IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: RAMADHANI, J.A., LUBUVA, J.A., And LUGAKINGIRA, J.A.)

CIVIL APPEAL NO. 78 OF 1999

BETWEEN

THE NATIONAL MILLING CORPORATION..... APPELLANT

AND

JARED K. LISSO..... RESPONDENT

(Appeal from the decision and order of
the High Court of Tanzania at Dar es Salaam)

(Mackanja, J.)

dated the 13th day of July, 1999

in

Civil Case No. 204 of 1994

JUDGMENT OF THE COURT

LUBUVA, J.A.:

This appeal arises from the decision of the High Court (Mackanja, J.) in Civil Case No. 204 of 1994. The respondent was employed by the appellant, the National Milling Corporation, from 1/10/1975 to 1/7/1994, when his employment was terminated. Initially, the respondent was employed as Assistant Accountant rising to the post of Milling Manager.

The background of the matter is simple. The Board of Directors of the appellant corporation, decided to terminate the service of the respondent following disciplinary charges against the respondent presented by the General Manager (DW.2) to the Board of Directors. The respondent was summoned to appear before the Board of Directors to answer the charges. The General Manager also attended the Board Meeting to assist clarify issues arising

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from the charges. The respondent's case was that the termination of his service was wrongful because the decision of the Board was influenced by the presence of the General Manager (DW.2). He successfully sued the appellant in the High Court claiming damages for wrongful termination of service. The trial judge awarded the respondent shillings 25 million for general damages holding that the termination of the respondent's service was wrongful because the presence of the General Manager (DW. 2) at the Board's Meeting influenced the decision. The judge further held that the presence of the General Manager at the Meeting of the Board violated the principle of natural justice against bias. Against this decision, the appellant has appealed.

Mr. Fungamtama, learned counsel, represented the appellant in this appeal. He argued grounds one and two together. They read as follows:-

> 1. That the High Court erred in law infact in holding that the General Manager was a prosecutor and a judge in the cause.
>
> 2. That the High Court erred in law and infact in finding that the General Manager had an opportunity to influence the decision making process.

In his submission, he stated that apart from the minutes of Board of Directors' meeting Exh. P1 showing that Mr. Semesi, the General Manager, was present at the

making process of the Board or that the Board was in anyway influenced in its decision to terminate the service of the respondent. This is so because the General Manager (DW. 2) is neither a Board Member nor is he the secretary to the Board of Directors, Mr. Fungamtama contended. In order to participate in the deliberations of the Board, one has to be a Board Member or the Secretary. In this case, Mr. Fungamtama said the General Manager, Mr. Semesi was neither of these. It was therefore an error on the part of the learned judge to hold that the General Manager (DW. 2) in this case was a prosecutor and a judge in the case. Elaborating further, he said the General Manager's role at the Board Meeting was such that he could not be regarded as having played the role of a judge in his own cause. He argued that according to the evidence of Ridhiwani Masudi (DW. 1), a Board Member, the General Manager (DW. 2) was called to the Board Meeting to clarify some issues relating to the disciplinary charges preferred against the respondent. Otherwise, Mr. Fungamtama concluded, in the absence of any proof on a balance of probabilities to show that the Board was influenced by the General Manager (DW. 2), the finding of the trial judge of bias was erroneous and speculative. He urged the court to hold that the termination of the respondent's service was lawful. He also submitted that as the termination of the respondent's service was lawful, the damages awarded had no legal basis.

Mr. Maira, learned counsel, assisted by Mr. Koshuma, learned counsel, advocated for the respondent. He vigorously argued that Mr. Semesi, the General Manager (DW. 2) was an interested party in

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the proceedings and deliberations of the Board. According to Mr. Maira, the General Manager not only initiated the disciplinary charges against the respondent, but also presented the case before the Board of Directors. In that situation, he insisted, the General Manager played the role of a prosecutor and a judge in the case against the respondent. He went further saying that the General Manager, as the Chief Executive of the appellant corporation was interested in defending before the Board the charges preferred against the respondent. For this reason, Mr. Maira went on, the mere presence of the General Manager at the meeting of the Board of Directors deliberating on the respondent's fate, was sufficient to influence the Board's decision. In support of this proposition, he referred to the book by the distinguished authors H.W.H. Wade and C.F. Forsyth on Administrative Law, 8th Edition at page 449. In this case, Mr. Maira further submitted, it was not a matter of mere presence of the General Manager (DW. 2) at the Board Meeting. He said DW. 2 presented the case against the respondent and also clarified certain matters pertaining to the charges. He also contended that because of the role played by the General Manager (DW. 2) at the Board Meeting, the rule of natural justice against bias, 'nemo judex in causa', was breached. For this reason, Mr. Maira urged, the finding of the learned trial judge that the Board's decision to terminate the service of the respondent was unlawful, was sound, it cannot be faulted.

In our view, the determination of the appeal turns around one issue. That is whether the presence of Mr. Vincent Semesi, the General Manager (DW. 2) of the respondent corporation at the Board meeting, influenced the decision to terminate the service

of the respondent. The learned trial judge was settled in his view that the General Manager (DW. 2) influenced the decision. In so holding, he stated inter alia:

> Indeed, a careful examination of Exh. P.1 shows that only those who attended the Board Meeting full time are recorded as having attended. The General Manager is such person. I am satisfied that there is sufficient preponderant evidence upon which to hold, as I now do, that Mr. Vincent Semesi, the then General Manager of the defendant Corporation, attended the Board Meeting at which the decision to terminate the plaintiff's contract of employment was taken, this he did full time, the time the Board took its decision in the absence of the plaintiff. In the instant case, in view of my findings, the General Manager was prosecutor and sat to guide the board in its deliberations when in the absence of the plaintiff he made clarifications of issues which were being discussed. In so doing he had the opportunity to influence the decision making process...

It is apparent from the extract above that in coming to the conclusion that the General Manager (DW. 2) attended the Board Meeting full time, the learned trial judge heavily relied on the minutes of the Board Meeting Exh. P.1 of 1/7/1994, which deliberated on the charges against the respondent. Upon close examination of these minutes, one thing is clear to us, namely

that Exh. P1 reflects the names of the Board members who attended the meeting as well as those who were absent. It is also shown that the General Manager (DW. 2), Mr. Vincent Semesi, attended the meeting. From these minutes, it is also apparent that the respondent, though his name is not listed among those present at the meeting, was present at the meeting. This is evident form item Muht. 1 of the minutes when the Chairman of the Board is recorded to have specifically addressed the respondent, Mr. Lisso, to the effect that the respondent's defence had been received and that it was still open for the respondent to address the Board on any additional matter if he so wished. Otherwise, it is not shown in the minutes who, among the Board members and the General Manager, Mr. Vincent Semesi, was present at the meeting throughout. It seems to us therefore that the document, Exh. P.1 which the learned judge relied on in his finding that the General Manager DW. 2 attended the Board Meeting full time, does not support him in his finding.

On the contrary, from the record, the evidence of Ridhiwani Masudi (DW. 1) a Board Member of the appellant gives a clear picture of what transpired at the Board Meeting. His evidence is to the effect that prior to the meeting, the Board members were served with the Board papers. On the day of the meeting, the General Manager was called to the meeting to clarify on the charges preferred against the respondent. Then the respondent was called before the Board when the General Manager was asked to leave the Board room to enable the respondent make his defence to the charges freely. Mr. Vincent Semesi, the General Manager (DW. 2) was again called to the Board Meeting for clarification in the presence of

the respondent. Both the respondent and the General Manager were sent out of the Board Meeting to enable the Board to deliberate on the issue raised and make a decision. Finally, the respondent and DW. 2 were called to the meeting and were informed of the Board's decision and verdict. DW. 1 is categoric in his evidence that DW. 2, the General Manager was not a member of the Board and had nothing to do with the Board's decisions. From the evidence of DW. 1, it is clear that the finding of the trial judge on the presence of the General Manager (DW. 2) throughout at the Board Meeting is not supported. If anything at all, the evidence of DW. 1 together with the evidence of the General Manager DW. 2, bears out the submission of Mr. Fungamtama, counsel for the appellant that the General Manager (DW. 2) attended the Board Meeting at the time when he was called to clarify certain points on the charges. The evidence of DW. 1 also shows that the General Manager was present together with the respondent when they were called to be informed of the decision of the Board. In this light, we are of the settled view that the finding by the learned judge that the General Manager attended the Board Meeting full time when the decision to terminate the service of the respondent was taken in the absence of the respondent, was not based on any evidence at all on record. With respect, it was an erroneous finding based on speculation.

In the circumstances of this case where, the General Manager did not sit at the Board meeting throughout, we think the case of Cooper V. Wilson (1937) 2 K.B. 309, which Mr. Maira referred

in the book by H.W. Wade and C.F. Forsyth (supra), does not apply. In that case, the proceedings of a Watch Committee hearing an appeal by a Police Sergent, his dismissal by his Chief Constable were flawed by the presence of the Chief Constable at the hearing of the appeal. Here, the position is different, the General Manager (DW. 2) did not attend the Board Meeting when the Board was making the decision to terminate the service of the respondent. The court was also referred by Mr. Maira to the case of Jimmy David Ngonya V. National Milling Corporation Limited [1994] TLR. 28 in support of his submission that the General Manager DW 2 was a judge in his own cause. This is the case in which the High Court (Bahati, J.) held that the proceedings of the Board dismissing the applicant were vitiated because the General Manager who initiated proceedings, against the applicant attended the meeting. This, it was held, breached the rule against bias. With respect, it is also our view that the case is distinguishable from the instant case where the General Manager, Mr. Semesi (DW. 2) was not present at the Board Meeting when the fate of the respondent was decided. So, again we think the decision in that case is not of any assistance to the appellant.

All in all therefore, having regard to the circumstances of the case, we are satisfied that the learned trial judge arrived at the wrong conclusion that the termination of service of the respondent by the Board of Directors was unlawful. As abundantly shown, the conclusion of the trial judge was based on speculation that the principle of natural justice against bias had been breached by the General Manager's (DW. 2) presence at the Board

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Meeting. On the evidence on record, it had not been shown on a balance of probabilities that the General Manager was present throughout the time of the Board's Meeting or when the fate of the respondent was being decided. In the event, we are of the settled view that the decision of the Board, to terminate the service of the respondent was lawfully arrived at. This one, we think is sufficient to dispose of the appeal.

The claim for damages was dependant upon the issue on the lawfulness or otherwise of the decision to terminate the respondent's service. The learned trial judge having held the termination was unlawful, proceeded to award the damages which is the subject of the other grounds in this appeal. For our part, having taken the view that the termination was lawfully arrived at, there is no leg upon which to peg the damages. As a result, we find it unnecessary to deal with the useful submissions by counsel on the grounds relating to damages. Nonetheless, we are grateful to them.

In the event, and for the foregoing reasons, we allow the appeal and set aside the decision of the High Court. Costs to the appellant.

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DATED at DAR ES SALAAM this 21st day of August, 2002.

A.S.L.RAMADHANI
JUSTICE OF APPEAL

D.Z. LUBUVA
JUSTICE OF APPEAL

K.S.K.LUGAKINGIRA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(F.L.K. WAMBALI)
DEPUTY REGISTRAR