

**REPORTABLE ZLR (36)**

**TELECEL ZIMBABWE PRIVATE LIMITED**  
**vs**  
**SIBANGANI MABORE**

**SUPREME COURT OF ZIMBABWE**  
**MALABA DCJ, ZIYAMBI JA & HLATSHWAYO JA**  
**HARARE, JUNE 3, 2013**

*C Kuhuni*, for the appellant

*F Mahere*, for the respondent

**ZIYAMBI JA:** This is an appeal from the Labour Court. It concerns the law relating to the assessment of damages consequent upon the unlawful dismissal of an employee.

At the end of the hearing of the appeal the following order was issued:

1. The appeal is allowed with costs
2. The Judgment of the court *a quo* is set aside and substituted as follows:-

“a) the respondent shall make the following payments to the appellant:

- (i) Back pay in the sum of US\$12 883.00
- (ii) Cash *in lieu* of leave in the sum of US\$2 572.36
- (iii) Damages *in lieu* of reinstatement amounting to US\$9 600.00

- (b) The sum of US\$3000.00 shall be deducted from the total of the amounts set out above.
- (c) Each party shall bear its own costs.”

The following are the court’s reasons for so ordering.

The respondent was employed by the appellant in the capacity of Procurement Manager on 1 July 2010. In terms of the contract of employment, the respondent was to complete a probationary period of three months ending September 2010. On 25 November 2010, the appellant advised the respondent of an extension of the probationary period. In January 2011, the respondent was advised that his permanent employment with the appellant had not been confirmed. He was dismissed on 30 January 2011.

The respondent was aggrieved by the dismissal and all efforts at conciliation having failed, the matter was referred to an arbitrator who found that the respondent was unfairly dismissed and ordered the appellant to pay damages in the sum of \$40 000.00. The respondent appealed against this order, it being his contention that the quantification of damages due to him had been done by the arbitrator without hearing the parties. A consent order was issued by the Labour Court in terms of which the appellant was to reinstate the respondent to his former employment failing which the Labour Court was to quantify the damages.

In due course, the appellant having failed to reinstate, the respondent applied to the Labour Court for quantification. The Labour Court awarded by way of damages thirty-six (36) months’ salary as well as other benefits amounting to a total of US\$156 458.67. This appeal is concerned with that judgment.

The main issue taken on appeal is whether or not the court *a quo* erred in awarding damages in the equivalent of 36 months' salary in the light of the evidence placed before it.

The principles applicable to the computation of damages for unlawful dismissal were enunciated by this Court in *Ambali v Bata Shoe Company Ltd* 1999 ZLR (1) 417. At p 419 it was said:

“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. He will be compensated only for the period between his wrongful dismissal and the date when he could reasonably have expected to find alternative employment.”

It was contended on behalf of the appellant that the documents produced by the respondent himself indicate that he had managed to secure employment by 7 July 2011.

An email from the respondent dated Thursday 7 July 2011 was to the following effect,

“Dear Mr Godfrey Lang

I have attached my CV to be considered for the above mentioned position.

I have a degree in mechanical and production engineering from Zimbabwe and over fifteen years experience in procurement and warehouse management gained from mining and processing environment.

Currently, I am working in Nigeria as a group supply chain manager in a limestone mining and cement processing plant.

I will be in a position to attend interviews if considered and relocate immediately if successful.

I hope my application would be taken into consideration.

Best regards

Sibangani Mabobe.”

On 12 July 2011, the respondent applied for another position. The email which contained his application read as follows:

“Dear Mahommed Abubakani

I have attached my CV to be considered for the above mentioned position of a Regional Supply Chain Manager-West Africa.

I have a degree in Mechanical and Production Engineering from Zimbabwe and over 15 years experience in Supply Chain Management in Mining environment gained from Zimbabwe, South Africa and West Africa in Nigeria.

Currently I am working in Nigeria as a Group Supply Chain Manager in Limestone Mining and Cement Processing Plant.

I would be in a position to attend interviews if considered and take employment immediately if successful.

I would be grateful if my application is taken into consideration.

Best regards

Sibangani Mabobe.”

A further e-mail dated 31 October 2011, stated as follows:

“Dear Sir/Madam

I have attached my CV to be considered for the position of a procurement manager.

I have a degree in mechanical engineering and over fifteen years experience in procurement gained in Zimbabwe, South Africa and Nigeria.

I am currently working in Nigeria as a group procurement manager.

I will be in a position to attend interviews if considered.

Best regards

Sibangani Mabobe.”

These emails were produced by the respondent himself. They establish that the respondent was employed by 7 July and certainly by 31 October 2011.

It was submitted by the appellant that in the light of the e-mails set out above the court *a quo* had no reasonable basis for concluding that the respondent was entitled to receive damages *in lieu* of reinstatement equivalent to 36 months' salary and that, going by these dates, the damages to which the respondent would be entitled in terms of the *Ambali* judgment (*supra*), would be five (5) months' salary.

It was, however, contended on behalf of the respondent that the allegation in the email that the respondent was employed on 7 July 2011 "was not true but was only a way of looking for employment" and that the respondent was not in fact employed.

In my judgment, if the respondent told lies in the emails, then he is the author of his own dilemma. He represented to the addressees of the emails that he was employed. He now argues that these documents do not contain the truth. The respondent has confessed himself to be a liar. No basis has been established upon which this Court could disregard the factual allegations set out in the emails in preference to his submissions to the contrary.

The e-mails set out above clearly support the contention advanced by the appellant that by 7 July 2011, the respondent had obtained alternative employment. It is therefore difficult to comprehend the generous award of damages made by the court *a quo* of the equivalent of 36 months' salary. It must be noted that this was not a case of a premature termination of a contract of employment which had yet to run its full term. The respondent was employed on probation for three months. The unlawful dismissal arose from a failure by the appellant to properly terminate the probation. As it was said in *Nyaguse v Makwasine Estates (Pvt) Ltd* 2000 (1) ZLR571 (S) at p 575D:-

“...if the Tribunal is forced to make an estimate, it must use the information to hand, and not simply pluck a figure from nowhere...”

In the instant case, there was no need to estimate. The evidence clearly indicated that by 7 July 2011, the respondent had already found employment.

With regard to para 2 (b) of the order granted, it was common cause that the respondent had earned US\$3000 since his dismissal by the appellant hence the deduction of this sum from the total damages awarded.

**MALABA DCJ:** I agree

**HLATSHWAYO JA:** I agree

*C Kuhuni Attorneys*, appellant’s legal practitioners

*Matsikidze & Mucheche*, respondent’s legal practitioners