

MONTEREY ESTATE (PRIVATE) LIMITED
v
KENNY BROXHAM

SUPREME COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JA & MAVANGIRA AJA
HARARE NOVEMBER 3, 2014 & NOVEMBER 3, 2016

D. Ochieng, for the appellant

F. Mahere, for the respondent

MAVANGIRA AJA: This is an appeal against the quantum of damages *in lieu* of reinstatement that was awarded to the respondent by the arbitrator and upheld, on appeal, by the Labour Court.

The respondent was employed by the appellant as a Farm Manager in November 2008. On 30 November 2009, without any prior warning, the respondent through a letter was given a month's notice of termination of his services, effective from 1 December 2009 to 31 December 2009. The respondent was also asked to vacate the farm house and move off the property by not later than 31 December 2009.

On 21 December 2009 the appellant paid the respondent \$2 100 broken down as follows:

- (a) \$900 which was due in respect of payment shortfalls for the months of December 2008, January 2009 and February 2009.
- (b) \$600 for 26 days of leave pay; and

- (c) \$600 being 2 months' pay as a termination benefit (for December 2009 and January 2010)

On 8 February 2010 the respondent wrote a letter of complaint to a Labour Officer and requested that there be a hearing which would facilitate the payment of what he claimed to be due to him by appellant. The process culminated in the issuance of a certificate of no settlement and the matter was referred for compulsory arbitration. The issues for determination by the arbitrator were stated as:-

1. To determine whether the dismissal was lawful and fair.
2. To determine the nature of contract, whether open ended or not.
3. To determine the quantum of terminal benefits
4. To determine the appropriate remedy

The initial arbitral award made by the arbitrator is not on record. What is on record is the award of 21 July 2010. Therein the arbitrator stated that the matter was before him for quantification of damages. He stated that in his (earlier) award he had requested the parties to negotiate on the quantum but they had failed to reach agreement. He stated that from the submissions by both parties it was clear to him that the parties were agreed on the headings under which remuneration was due to the respondent but were not agreed on the quantum. He listed the agreed headings as:

- (a) Salaries
- (b) Medical Aid
- (c) School fees
- (d) Accommodation
- (e) Fuel
- (f) Domestic/Utilities
- (g) Electricity and water
- (h) Tobacco seed
- (i) Leave entitlements

The arbitrator proceeded to award specific amounts in favour of the respondent for each of the headings as well as an additional one titled “commission”. The awards that the arbitrator made in respect of salaries, accommodation, fuel, domestic/utilities as well as electricity and water were calculated on the basis of a monthly figure multiplied by nine months. Regarding medical aid, the arbitrator determined that he would grant the respondent one year’s cover instead of the two years that he was claiming. On school fees he awarded an amount that he said was the 3rd term fees for that year as well as an additional amount for which he gave no explanation. Under the heading tobacco seed the arbitrator calculated what was due to the respondent on the basis of a percentage of the 2009 harvest. He justified this on the ground that the then current season’s tobacco had not been sold yet. He used the same method for an award under the heading “commission”, which he also based on a percentage of the 2009 harvest. The amounts thus awarded totalled \$35 434.00.

It is apposite to state at this juncture that the respondent accepted alternative employment with effect from May 2010. He was thus out of employment for four months. His new monthly salary was \$500 gross without any benefits. His payslip was produced as proof thereof.

The appellant was aggrieved by the arbitrator’s decision and appealed to the Labour Court on the following grounds:-

1. The learned arbitrator erred in law in failing to appreciate that the *onus* lay on the respondent to prove his claim. Hence the respondent should have adduced evidence to substantiate figures he gave for the sale of tobacco crop and tobacco seed respectively.

2. The learned arbitrator grossly misdirected himself in awarding commissions on tobacco crop and tobacco seed based on the sales figures of the 2009 crop.
3. The learned arbitrator erred in law in awarding medical aid in the absence of proved medical expenses.
4. The learned arbitrator erred in law in failing to appreciate that when assessing damages, consideration should be had to the fact that the respondent was now working and accordingly his earnings and benefits should have been taken into account in assessing the sum due.
5. The learned arbitrator erred in being satisfied that appellant had proved his damages on a balance of probability.
6. The learned arbitrator erred in finding that sufficient evidence had been produced by the appellant to prove its claim
7. The learned arbitrator misdirected himself in making an award for the period he did.

The Labour Court dismissed the appeal and upheld the arbitrator's quantification of damages payable to the respondent in the amount of \$35 434.00. In its reasons the Labour Court stated *inter alia*, that the arbitrator indicated in his award that evidence was led before he made the determination of the appropriate amounts due and payable to the respondent. The court *a quo* further indicated that it had no reason to doubt that evidence was led in support of the claim and that such evidence formed the basis of the learned arbitrator's award. It went on to make the following remarks:-

“It was submitted on behalf of the respondent that while the respondent may have secured alternative employment, such alternative employment paid the respondent considerably less than what he used to get. It is not disputed that where such a situation exists, the employee is entitled to compensation of the difference (between the former earnings and the alternative employment secured) in both salary and

benefits in order for justice to be done. I have satisfied myself that evidence was led in the earlier tribunal. It follows that the necessary considerations were made before the award was made.”

The appellant has now appealed to this court against the decision of the Labour Court on the following grounds:-

1. The court *a quo* erred in law by upholding an award of damages for any period in excess of the period which respondent was actually out of employment.
2. The court *a quo* erred in law in upholding (without stating reasons for doing so) an award for payment in respect of a commission that had not yet accrued.
3. The court *a quo* erred by upholding (without stating reasons for doing so) an award for medical aid in the absence of any evidence that the respondent had in fact incurred medical expenses.
4. The court *a quo* erred in finding that the arbitrator received evidence as to:
 - i) The time it would have taken respondent to find alternative employment: and
 - ii) The disparity, if any, between the respondent’s actual earnings and his notional earnings from comparable employment.
 - iii) The error was so gross as to amount to an error of law.
5. The court *a quo* consequently erred in law by upholding findings made by the arbitrator with no evidentiary basis.

It is not in dispute that the respondent was out of employment for a period of four months after which he accepted a job with less remuneration. The arbitrator however went on to award damages for a period of nine months. A perusal of the record, including the arbitral award, does not support the finding of the court *a quo* that there was any evidence led

to justify the computation done by the arbitrator. The nine month period and the amounts granted under the various headings are not based on any evidence that was placed before the arbitrator. No such evidence is reflected on the record. No basis was laid for picking on the nine month period and not any other period.

The *onus* was on the respondent to prove that he was owed more than what the employer paid him. He did not discharge that *onus*. Miss *Mahere* for the respondent conceded as much before this court.

This inescapable concession by Miss *Mahere* resolves this appeal. She rightly conceded that the court *a quo* seriously misdirected itself by upholding awards that were made without any legal basis. The arbitrator having had no basis to make them, the court *a quo* had no basis to confirm such awards on appeal, no evidence having been placed before the court *a quo* to substantiate such quantification. The lower court's decision is therefore founded on a misdirection.

The case of *Ambali v Bata Shoe Company Ltd* 1999 (1) ZLR 417 that was cited by the respondent is of no avail to his case for it merely states that an employee who has been wrongfully dismissed has an immediate duty to mitigate his loss. It also places a limit on the period for which damages may be payable, to the period between the date of dismissal and the date when new employment is found. In *casu* the respondent was out of employment for four months. Thus the quantification of damages ought to have been based on the four month period. As already noted earlier, the nine month period used in the computation of the amount granted in the arbitral award has no basis or explanation and is completely arbitrary.

Despite making reference to the *Ambali* case and to *Zupco v Daison* 2002 (2) ZLR 628, the court *a quo* failed to point to the evidence on which the arbitrator's quantification was based. It appears to have acted on the premise that the arbitrator must have received the necessary evidence. The court *a quo* itself did not hear any evidence that would justify the quantification, from the respondent. As Miss Mahere rightly conceded, there is no such evidence on the record.

In *Zupco v Daison* (*supra*) at 630D - E SANDURA JA stated:

“ ... in its judgment the Tribunal did not say why it chose the period of forty-eight months as opposed to any other period. As stated in *Nyaguse v Mkwesine Estates (Pvt) Ltd* 2000 (1) ZLR 571 (S) at 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 circumstances, I am satisfied that the Tribunal’s decision can be categorised as wholly unreasonable. ...’

Likewise, in *casu* the award of damages for a period in excess of four months was wholly unreasonable.

This court was also referred to *Duly Holdings Limited v Clever Spanera* 2005 (1) ZLR 407 (S); SC 140/04 wherein CHIDYAUSIKU CJ referred to the *Ambali* case (*supra*) and quoted McNALLY JA who stated at 419A:

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

And at 419D:

“But if an employee is wrongfully dismissed his duty to mitigate his loss arises immediately. If he is offered a good job a day after he is dismissed he must take it, or forfeit any claim for damages. If he is offered a good job only after he has been unemployed for six months, he must take it. If, in the meantime, he has instituted proceedings for reinstatement he may continue these, but his claim for damages will usually then be limited to his loss over the six month period.”

The learned Chief Justice proceeded to state thereafter:

“... On the strength of *Ambali’s* case, the respondent is entitled to damages calculated on the basis of his income from the date of his dismissal to the date when he found employment.”

The quantification done by the arbitrator and upheld by the Labour Court in this matter is legally unsustainable. As the respondent did not prove that he was entitled to more than what the appellant had paid him, the Labour Court ought to have granted absolution from the instance.

For the above reasons, the appeal must succeed with costs. The order of the Labour Court must therefore be set aside and substituted with an order of absolution from the instance. Accordingly, it is ordered as follows:

1. The appeal be and is hereby allowed with costs
2. The order of the Labour Court be and is hereby set aside and substituted with the following:

“(1) The appeal be and is hereby allowed.

(2) The arbitral award dated 21 July 2010 be and is hereby set aside and substituted with the following:

“The respondent be and is hereby absolved from the instance.””

MALABA DCJ: I agree.

ZIYAMBI JA I agree.

Kevin J. Arnott, appellant’s legal practitioners

Honey & Blanckenberg, respondent’s legal practitioners