7 April 2004. The amounts should also be paid with interest at the prescribed rate of payment in full.
- (3) Cash in lieu of leave and notice pay as stated in the body of my decision with interest calculated from April 2004 to the date of payment in full.

- (4) Annual bonus paid to other employees as stated in the body of my decision. The amounts are to be paid together with interest at the prescribed rate calculated from the date each amount fell due.
- (5) Pension withdrawal benefits as outlined in the body of my decision. All amounts due in this regard is to be paid together with interest at the prescribed rate from the date of this order to the date of payment in full.
- (6) Three months medical aid contributions as originally agreed between the parties and proven medical expenses in terms of my decision. These amounts are to be paid with interest at the prescribed rate from the date each amount becomes due to the date of payment in full.
- (7) Gratuity in terms of the body of my decision paid with interest calculated from the date of this order to the date of payment in full.
- (8) Insurance benefits in terms of the body of my decision. The amounts are to be paid together with interest at the prescribed rate calculated from the date of this order to the date of payment in full.
- (9) A house of comparable value to the Kadoma house belonging to Muzivi which was sold by the employer. The house is to be paid on the same terms as originally agreed between the parties.
- (10) Fees disbursed by Muzivi for his children's fees as outlined in the body of this decision.
- (11) Muzivi to be refunded the amounts he paid in relation to the courses he attended as per the body of my decision.
- (12) 9 933 353 shares as outlined in the body of my decision.
- (13) A car as outlined in the body of my decision.

- (14) Offer Muzivi items that were in his office as outlined in my decision if these items are no longer available, items of similar value.
- (15) Two years salary as damages for loss of employment at current rates. This amount is to be paid together with interest at the prescribed rate calculated from the date of this judgment to the date of payment in full.
- (16) The employer is to make the following deductions from all the amounts due to Muzivi –
 - (a) what the employer has already paid;
 - (b) net earned by Muzivi from his association with Choice Quality Performance Management.

I now turn to examine whether the Labour Court complied with the order of the Supreme Court.

The Concise Oxford Dictionary gives the following definition of quantify:

“Quantify – to determine quantity of; measure or express as quantity”

In the very first sentence of its judgment the Labour Court stated as follows:

“This is an application for quantification of damages. The basic principle in the assessment of damages is that the plaintiff should be placed in the position he or she would have been had the contract been fully performed.”

Having started by stating correctly what the application before it was about in the very first sentence, it is not clear why the Labour Court ended up not doing what it was clearly directed to do.

The Labour Court was supposed to assess and determine the monetary value (*quantum*) of each claim that was to be awarded to the respondent (the employee). The employer was supposed to be advised what exactly it was supposed to pay to the employee in figures. What the Labour Court did was not quantification at all. What was required were specific monetary awards in respect of each claim so that the employer would know how much it was to pay. A mere reference to awards being made is not quantification. How much should he get by way of back pay? What is the employer to pay him by way of commission? How much is due as cash in lieu of leave? How much was to be paid as gratuity? How much was to be paid as fees for children?

The Labour Court should have dealt with each claim and established the exact amount. It did not do that.

Further to that, the Labour Court failed to observe certain clear principles taken into account in quantifying damages. For example, an award for an unknown amount of fees is not appropriate. The employee was supposed to prove what he spent as children's fees, then claim to be refunded that amount. In the absence of such determination, what happens if he demands a figure which the employer disputes? The matter may have to go to court again for determination of that amount.

The suggestion that the employer failed or refused to furnish the respondent with the appropriate salary scale suggests a wrong approach to the issue.

It is the respondent who had the *onus* to prove his claims.

If he was dismissed when he was in a certain grade, it was for him to tell the court what salary scale applied to him at the time of his dismissal. He could not just claim that he was in a certain grade whose salary scale he did not know. This would suggest that he did not know what he was claiming.

Payment of an annual bonus, is generally discretionary on the part of the employer. It could not be said that the employee would have been awarded a bonus under all circumstances. A bonus would have depended on a clear record of performance. Having been suspended, it could not be said that the employee performed so well that he would have been entitled to a bonus.

On pension withdrawals, it is not clear what the employee's entitlement is. What were the withdrawal benefits? Who was to withdraw the benefits and from whom? This issue remains vague, leaving the employer unclear as to what it is to pay.

Reference to what the President says is "as outlined in the body of my decision" does not inform the employer what it is to pay as no figures were given in the body of her decision. In any case, a court order should set out the payments clearly and not refer to the body of the decision.

Any enforcement of the order will depend on what the order says and not what was said in the body of the decision, which may not be easy to ascertain even if one read the judgment. The order of the court should be clear enough to stand on its own.

The employee would have been entitled to the use of a car in the performance of his duties. Once he was suspended the benefit of the use of a car would under normal circumstances fall away. The order that a car be purchased for the employee is without legal basis. Worse still, should he be given a new or used car? What make or model of a car is he to get? Is he to get a Toyota or Mercedes Benz?

Commission in relation to policies depends on the number of policies sold and the monetary value of the policies. In the absence of any policies proved to have been sold any award of commission is incompetent.

The award for medical aid contributions is also unclear. If the employee incurred any medical expenses during the period of suspension then such expenses should be proved before reimbursement is ordered.

It is not clear on what legal basis an employee who has been dismissed from a company should be awarded shares in the company and be allowed to take away office furniture from it. Further, there is no logical basis for awarding an employee a salary at current rates as opposed to the rates applicable at the time of suspension.

The award of a house is unreasonable. If the employee wishes to recover the cost of his house sold by the employer this would be the subject of a different claim for the recovery of that amount and not a claim under the Labour Relations Act.

I have outlined some of the awards made in order to illustrate the fact that the Labour Court failed to apply basic principles governing the quantifications of damages.

As things stand, the Labour Court's decision remains so vague that neither the employer nor the employee is properly informed of what the damages to be paid are in monetary terms.

Accordingly the order of the Labour Court is set aside.

The matter is remitted to the same court for it to make an appropriate assessment and quantification of damages in accordance with the ruling of the Supreme Court in judgment No. SC 62 of 2003.

Since the failure to properly quantify the damages was that of the Labour Court, I do not consider it appropriate to make an order for costs against either party.

There will be no order as to costs.

ZIYAMBI JA: I agree

MALABA JA: I agree

Atherstone and Cook, appellant's legal practitioners