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Judgment No. SC 43/07
Civil Appeal No. 168/06

HONGYU ENTERPRISES v PHILLIP MAFOTI

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & MALABA JA
HARARE, JULY 2 & JANUARY 22, 2008

J Mambara, for the appellant

The respondent in person

ZIYAMBI JA: The respondent was dismissed from the appellant's employ on 26 July 2002. Following a series of appeals, the Labour Court, on 25 January 2005, ordered the appellant to reinstate the respondent or alternatively pay damages, the quantum of which was to be agreed by the parties, failing which either party could refer the issue to the Labour Court for quantification of the damages due to the respondent.

It appears that the respondent fell ill some time after his dismissal but it is common cause that the illness was not work related.

The parties having failed to reach agreement on the quantum of damages payable, the matter was placed before the Labour Court for quantification. The Labour Court gave its judgment on 9 June 2006 and made the following order –

1. The agreed back pay and allowances in the sum of $9 404 328,40 be paid together with interest calculated at the prescribed rate on each amount as it fell due to the final date of payment.

2. Annual leave days for the period covered by the back pay be paid together with interest at the prescribed rate calculated from January 2005 to the date of payment in full.

3. The matter is remitted to the employer to enable it to calculate the sum that would have been payable to the applicant had he been retired on medical grounds as at January 2005. That amount should be paid with interest calculated at the prescribed rate from 1 February 2005 to the date of payment in full.

The appellant was aggrieved by para 3 of the order and, with leave of the Labour Court, now appeals to this Court on the grounds that the learned President of the Labour Court misdirected herself not only in ordering the appellant to pay to the respondent damages calculated as if the latter was being retired on medical grounds but in granting to the respondent a remedy which he had not sought. The remedy sought by the appellant on appeal was the deletion of para 3 of the order.

The law relating to quantification of damages has been clearly set out in decided cases. See, for example, *Ambali v Bata Shoe Co Ltd* 1999 (1) ZLR 417 at 418H – 419A, where it was stated as follows:

> "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. 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."

The learned President of the Labour Court was cognizant of the law in this regard and said at p 5 of the cyclostyled judgment (No. LC/H/66/2006):

> "The courts in previous cases have indicated that the damages should be for the period it would have taken him to find alternative employment."

However she went on to say:

> "In this case however the finding of alternative employment was out of the question since the applicant became ill soon after the illegal dismissal.
>
> The damages that he suffered would therefore have been what it would have cost the company to retire him on medical grounds. That figure in my opinion would correctly reflect the amount of damages that he suffered. The court is not in a position to state what that figure could have been."

This is where the learned President of the Labour Court misdirected herself. The issue for determination was the period during which the respondent could reasonably be expected to find employment. It was for the court to determine that period based on the evidence before it and, having done so, to award the respondent a figure which represented his salary for that period.

The Labour Act [*Cap 28:01*] ("the Act") makes provision for the remuneration by the employer of employees who fall sick while in employment. There is no such provision for the remuneration of persons who fall sick after their dismissal from employment. See s 14 of the Act.

There is, therefore, no legal basis for para 3 of the order made by the Labour Court and the position is aggravated by the fact that the claim, notwithstanding its lack of any legal basis, was raised by the court *mero motu*.

It is regrettable that because of the absence of any evidence in the record as to the period it would have taken the respondent to obtain alternative employment, this Court is unable to determine the matter. The respondent claimed 6 years salary without leading any evidence to justify this claim. The appellant, taking the view that the respondent's claim was unjustified, offered to pay to the respondent, 6 months salary. This issue was not resolved by the court *a quo*. The matter must, therefore, be remitted to the court *a quo* in order that an assessment of damages can be done after hearing evidence and applying the correct legal principles.

Accordingly the appeal succeeds.

Paragraph 3 of the Order of the Labour Court is hereby set aside. The matter is remitted to the Labour Court for assessment of the period within which the respondent could not reasonably have been expected to obtain employment and to make an award of damages based on that assessment.

No order of costs was asked for and none is made.

SANDURA JA: I agree

MALABA JA: I agree

J Mambara & Partners, appellant's legal practitioners