

DISTRIBUTABLE (127)
Judgment No SC. 140/04
Civil Appeal No 389/03

DULY HOLDINGS LIMITED v CLEVER SPANERA

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA & ZIYAMBI JA
HARARE NOVEMBER 23, 2004 & JUNE 13, 2005

R.Y. Phillips, for the appellant

The respondent in default

CHIDYAUSIKU CJ: This is an appeal from the Labour Court. The facts of this matter are fairly simple and straight-forward.

The respondent is a former employee of the appellant. The appellant dismissed the respondent on 3 September 1999. The dismissal was disputed by the respondent. After his dismissal the respondent was employed by KB Locksmith with effect from 1 February 2000. He remained in the employment of KB Locksmith from February 2000 to March 2001. The respondent resigned from his job with KB Locksmith on 8 March 2001. He persisted in his action for wrongful dismissal by the appellant. On 11 June 2002 the Tribunal held that the respondent had been wrongfully dismissed on 3 September 1999. The Tribunal ordered reinstatement of the respondent to his original position without loss of salary and benefits from the date of dismissal, namely, the 3rd September 1999. In the event of the appellant not being able to reinstate the respondent it was ordered to pay damages. The damages were not quantified and the parties were given leave to approach the Tribunal for quantification of damages in the event of failure to agree on the *quantum*.

The parties failed to agree on the *quantum* of damages and approached the Labour Court (the successor of the Tribunal) for the determination of the *quantum* of damages.

At the hearing to determine the amount of damages the respondent, (who was then the applicant), claimed:

- (a) back pay;
- (b) benefits i.e, annual bonus and annual wage increases as awarded by the industry;
- (c) compensation for premature termination of contract;
- (d) accumulated leave days.

The respondent in the court *a quo*, on the other hand, offered the equivalent of one year's wages plus benefits calculated with effect from the date of dismissal. The Labour Court issued the following order: -

"He (applicant) is thus entitled to his back pay for the period September 1999 to January 2000 (5 months). He stated that he was earning less than what the respondent used to pay him. Thus for the period February 2000 to date of judgment he is entitled to his damages less what he earned between February 2000 and March 2001. If he was entitled to any allowances in terms of the contract he should be paid them. He should also be paid all the benefits to which he is statutorily entitled.

The above is granted with costs and interest at the prescribed rate.

In the circumstances the damages should be computed in terms of the above. Accordingly it is so ordered."

The appellant now appeals against that order. It appeals against the above order on two grounds set out in the Notice of Appeal: -

- "1. The Labour Court erred in law, alternatively its judgment erred so seriously in respect of the facts as to amount to a misdirection of law in:
- 1.1 failing to give proper weight to the fact that respondent secured alternative employment five months after his dismissal;
 - 1.2 in finding that, in computing damages respondent's entitlement accrued up to the date of the court's judgment; and
 - 1.3 in any event, in failing to make any computation as to damages.
2. In the circumstances appellant prays that the order of the Labour Court be set aside and substituted with the following –
- 'That the appellant be awarded damages equivalent to the salary and allowances which he would have earned from respondent had he remained in its employment up to 31 January 2000.'

Mr *Phillips*, for the appellant, argued that the Labour Court misdirected itself in calculating the damages to which the respondent is entitled. He submitted that the respondent was entitled, by way of damages, to his salary and benefits for the period between his dismissal by the appellant and his employment by KB Locksmith. For this submission he relied on the case of *Ambali v Bata Shoe Company* 1999 (1) ZLR 417 (S). In the *Ambali* case, *supra*, *Ambali* was wrongfully dismissed and the Tribunal calculated his damages on the basis submitted by Mr *Phillips*. In so doing McNALLY JA at p 419A had this to say: -

"He (the employee) 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 judge further remarked at p 419D: -

"But if an employee is wrongfully dismissed his duty to mitigate his loss arises immediately. If he is offered a good job the 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."

Mr *Phillips* argued that on the approach adopted in the *Ambali* case, *supra*, the respondent was entitled to his back pay and allowances from the date of his dismissal by the appellant to the date he found employment with KB Locksmith and no more as his resignation from KB Locksmith on 8 March 2001 was his own decision.

I find myself in agreement with the submission by Mr *Phillips* that on the authority of *Ambali's* case, *supra*, 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.

On this basis it is quite clear that the learned President of the Labour Court misdirected herself in regard to the assessment of the *quantum* of damages to which the respondent was entitled.

In the result the appeal is allowed with no order as to costs. The order of the Labour Court is hereby set aside and substituted with the following order:

"That the applicant be awarded damages equivalent to the salary and allowances which he would have earned from the respondent had he remained in its employment up to 31 January 2000."

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

Gill Godlonton & Gerrans, appellant's legal practitioners