

1. THANDIWE MANDIRINGA
versus
NATIONAL SOCIAL SECURITY AUTHORITY
2. GANIZIO JAMU
versus
INNSCOR AFRICA (PVT) LTD
3. PETER CHIGABA
versus
FARMQUIP (PVT) LTD
4. NELSON GARIKAI
versus
SUPERBAKE BAKERIES
5. VALERIE SANYIKA
versus
SOUTHERN AFRICA AIDS TRUST
6. CHISTOPHER MESIKANO
versus
SAYBROOK (1978) (PVT) LTD

HIGH COURT OF ZIMBABWE
MAKARAU J
Harare, 21 October and 17 November 2005

Chamber Applications

Messrs *Chibwe, Uriri, Musendekwa, Macheyo and Dhlakama*, for applicants
2nd and 3rd applicants in person
Messrs *Hwacha, Nkomo, Maunga Bvekwa and Dhumbura*, for respondents

MAKARAU J: The above six matters raise the same issue. The matters came before me and other judges of this court as individual chamber applications for registration in terms of section 98 (14) of the Labour Act [*Chapter 28:01*] of certain arbitral awards in favour of each applicant. For the purposes of arguing the legal point of practice and procedure arising, I set down all for hearing all the chamber applications in terms of rule 246 (1)(b) of the High Court Rules, 1972. For convenience, I combined the hearings of the chamber applications. I also received separately, submissions from Messrs *Dlakama and Matizanadzo*, who could not attend the combined hearing of the Chamber Applications.

I received valuable submissions from all the legal practitioners, to whom I extend my gratitude.

In each of the six matters, the respondent purportedly dismissed or suspended the applicant from employment without salary and benefits. Each labour dispute was then referred to arbitration in terms of the Labour Act [*Chapter 28.01*], (“the Act”) and an arbitral award issued. The effect of each of the awards in the six matters was to set aside the purported dismissal or suspension of the applicant and to order his or her reinstatement without loss of salary or benefits.

For the purposes of this judgement, it appears to me desirable that I set out in full the wording of each of the six awards made.

In the first matter, the arbitral award was worded as follows:

“National Social Security is ordered to reinstate Mandiringa without loss of salary and benefits from the time of dismissal”

In the second matter, it reads:

“Therefore in line with the above, I do hereby order Inncor Africa to reinstate Ganizio Jamu from the date of suspension without loss of salary or benefits or alternatively pay him damages in lieu of reinstatement quantum to be agreed between the parties.”

In the third matter, the award was worded as follows:

“Having considered the submissions made, I find that the company’s dismissal of Mr Chigaba was procedurally and substantively unfair. I order that he be reinstated to his former position, without any loss of pay and other benefits. The reinstatement is with effect from the date of dismissal.”

And in the fourth:

*“Whilst the arbitrator does not condone theft in toto, it is very clear that the respondent erred at Labour law by not exhausting all the proper termination procedures as laid down in the Labour Relations Termination Regulations SI 130 of 2003. As such it is hereby determined that the Appellant, Mr Garikai Nelson, be reinstated to his previous position without any loss of pay or other benefits due to him from the date of the unlawful suspension. In the event that that reinstatement is no longer feasible the appellant be paid an agreed amount as damages in lieu of reinstatement in addition to his terminal benefits as laid down in section 13 of the Labour Act [*Chapter 28.01*].*

In the fifth and sixth matters respectively, the awards read:

“In light of the above I determine that V Sanyika be reinstated without loss of pay and benefits or alternatively be paid damages quantum to be agreed upon between the parties if the employment relationship cannot be salvaged”;

and

“Saybrook is ordered to reinstate Mr C Mesikano without loss of salary and benefits with effect from date of dismissal”.

Section 98 (14) of the Act provides that:

“Any party to whom an arbitral award relates may submit for registration the copy of it furnished to him in terms of subsection (13) to the court of any magistrate which would have had jurisdiction to make an order corresponding to the award had the matter been determined by it, or, if the arbitral award exceeds the jurisdiction of any magistrates court, the High Court.”

It is in terms of this section that the above six applications were purportedly made to this court.

It is common cause that in all of the six matters, each arbitrator ordered the reinstatement of the applicant but did not make an award for the payment of damages in a specified sum in lieu of reinstatement nor did they compute what the loss of pay and benefits to the date of the award amounted to. In a few of the matters, the arbitrator left the quantification of the damages due to the applicant in lieu of reinstatement to be agreed upon between the parties. Needless to say and as one can expect in such matters, no such agreement was reached at the time of the filing of the chamber applications before me.

In my view, the wording of section 98 (14) strongly suggests that the award submitted for registration in terms of the section should sound in money either in the main or in the alternative.

Firstly, regarding the issue of the civil jurisdiction of our courts, it is trite that this court has inherent jurisdiction to hear and determine all issues arising within Zimbabwe. On the other hand, the magistrate’s court, being a creature of statute, can only enjoy that jurisdiction expressly conferred upon it by the Magistrate’s Court Act [*Chapter 7.10*]. The jurisdiction of the magistrate’s court is limited in specific instances provided for in the act and generally, to claims not exceeding an amount to be prescribed in the rules of the court. Currently the prescribed amount is \$50 million.

In my view, for the purposes of section 98(14) of the Act, an award can only exceed the jurisdiction of the magistrates’ court if it sounds in money and the amount of that money exceeds currently, \$50 million.

Secondly, it is my further view that it is only when the award sounds in money that a proper determination can be made as to which of the two courts mentioned in the section has jurisdiction.

It appears to me that following the wording of the section, all awards that require the payment to the applicant of a sum in excess of the sum of \$50 million are to be registered with this court. In entertaining this view, I am aware that the magistrates' court does have some other grounds other than money, restricting its jurisdiction. For instance, the magistrate's court jurisdiction is also defined territorially. Thus, a cause of action arising in one province of the country cannot be determined in a magistrates' court situated in another province. In my view, this ground is only relevant when determine which of the magistrates' courts as amongst they has jurisdiction. It is not relevant for the purpose of section 98 (14) when the only relevant factor to determine which of the two courts mentioned in the section has jurisdiction becomes the amount of the award.

It is my further view that the interpretation I have rendered to the section to the effect that an award submitted for registration under it must sound in money either in the main or in the alternative, also finds some support in section 89 (2) (c) (iii) of the Act. The section provides:

89 (2) *"In the exercise of its functions the Labour Court may-*

- (a)
- (b)
- (c) *in the case of an application made in terms of subparagraph (ii) of subsection (7) of section ninety three, make an order for any of the following or any appropriate order-*
 - (i)
 - (ii)
 - (iii) *reinstatement or employment in a job:
Provided that any such reinstatement shall specify an amount of damages to be awarded to the employee concerned as an alternative to his reinstatement or employment."*

In turn, section 98 (9) of the Act provides that an arbitrator appointed by the Labour Court shall determine any dispute as if he or she was the Labour Court. In effect, the arbitrator so appointed can order reinstatement provided that any such reinstatement shall specify an amount of damages to be awarded in lieu of the reinstatement.

An interpretation of the pre-cursor to section 89 (2) (c) (iii) of the Act was rendered in *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S). In deciding

that case, the Supreme Court overruled its earlier decision in *United Bottlers (Pvt) Ltd v Murwisi* 1995 (1) ZLR 246 (S) to the effect that a determining authority under the Labour Act had just the two options of either dismissing or reinstating the employee and could not award damages. The Supreme Court Judges did not hesitate to hold that the peremptory provisions of the section left no room for doubting that the determining authority in its determination, was duty bound to make an assessment of damages as an alternative to reinstatement.

The decision in *Hama v National Railways of Zimbabwe* (supra) has since been followed in other matters as representing the correct position at law. (See *ZESA v Bopoto* 1997 (1) ZLR 126 (S) and *Mhowa v Beverley Building Society* 1998 (1) ZLR 546 (S)).

It is therefore the settled position in our law that in ordering reinstatement in terms of the Labour Act, the Labour Court, labour officers and arbitrators appointed under the Act are duty bound to assess damages in lieu of the reinstatement. Any judgment, determination or award by these officials that fails to do so is liable to be interfered with as a misdirection or as failing to comply with the Act in a material way.

An award that orders the reinstatement of the applicant without awarding a specified amount in damages in lieu of the reinstatement is incomplete and consequently, incompetent and cannot be registered in terms of section 98(14) of the Act as an order of this court.

Assuming that I have erred in holding that an award that does not specify an award of damages in lieu of reinstatement is incompetent and incapable of registration as an order of this court, I still would have denied all the six chamber applications before me on another basis.

It is clear from a reading of each of the awards that were made in the six matters that the applicants were to be reinstated without loss of pay and benefits from certain given dates in each case to date of reinstatement. The awards did not compute the loss that each employer had to make good even if he chose to reinstate the respective applicant. It is conceded that while such computations are relatively easy by comparing what a similarly placed employee received in emoluments over the same period, the issue remains that the quantum thereof is not part of the award made and was not determined as part of the arbitration proceedings in the presence of both parties. It was not agreed upon in any one of the matters.

The purpose of submitting arbitral awards to this court (and to the magistrates' court), is to enable the applicants to execute upon the awards. Arbitrators do not issue writs of execution. This court does and so does the magistrates' court.

In terms of Rules 322 and 323 of the High Court Rules, 1972, a writ may be sued out by any holder of a judgment or order in terms of which has been ordered "the payment of money, the delivery up of goods or premises or for ejection". A writ may not be sued out in this court for reinstatement in employment. Aware of this impediment created by the rules of this court, all the applicants before me calculated their own losses and attached computation of these to the awards ordering their reinstatement. Such computations, no matter how accurate, are not part of the awards made by the arbitrators and have not been before any determining authority for quantification. They remain the claims that the applicants are making against their respective employers. A writ of execution cannot therefore issue in respect of such claims before they are made part of the arbitral award. On their own, they are not capable of registration as orders of this court as they fall outside the ambit of the provisions of section 98(14) of the Act.

On the basis of the foregoing, it is my view that all the six applications before me cannot succeed.

Regarding costs, I note from the submissions made by the legal practitioners who appeared before me that the practice of this court in past matters may have contributed to the mistaken belief on the part of the applicants that arbitral awards that do not sound in money can be registered as orders of this court. Further, I also take into account that the "opposition" to the applications was at my specific direction and request in a bid to clarify the practice of this court on the matter. Finally and refreshingly in my view, all the legal practitioners who appeared before me were of the view that the correct practice of this court should be to deny registration of arbitral awards that do not sound in money and through this judgement, to remind all determining authorities dealing with labour matters to strictly follow the peremptory wording of section 89 (2) (c) (iii) of the Labour Act when ordering reinstatement of suspended or dismissed employees in accordance with the decision in *Hama v National Railways of Zimbabwe* (supra). It is on the basis of the foregoing that I am of the view that no party should be mulcted with an order of costs.

In the result, I make the following orders:

1. Each application is dismissed.
2. Each party in each application shall bear its own costs.