DAVID KAMUGISHA MULIBO V BUKOP LTD – BUKOBA

COURT OF APPEAL OF TANZANIA AT MWANZA

(Omar, Mnzavas and Mfalila, JJA)

CIVIL APPEAL NO 14 OF 1994

(From the ruling of the High Court of Tanzania at Mwanza, Masanche, J)

Civil Practice and Procedure – Change of judge before concluding the trial – Whether proper – Order 17 Rule 10 of the Civil Procedure Code 1966.

Labour Law – Summary dismissal of employee – Meaning of 'employee' in cases of summary dismissal – Sections 4 and 28(1) of the Security of Employment Act 1964 as amended by Act No 45 of 1969.

Labour Law – Meaning of 'employee' under the Security of Employment Act 1964 – Whether the opinion of the Labour Officer is binding on the court.

The appellant sued the respondent for wrongful termination of employment. At the commencement of the trial the respondent had raised a preliminary objection to the effect that the trial court had no jurisdiction because the appellant had been summarily dismissed. The trial judge ordered the trial to be stayed so that the opinion of the labour officer could be obtained regarding whether or not the appellant was employed in the management of the business of the employer, and therefore not an 'employee' under the Security of Employment Act 1964. That opinion was obtained and given to the court. The matter was then called before another judge who proceeded to strike out the case 'as incompetent in law'.

On appeal:

Held:

(i) It was highly irregular and unprocedural for the matter, which was initially before a judge who had stayed his ruling pending the opinion of the labour officer, to be heard and determined by another judge;

(ii) The opinion of the labour officer that the appellant was not a member of the respondent's management team was no more than a mere opinion which the court was not bound to follow;

(iii) As there was a triable issue before the court, ie whether or not the appellant was wrongly terminated by the respondent, the suit was in no way incompetent.

A *Case remitted to the High Court to proceed by the Judge before whom it was initially heard.*

No case referred to.

Nasimire, for the appellant.

B *Katabalwa*, for the respondent.

Mnzavas, JA, delivered the following considered judgment of the Court:

The appellant, David Kamugisha Mulibo, filed a suit in the High C Court against his former employer, Bukop Ltd – Bukoba, claiming damages for wrongful termination of his appointment.

When the case came up for hearing on 14 August 1990 Mr *Katabalwa*, learned defence Counsel for the respondent/defendant, raised a preliminary objection to the effect that the Court had no D jurisdiction to hear the case as, it was argued, the appellant was summarily dismissed. He quoted the provisions of s 28(1) of the Security of Employment Act 1964 and case law in support of his submission.

In rebuttal the appellant/plaintiff argued that the suit was for E claim of damages and that he was not questioning his dismissal. In his ruling the High Court (Sekule, J) said inter alia:

> '... This is therefore a case of summary dismissal and the jurisdiction of this Court is ousted by Section 28(1) of the Security of F Employment Act 1964. The matter however does not end here because for the jurisdiction of this Court to be ousted, the second requirement must be met. That is, the plaintiff must show to have been an employee within the meaning of Section 28(1) of the said Security of Employment Act, 1964.
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> G According to Section 2 of the Security of Employment (Amendment) Act 1969, employees who are employed in the management of their employer's business are exempted from the provisions of the Act and are not therefore employees within the meaning of Section 28 of the Security of Employment Act, 1964. The issue therefore is, was the plaintiff in this case employed in the H management of the business of his employer.

Act No 45 of 1969 – The Security of Employment (Amendment) Act 1969 amends s 4 of the principal Act regarding the definition of 'employee' by adding para *(e)* which says that an employee also I means 'any employee who, in the opinion of the labour officer is employed in the management of the business of his employer'.

In deciding on the question whether or not the appellant/plaintiff was employed in the management of the business of his employer of the High Court (Sekule, J) said inter alia:

'... I am inclined to the view that this is a fit case for the labour officer to give his opinion in terms of section 4*(e)* as amended by the Security of Employment (Amendment) Act, 1969 as to whether or not in his opinion the plaintiff was employed in the management of the business of his employer. In this regard, I would adopt the approach of this Court in the case of *Walter Jager v Cordura Ltd t/a Tanganyika Tourist Hotels and Oyster-Bay Hotels* (1972) HCD 133: and stay the suit, and leave it open to either party to this suit to obtain the opinion of the labour officer under Section 4*(e)* of the Security of Employment Act as amended by the Security of Employment (Amendment) Act No 45/1969 i.e. whether or not the plaintiff was employed in the management business of his employer. It was so ordered'.

This was on 7 March 1991. On 15 January 1993 the District Magistrate minute to Sekule, J was to this effect:

'This suit was stayed, pending opinion of the Labour Officer. The same has now been obtained and the case is referred back to your Lordship for your action/advice'.

Sekule, J in reply to the minute said:

'Let the parties be informed of the Labour Officer's opinion, And the case should be fixed for hearing or mention so that the effect of the opinion could be formally dealt with in the presence of the parties'.

On 24 February 1993 the case came before Masanche, J. On that day the appellant/plaintiff was present but the defendant was not. The record does not show whether or not he had been served with notice of hearing. The appellant/plaintiff is recorded to have told the Court: 'I am suing Bukop for dismissing me without following procedure'.

The Court (Masanche, J) retorted –

'But the record shows that it has been resolved that you were not a member of management team. Again, in terms of s 28(1) of the Security of Employment Act, 1964 Cap 574 this Court would have no jurisdiction to entertain the case'.

A The appellant/plaintiff replied:

> 'My Lord I think you can take my case. I think there is an authority of the Court of Appeal that says that such cases can be entertained. It is the case of Kaijago'.

B The Court fixed the 1 September 1993 as the day the ruling would be delivered. It was indeed delivered on that day and the High Court (Masanche, J) found that the Court had no jurisdiction to entertain the case and 'struck it out as incompetent in law'. Ag-
C grieved by the ruling the appellant has come to this Court.

Before us Mr *Nasimire* and Mr *Katabalwa*, learned Counsel appeared for the appellant and the respondent respectively.

Mr *Nasimire*, Learned Counsel, argued, after direction from the bench, that the High Court should have called the labour officer as
D a court witness to elaborate on his report that the appellant was not employed in the management of his employer's business before acting on the report to the detriment of his client, the appellant. It was also Mr *Nasimire's* submission that as Sekule, J had stayed the proceedings pending an opinion from the labour officer the
E matter should have been dealt with by the same judge after the opinion of the labour officer was received. The fact that the case was placed before Masanche, J was said to be irregular and we were ordered that the case be continued to completion before Sekule, J.

In rebuttal Mr *Katabalwa*, learned Counsel for the respondent,
F was apparently of the same view – adding that the whole matter was in confusion as Sekule, J did not finish his ruling. With respect to the learned Counsel we agree that it was highly irregular and unprocedural for the matter (which was initially before Sekule, J who had stayed his ruling pending an opinion from the labour officer) to
G be heard and determined by another judge.

The record is totally silent as to why Sekule, J did not conclude the trial after the opinion of the labour officer was received.

Order 17 Rule 10 of the Civil Procedure Code 1966 says:

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> 'Where a Judge or magistrate is prevented by death, transfer or another cause from concluding the trial of suit, his successor may deal with any evidence or memorandum taken down or made by the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and
I may proceed with the suit from the stage of which his predecessor left it'.

As none of the impediments mentioned above were present to prevent Mr Justice Sekule from concluding the trial of the suit, the trial of the suit by Mr Justice Masanche went counter to the clear provisions of Order 17 Rule 10 of the Civil Procedure Code – above mentioned. It is also not irrelevant to mention, if only in passing, the remark by Masanche, J to the plaintiff – 'But the record shows that *it has been resolved* that you were not a member of the management team' – (emphasis supplied). If the learned judge meant that the opinion of the labour officer had resolved the issue that the plaintiff was not a member of the management team (and we think that is what he meant), it is our view that the labour officer's opinion was mere opinion. It was not evidence, and the Court was not bound to follow it.

Another observation is that in his concluding remarks Masanche, J said – 'I order that his case be struck out as incompetent in law'. With respect, the suit was in no way incompetent. There was a triable issue i.e. whether or not the appellant/plaintiff was wrongfully terminated by the respondent/defendant from his employment, and the Court proceeded and tried the suit.

In view of the glaring irregularity mentioned above we have no alternative but to quash the decision by Masanche, J; and the order thereto is hereby set aside.

The case is remitted to the High Court and hearing should continue before Sekule, J from where it was stayed and the opinion of the labour officer be put to the parties.