REPORTABLE (80)

NATIONAL FOODS LIMITED
v
(1) MARTIN JONGWE (2) FELIX DZINGO

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MATHONSI JA & CHIWESHE JA
BULAWAYO: 23 NOVEMBER 2023 & 31 JULY 2024

D. Peneti, for the appellant

The respondents in person

CHIWESHE JA: This is an appeal against the judgment of the Labour Court (the court *a quo*) sitting at Bulawayo handed down on 31 May 2022 which ordered the appellant to pay to the first respondent the sum of ZWL 11 417 548.17 and to the second respondent the sum of ZWL 2 951 701.67. The court *a quo* ordered these amounts to be back dated increments on the salaries the respondents earned during the period 2002 to 2008, inclusive of interest at the rate of 5% per annum for 14 years.

Aggrieved by that decision, the appellant noted the present appeal. Equally aggrieved was the first respondent who noted a cross appeal.

THE FACTS

The respondents were employed by the appellant. In the early 2000s the appellant conducted a job revaluation exercise as a result of which it increased the salaries of its secretaries

but omitted to do the same for its artisans and journeymen. As a result, the artisans and journeymen, who were placed on a higher grade than the secretaries, were now earning less than the secretaries. Displeased by that development, the artisans demanded an increment commensurate with their grade. They took the appellant to the court *a quo*. The matter was settled in favour of the artisans in 2008. The appellant requested that the judgment be stayed pending the determination of a Supreme Court case as to whether workers should now be paid in United States dollars. The Supreme Court subsequently ruled that workers be paid in that currency.

The appellant settled with the rest of its work force and paid the increments in United States dollars. The respondents did not accept the offer that was extended to them. They sought to be paid what had been quantified to be due to them. However, this was no longer possible because the amounts had been eroded by inflation and the removal of zeros. They engaged the services of one Mr Muswere, an actuary by profession, to quantify the amounts they were owed. Although the parties were agreed on the amount owed in ZWL terms, the respondents sought that the amounts so owed be converted to the ZWL currency applicable in today's economy.

At the hearing Mr Muswere gave expert evidence based on his findings. Although the appellant accepted that Mr Muswere was an expert, it was not satisfied with his calculations.

DECISION OF THE COURT *A QUO*

The court *a quo* acknowledged that the conversion done by Mr Muswere was authentic but that it could result in unrealistic figures as the first respondent could not have been earning the equivalent of US$2 000.00 per month during the period 2002 to 2008. The court *a quo* then did its own research. It googled and found a site that assists with currency conversions. It

thereafter evaluated the amounts using both the unofficial and official rates. It reasoned that both rates would provide realistic figures and a true value of the increment per month depending on the grade of the recipient. In the result it ordered that the first respondent be awarded the sum of ZWL11 417 548.17 and that the second respondent be awarded the sum of ZWL2 951 701.67. It ordered the amounts to be back dated increments on the salaries earned during the period 2002 to 2008 inclusive of interest at 5% for 14 years.

It is that decision that the appellant appeals against on the following grounds:

GROUNDS OF APPEAL

"1. With the court *a quo* having correctly rejected the testimony led before it as one that would result in unrealistic outcomes, the court subsequently erred at law in falling to dismiss the matter before it for lack of evidence.

2. The court *a quo* erred at law in sourcing some expert evidence on its own and then determining the matter based on that evidence without affording parties an opportunity to interrogate that evidence.

3. Having previously held that there ought to be conversion of currency from one currency, Zimbabwe dollar of pre 2009 to the currently usable currency, the court *a quo* erred at law in now contradicting itself in finding that there was no need to convert any currency." (sic)

RELIEF SOUGHT

The appellant seeks the following relief:

"1. The appeal succeeds with costs.

2. The decision of the court *a quo* be and is hereby set aside and is substituted with the following:

'The application be and is hereby dismissed with costs.'"

The first respondent noted a cross appeal on the following grounds:

GROUNDS OF CROSS APPEAL

"1. The court *a quo* erred at law when upon establishing that ZW11 417 548.17 would convert to US$38 967.00 failed to track the RBZ interbank rate in ordering payment in ZWL and erred further by not ordering interest between date of judgment and date of payment resulting in an award that is imprecise.

2. The court *a quo* misdirected itself at law when upon accepting the figure of ZWL6 716 203.69 as calculated by expert on 30 September ascribed an inapplicable RBZ bank rate.

3. The court *a quo* erred at law when upon accepting unchallenged scientific evidence of direct and indirect loss arising from deferred payments did not award damages as contemplated by s 5(4)(a) of the Labour Act [*Chapter 28:01*] resulting in unfair impoverishment of the claimant and unjust enrichment of the respondent." (sic)

RELIEF SOUGHT IN CROSS APPEAL.

(a) The cross appeal is allowed with costs.

(b) The judgment of the court *a quo* is upheld to the extent para 53 of the judgment is substituted with the following:

> "[53] The respondent be and is hereby ordered to pay Martin Jongwe the sum of US$38 967.00 or the equivalent at prevailing RBZ interbank rate, interest at the prescribed rate to accrue from date of judgment to date of payment." (sic)

ISSUES FOR DETERMINATION

Main Appeal

1. Whether the court *a quo*, having disregarded the evidence of the expert witness, should have proceeded to dismiss the matter for lack of evidence.
2. Whether the court *a quo* erred in sourcing expert evidence on its own and determining the matter based on that evidence without affording the parties the opportunity to interrogate that evidence.
3. Whether the court *a quo* contradicted itself in coming to the conclusion that there was no need to convert any currency.

Cross appeal

1. Whether the court *a quo* failed to properly apply the RBZ interbank rate in ordering payment in ZWL and whether it should have ordered payment of interest between the date of judgment and the date of payment.
2. Whether the court *a quo* should have ordered payment of damages as contemplated under s 5(4)(a) of the Labour Act [*Chapter 28:01*].

SUBMISSIONS BEFORE THIS COURT

The appellant, in its heads of argument, submitted that only one witness was called to prove the respondents' case *a quo* that is, Mr Muswere, an expert. Having disregarded the

conclusions of that expert, and, there being no other witness or evidence, the court *a quo* should have dismissed the matter.

It was also submitted that it was improper for the court *a quo* to singularly source expert evidence from a website and rely on such evidence in arriving at a decision, without recourse to the parties. In support of that submission, the appellant relied on the decision of this Court in *Nzara & 3 Ors* v *Kashumba N.O. & Ors* SC 18/2018 wherein this Court cited with approval the decision in *Groenewald N.O. & Anor* v *Swanpoel* 2002 (6) SA 729 where it was held as follows:

> "It hardly needs stating that a judge may only have regard to the evidence placed before him or her during the course of the hearing and that a reliance on facts not averred in the pleadings or raised in court constitutes a serious misdirection."

It was submitted that the decision of the court *a quo* should be set aside on that account and that the matter be remitted to the court *a quo* for determination before a different judge.

On the other hand, the respondents supported the reasoning and decision of the court *a quo* with the first respondent filing a cross appeal only against that part of the judgment of the court *a quo* pertaining to the application of the RBZ bank rate. He also submitted that the court *a quo* should have, in addition, ordered payment of damages in terms of s 5(4)(a) of the Labour Act [*Chapter 28:01*].

ANALYSIS

The appellant's second ground of appeal raises a serious misdirection on the part of the court *a quo*. The court *a quo* sourced evidence from a website and proceeded to determine the matter before it on the basis of such evidence. It is common cause that such evidence had not been part of the parties' pleadings nor was it part of the evidence adduced before the court *a quo* at the hearing or in arguments. The court *a quo* should have brought such fresh evidence to the attention of the parties and invited submissions thereon before proceeding to determine the matter. As matters stand, the court *a quo* denied the parties the opportunity to make representations on the very evidence that it sought to rely on. It is evident that the parties were denied the right to be heard, in contravention of the "*audi alteram partem*" rule, a fundamental tenet of our law.

However, our finding that the court *a quo* ventured into the internet to find its own evidence does not detract from the correctness of a finding that it had no evidence to find for the respondents. That is so because the court *a quo* disbelieved the evidence of the only witness before it and, as a result, no evidence was available to sustain its decision to find for the respondents. For that reason, the appeal has no merit. It must succeed. Conversely, the cross-appeal stands to be dismissed.

DISPOSITION

In the circumstances, we are satisfied that the order of the court *a quo* cannot stand. Costs will follow the cause.

Accordingly it is ordered as follows:

1. The appeal be and is hereby allowed with costs.
2. The order of the court *a quo* be and is hereby set aside and, in its place, substituted the following:
   "The application be and is hereby dismissed with costs."

3. The cross-appeal be and is hereby dismissed.

GWAUNZA DCJ : I agree

MATHONSI JA : I agree

Maguchu & Muchada, appellants' legal practitioners