REPORTABLE (75)

Judgment No. SC. 88/05
Civil Appeal No. 165/04

OLIVINE INDUSTRIES (PRIVATE) LIMITED

v CAUTION NHARARA

SUPREME COURT OF ZIMBABWE
CHEDA JA, MALABA JA & GWAUNZA JA
HARARE, SEPTEMBER 12, 2005 & MARCH 7, 2006

Ms N Moyo, for the appellant

The respondent in person

CHEDA JA: In a judgment, No. LRT/H/238/2002, dated 26 September 2002 the Labour Relations Tribunal (now the Labour Court) made an order for the reinstatement of the respondent to his employment by the appellant. Part of the order read:

> "In the event that reinstatement is no longer an option the respondent be and is hereby ordered to pay the appellant damages in lieu of reinstatement, (the) *quantum* of which the parties may agree, on failure of which the parties may approach the Tribunal for quantification. (The) appellant (is) granted costs of suit and interest at the prescribed rate."

The parties met as directed, but failed to agree on the *quantum* and returned to the Labour Court once more. Mr Sithole, a Trade Unionist, represented the then appellant (now the respondent). Part of his address to the Tribunal reads as follows:

> "… the issue of Nharara was partly implemented as per the court order. The judgment, number LRT/H/238/2002, in that judgment, Your Honour, it was ordered that the respondent, being Olivine Industries, was ordered to reinstate the appellant without loss of salary and benefits. And what Olivine did, Your Honour, was simple (*sic*) to back-pay and they said the issue of reinstatement was a non-starter. We tried our level best, Your Honour, to reason with the respondent but to no avail. The respondent has his (*sic*) own interpretation of that court order. The respondent was of the opinion that because the relationship was sour, they (*sic*) could not entertain the issue of reinstating Mr Nharara as per the court order. At the same time they where (*sic*) not prepared to pay damages in lieu of reinstatement. And there was a bit of confusion until we had to write back in terms of the spirit of the court order we should refer it back to the Honourable Court, and that is exactly what we did on 11th of July 2003. And in our referral to this Honourable Court, we wrote that we could not agree. Olivine Industries decided to pay only back-pay. Other benefits and damages they refused, hence our application for a set-down for this matter."

The above shows that the parties returned to the Tribunal because of the disagreement on the *quantum* of damages the appellant should have paid the respondent. The appellant had obviously paid the respondent his back-pay as per part of the order made by the Tribunal.

After hearing both sides, the Tribunal proceeded to make the following order:

> "1. The applicant is awarded back-pay from July 4, 1997 to October 11, 2001, together with all the benefits he would have been entitled to had he remained in the respondent's employ during that period.
>
> 2. That the respondent pays interest at the prescribed rate on the back-pay calculated from October 11, 2001 to the final date of payment.
>
> 3. That the respondent pays the applicant eighteen months' salary at today's rates as damages for the applicant's premature loss of his job, together with interest at the prescribed rate calculated from the date of this judgment to the date of payment in full.
>
> 4. That from the back-pay, an amount of $1 052 010.00 (one million fifty-one thousand and ten dollars) be subtracted since the applicant has already received this amount.

5. That each party bears its own costs."

The main grounds of appeal to this Court are that –

(a) the court *a quo* erred at law in awarding two remedies of back-pay and damages, thus over-compensating him;

(b) the court *a quo* made a vague award of damages at "today's rates"; and

(c) the court *a quo* made an award that was neither asked for nor supported by either of the parties.

The appellant prays that this Court either reassess an appropriate award of damages from the evidence on record or remit the matter to the court *a quo* with directions to make a proper assessment of an award of damages.

There are several cases that provide guidance in cases similar to this one. Where an employee is found to have been wrongfully dismissed reinstatement is normally ordered. Taking into account that in some cases reinstatement is found to be no longer desirable if relations between the parties have soured, provision was made for damages to be paid to the employee instead of reinstatement. See *Gauntlett Security Services (Pvt) Ltd v Leonard* 1997 (1) ZLR 583 (S); *Chegutu Municipality v Manyora* 1996 (1) ZLR 262; *BHP Minerals Zimbabwe (Pvt) Ltd v Cranny Takawira* SC 81/99 (not reported); and *Leopard Rock Hotel Co (Pvt) Ltd v Hilary van Beek* SC 6/2000 (not reported).

In *Leopard Rock Hotel Co (Pvt) Ltd v van Beek supra* this Court stated as follows:

> "'Back-pay' is thus a concept associated with reinstatement. If an employee is reinstated she will normally be awarded back-pay. If she succeeds in proving wrongful dismissal, but is not reinstated, she will be entitled to 'damages', a major element of which will be back-pay. Perhaps more correctly one should say the damages will be assessed by reference to the back-pay lost. But here the back-pay will be limited to a period from the date of wrongful dismissal to a date by which she could, with reasonable diligence, have obtained alternative employment. See *Ambali supra* and *Myers supra*."

In this case, it had been argued that back-pay should be paid only up to the time the respondent could have been expected to have found, with reasonable diligence, alternative employment. What remained in dispute was when the payment of salary and benefits should cease.

It was, therefore, correct to order that the respondent be awarded back-pay from 4 July 1997, together with interest. The back-pay and benefits would represent what the respondent should have received had he not been wrongfully dismissed.

In additional damages, the award should take into account the period he should have taken to obtain alternative employment. No evidence was led on that issue.

It was also submitted that the respondent earned money repairing cellphones and selling tomatoes. This, too, should have been taken into account. No details were given.

While this Court would have liked to see this matter finalised by making an order, such order cannot be made without evidence on the amounts earned by the respondent during that period.

The respondent can only be compensated by an amount that should be calculated at the rates applicable at the time and not at today's rates or some future unknown rates. An order for payment "at today's rates" is vague and inappropriate in the circumstances. Today's rates will obviously be very different from the rates that prevailed at the time.

In the previous judgment, No. LRT/H/238/2002, wherein the respondent had succeeded, he was granted costs. No reason was given for changing the award for costs in judgment No. LC/H/55/2004. No appeal was lodged against the order of costs either. Ms *Moyo*, for the appellant, conceded that there was no reason for the Labour Court to change the order for costs.

Accordingly, the appeal succeeds to the extent that –

1. Paragraph 3 of judgment No. LC/H/55/2004 is set aside.

2. The order for costs is set aside.

3. The matter is referred back to the court *a quo* to hear evidence on the period the respondent would have been reasonably expected, with due diligence, to obtain alternative employment, and the amount that he earned from repairing cellphones and selling tomatoes;

4. The court *a quo* is ordered to award damages at the rates prevailing at that time and not at today's rates; and

5. There shall be no order as to costs."

MALABA JA: I agree.

GWAUNZA JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners