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DAMAGES AS A REMEDY FOR UNLAWFUL DISMISSAL FROM EMPLOYMENT: LEGAL POSITION IN ZIMBABWE

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When an employee sues their employer for unlawful dismissal, the court or tribunal seized with the matter has to grant the employee a remedy if the employee succeeds. In *Zupco v Chisvo*¹, the Supreme Court held that there are instances where reinstatement is the appropriate and equitable remedy for unlawful dismissal. There was no obstacle whatsoever to reinstatement in that case. The fact remains however that the alternative of damages is an essential part of any order for reinstatement². This is so because reinstatement may not be appropriate for various reasons, in which case, damages come into play. The employee often responds by presenting an inflated claim for damages. The claim might find favour with lower tribunals, in some cases with the Labour Court. More often than not, the employer party will successfully appeal to the Supreme Court. Both parties are prejudiced when that happens because of the prolonged delay in resolving the dispute. For this reason and the further one that justice delayed is justice denied, we have decided, in the interest of expediency, to condense the principles relevant to the question of determination of damages as a remedy for unlawful dismissal.

¹ 1999 (1) ZLR 67 (SC)
² See proviso in section 89 (2) (c) (iii) (ii) of the Labour Act Chapter 28:01. It is important to note that damages remains an option even when reinstatement is not possible. See Leopard Rock Hotel Company (Pvt) Ltd v Van Beek 2000 (1) ZLR 251 (S)
The purpose of damages is to place the employee in the position he would have occupied had the contract of employment not been prematurely terminated, subject to the employee’s duty to mitigate his loss. The employee is entitled to be awarded the amount of wages or salary and any benefit to which he was entitled and of which he was deprived as a result of the unlawful termination of the contract:

- **Gauntlet Security Services (Pvt) Ltd v Leonard** 1997 (1) ZLR 583 (SC)
- **Amabali v Bata Shoe Co Ltd** 1999 (1) ZLR 417 (SC)
- **First Mutual Life Ltd v Muzivi** SC 09/07
- **Farm Community Trust v Claudious Chemhere** SC 22/13

The employee’s duty to mitigate his loss by looking for alternative employment arises immediately after the wrongful or unlawful termination. If the employee does not mitigate his loss, his damages will be limited to the period between his dismissal and the date when he could reasonably have been expected to find alternative employment: **Gauntlet Security Services (Pvt) Ltd v Leonard**, supra; **Amabali v Bata Shoe Co Ltd**, supra.

In **Leopard Rock Hotel Company (Pvt) Ltd v Van Beek** 2000 (1) ZLR 251 (S), the Supreme Court accepted as correct the formula used to determine the measure of damages, per Van Winsen J (as he then was) in **Myers v Abrahamson** 1952 (3) SA 121 (C) at 127C-E that:

"...the measure of damages accorded such employee is, both in our law and the English law, the actual loss suffered by him represented by the sum due to him for the unexpired period of the contract, less any sum he earned or could reasonably have earned during such latter period in similar employment"
It is imperative to correctly set out one’s claim for damages. A claim for back pay coupled with a distinct claim for damages is not legally sustainable. This is because back pay is a concept associated with reinstatement. It does not apply if the employee is not reinstated. Blue Ribbon Foods Ltd v Dube NO & Anor 1993 (2) ZLR 146 (S) at 152A-F. Instead, the employee will be awarded damages, with back pay as a component of such damages: Leopard Rock Hotel Company (Pvt) Ltd v Van Beek, supra; Telone (Pvt) Ltd vs Kuyumani Zulu SC 110/04.

The court or tribunal seized with the matter has a duty to hear evidence on how long it will reasonably take a person in the position of the dismissed employee to find alternative employment: Redstar Wholesalers v Edmore Mabika SC 52/05. The court is guided by considerations such as the prevailing economic climate, the skills (if any) of the person concerned, experience, age and so on: Fokoseni v Lobels Bakery 2004 (1) ZLR 406 (S). The court is entitled to set off against the award of damages any income earned by the dismissed employee during the time he was not employed, with onus being on the employer to show that the employee has or should have earned an income from another source: Nyanguse v Mkwasine Estates (Pvt) Ltd 2000 (1) ZLR 571 (S).

It is trite that the employee bears the onus to prove his damages with evidence: First Mutual Life Assurance Limited v Muzivi 2007 (1) ZLR 325 (S); American Friends Service Committee v Irene Chauke SC 01/12; Heywood Investments (Private) Limited t/a GDC Hauliers v Pharaoh Zakeyo SC 32/13. Where damages can be assessed with exact mathematical precision, the employee is expected to adduce sufficient evidence to meet this requirement. Where, this cannot be done, the employee must lead such evidence as
is available to him so as to enable the Court to quantify his damages and to make an appropriate award in his favour: Aaron’s Whale Rock Trust v Murray and Roberts Ltd and Another 1992 (1) SA 652. If an estimate must be made of the amount, the court must use the information at hand, and not simply pluck a figure from nowhere: Nyanguse v Mkwasine Estates (Pvt) Ltd, supra. If the evidence led by parties is insufficient to enable the court to make an informed conclusion, the court has a duty to call for evidence in order to resolve the issue: Redstar Wholesalers v Edmore Mabika, supra. See also section 89 (2) & section 90A (4) of the Labour Act. To quantify damages without hearing evidence or to make any finding on no evidence is to err in law: Ruturi v Heritage Clothing (Pvt) Ltd (1994) (2) ZLR 374 (S). This obviously delays resolution of the matter because a party against whom the damages are awarded in such circumstances is at liberty to appeal the decision: Section 98 (10) & section 92F (1) of the Labour Act.

Damages are awarded pursuant to hearing of parties in quantification proceedings. It is trite that to quantify is to assess and determine the monetary value of each claim to be awarded to the employee: First Mutual Life Ltd v Muzivi, supra. It is therefore wrong to make an award for an unknown amount. It is equally wrong to make an award of damages at current rates (e.g. salary rates) instead of rates applicable at the time of suspension or dismissal of the employee as the case may be: First Mutual Life Ltd v Muzivi, supra.

Equally important is to note that an award of damages must take into account the question of tax: Ambali v Bata Shoe Co. Ltd, supra; Chiriseri & Anor v Plan International 2002 (2) ZLR 261; Heywood Investments (Private) Limited t/a GDC Hauliers v Pharaoh Zakeyo, supra. Thus, an award of damages must clearly indicate the net amount payable to an employee.
It is imperative that we also consider the question of punitive damages. What are they and when do they apply? The case of *Mvududu v ARDA SC 58/15* makes the point that punitive damages:

- Are damages that are punitive in nature and effect?

Applicable once it is established that reinstatement is unsuitable as a remedy for an unlawfully dismissed employee because of an untenable working relationship with the employer arising from the unlawful and wrongful dismissal of the employee.

In deciding whether or not to award punitive damages, one looks at the employer’s fault in the circumstances in which he dismissed the employee and the extent of the employer’s blameworthiness in causing the untenable relationship:

- Exceed what would ordinarily be granted as damages for reinstatement *i.e.* in the absence of any aggravating circumstance occasioned by the manner in which the employer dismissed the employee.

- Must have some evidentiary basis *i.e.* the employee must prove them.

**NB:** The starting point is to conduct an inquiry into whether the employment relationship has become untenable such as to render reinstatement unsuitable. The onus is on the employer to prove this, taking into account the size of the employer, employee’s preferences, situation in the Labour market and any other relevant factors. See section 89 (2) (c) of the Labour Act. Once it is established the employee cannot be reinstated because of the untenable relationship, the next line of inquiry is whether the untenable relationship was brought about by the employer’s conduct. If the answer is in the affirmative, punitive damages apply. This is followed by an employee leading evidence in support of the quantum of damages and thereafter a determination is made after hearing both parties.

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3 See also *Zupco v Chisvo*
THE END ... for now.