

REPORTABLE (28)

Judgment No. SC 34/06

Civil Appeal No. 163/05

**UNITED BOTTLEERS v CHARLES KADUYA**

SUPREME COURT OF ZIMBABWE  
CHIDYAUSIKU CJ, SANDURA JA & CHEDA JA  
HARARE, JANUARY 16 & SEPTEMBER 12, 2006

*G V Mamvura*, for the appellant

*T Sakutukwa*, for the respondent

CHIDYAUSIKU CJ: This is an appeal against a judgment of the Labour Court. The issue in this case is the quantification of damages.

The appellant suspended the respondent from work without pay and benefits on 15 March 1999. The matter was heard before a labour relations officer, who ordered that the respondent be reinstated without loss of pay and benefits, alternatively that he be paid his wages up to 30 January 2000 plus three months' pay as damages and cash in lieu of leave. The appellant took the matter on review before a senior labour relations officer. On review the senior labour relations officer upheld the decision of the labour relations officer, but ordered that the wages were to be paid up to 30 June 2000.

The appellant appealed to the Labour Court against the decision of the senior labour relations officer. The Labour Court directed that the appellant comply with the determination of the senior labour relations officer before its appeal could be heard by it. The appellant complied with the determination of the senior labour

relations officer and paid the respondent his pay and benefits for the period 15 March 1999, being the date the respondent was suspended, to 30 June 2000, plus three months' salary.

While he was on suspension the respondent secured alternative employment with Bella Blue Track (Pvt) Ltd with effect from 1 June 2001. He continued in this employment up to 3 February 2004, a period of about two-and-a-half years.

When the matter of quantification came up before the Labour Court, the appellant offered to pay the respondent his pay and benefits from 1 October 2000 to 31 May 2001, when the respondent was not gainfully employed. The Labour Court determined that the respondent was entitled to his pay and benefits with effect from the date of his dismissal to the date of the judgment of the Labour Court.

It is against this determination that the appellant appeals to this Court. The learned President of the Labour Court held that the respondent had a duty to mitigate damages and find employment. Accordingly the respondent's employment with Bella Blue Track (Pvt) Ltd had no bearing on the contract of employment.

The learned President's reasoning and conclusion appear on pp 6-7 of the cyclostyled judgment (LC/H/289/2004), wherein she said:

"In the present matter the appellant argued that the respondent was on suspension and by securing alternative employment he repudiated his contract of employment with the appellant. The respondent submitted that he secured temporary employment in order to mitigate his loss. I am of the

opinion that he had a duty to do so. To state that a person who is on suspension without pay and benefits should not work and if he does work he risks losing his employment would be contrary to the purpose of the Act.

Further the appellant submitted that he was available for employment with the respondent after the court had ordered his reinstatement with the alternative for payment of damages. He submitted that it was the appellant who opted to pay damages and not that he (the respondent) was not available for reinstatement.

In view of the above it is my considered view that the respondent is entitled to his back pay and benefits with effect from (the) date of dismissal to the date of judgment of this court (i.e. forty-seven months' salary – item 1 of his claim).

In addition if items 2-4 of his claim were his entitlements he should get them. The respondent is also entitled to damages, which is the equivalent of twenty-four months' salary. The computation of the amount should take into consideration –

- a) the amount the appellant has already paid to the respondent; and
- b) the earnings he got during the period he had secured alternative employment.

The back pay should be as at the 1 January 2004 figure – as supplied by the appellant upon request by the court – i.e. \$1 896 044.46.

Accordingly it is ordered that damages be calculated in terms of the above."

Mr *Mamvura*, for the appellant, submitted that the effect of the respondent taking up employment with Bella Blue Track (Pvt) Ltd was to terminate his contract of employment with the appellant. In support of this submission he cited the case of *Zimbabwe Sun Hotels (Pvt) Ltd v Lawn* 1988 (1) ZLR 143 (S), wherein GUBBAY JA (as he then was) stated at p 151 as follows:

"Plainly the obligation of an employee who is placed under suspension to hold himself available to perform his duties if called upon to do so, is one which arises by operation of law. It is of no consequence therefore that no provision in that regard is contained in the contract of service; and it is not necessary for the employer at the time of suspension to so inform the employee."

I agree with Mr *Mamvura*. His submission reflects the correct position in law. Where an employee is under suspension and he takes up employment

elsewhere he terminates his employment. An unlawful suspension of an employee is a repudiation of the contract of employment by the employer. The employee can elect either to accept the repudiation or enforce the contract. If an employee accepts alternative employment, by that fact alone he accepts the employer's repudiation and the only remaining remedy for the employee is to sue the employer for damages for breach of contract.

The learned President of the Labour Court fell into error in two respects - firstly, by equating the position of a wrongfully suspended employee with that of a wrongfully dismissed employee. A wrongfully dismissed employee has a duty to mitigate damages by finding alternative employment as soon as possible. A wrongfully suspended employee has a duty by operation of law to remain available for employment by his employer. This is the legal position, as stated in the *Zimbabwe Sun* case *supra*. The issue was further clarified in *Ambali v Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S), wherein McNALLY JA at pp 418H-419D 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 been expected to find alternative employment. The figure may be adjusted upwards or downwards. If he could in the meanwhile have taken temporary or intermittent work, his compensation will be reduced. If the alternative work he finds is less well-paid his compensation will be increased.

There are also those, and *Ambali* is one of them, who seem to believe that they must on no account look for alternative employment; that so long as their case is pending they must preserve their unemployed status; that if they look for and find a job in the meanwhile they will destroy their claim.

It cannot be emphasised too strongly that this is wrong. There may be some confusion arising out of cases which deal with wrongful suspension rather than wrongful dismissal. *Zimbabwe Sun Hotels (Pvt) Ltd v Lawn* 1988 (1) ZLR 143 (S) is an example. 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 them, but his claim for damages will usually then be limited to his loss over the six month period." (the emphasis is mine)

The respondent in the present case accepted the repudiation by the employer of his contract of employment when he took up employment with Bella Blue Track (Pvt) Ltd. His damages for wrongful dismissal can only be calculated from that date to the date of wrongful suspension.

Secondly, the learned President of the Labour Court appeared to be under the impression that s 2A of the Labour Relations Act [*Cap. 28:01*] has amended the common law position as stated in the *Zimbabwe Sun Hotels (Pvt) Ltd* case *supra*. Section 2A of the Act provides as follows:

**"2A Purpose of Act**

(1) The purpose of this Act is to advance social justice and democracy in the workplace by –

- (a) giving effect to the fundamental rights of employees provided for under Part II;
- (b) giving effect to the international obligations of the Republic of Zimbabwe as a member state of the International Labour Organisation and as a member of or party to any other international organisation or agreement governing conditions of employment;
- (c) providing a legal framework within which employees and employers can bargain collectively for the improvement of conditions of employment;
- (d) the promotion of fair labour standards;
- (e) the promotion of the participation by employees in decisions affecting their interests in the workplace; and
- (f) securing the just, effective and expeditious resolution of disputes and unfair labour practices.

(2) This Act shall be construed in such manner as best ensures the attainment of its purpose referred to in subsection (1).

(3) In the event of inconsistency between this Act and any other enactment then, unless the enactment expressly excludes or modifies the provision of this Act sought to be applied –

- (a) this Act shall prevail over the enactment concerned to the extent of the inconsistency; and
- (b) the enactment concerned shall be construed with such modifications, qualifications, adaptations and exceptions as may be necessary to bring it into conformity with this Act."

Section 2A essentially sets out the objective of the Act and specifically provides that in the event of a conflict between the Labour Relations Act and any other enactment the Labour Relations Act shall prevail. The section is not a wholesale amendment of the common law. The common law can only be altered by an explicit provision of the Labour Relations Act.

The appeal is allowed and the order of the Labour Court is set aside and substituted with the following –

"The appellant is ordered to pay the respondent his salary and benefits from 1 October 2000 to 31 May 2001 when he was gainfully employed."

The costs follow the result and the respondent is ordered to pay the appellant's costs.

SANDURA JA: I agree.

CHEDA JA: I agree.

*Scanlen & Holderness*, appellant's legal practitioners

*Sakututwa & Partners*, respondent's legal practitioners