IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CIVIL APPEAL NO. 68 OF 2001

BETWEEN

PAUL SOLOMON MWAIPYANA.....APPELLANT
AND
NBC HOLDING CORPORATION.....RESPONDENT

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

(Luguru, PRM/Extended Jurisdiction)

dated the 3rd day of February, 2000
in
Civil Appeal No. 72 of 1999

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JUDGMENT

LUBUVA, J.A.:

The appellant, Paul Solomon Mwaipyana, was dissatisfied with the decision of Principal Resident Magistrate, (Luguru, PRM) exercising extended jurisdiction, hence, this appeal has been preferred.

For an ease appreciation of the sequence of events giving rise to the appeal, we think it is desirable to preface the judgment with a brief outline of the background. The appellant was an employee of

then National Bank of Commerce (NBC) from 13.8.1981 as a clerk. It is however, to be observed that with the dissolution of the NBC on 30.9.1997, the respondent, NBC, Holding Corporation, was joined as a party to the proceedings. On 28.5.1996, the appellant was summarily dismissed. He took up the matter with the Dar-es-Salaam Regional Conciliation Board. Acting under the provisions of section 24 (1) (b) of the Security of Employment Act, 1964, (hereinafter referred to as the Act) on 20.8.1997 the Board ordered the appellant to be reinstated. However, under the provisions of section 40A(5) of the Act, the respondent opted to pay the appellant statutory compensation amounting to a total of shillings 61,240/=. The appellant was dissatisfied, so, after unsuccessful negotiations for a settlement out of court, the matter was referred to the District Court under section 132 of the Employment Ordinance Cap. 366 seeking the enforcement of the decision of the Conciliation Board as a decree. The application was granted on 23.10.1998.

On the other hand, the respondent, was still not prepared to implement the decision of the Conciliation Board as ordered by the District Court. An appeal was preferred against the decision of the

District Court. The Principal Resident Magistrate (PRM Ext. Jurisdiction) allowed the appeal, and set aside the decision of the District Court with the result that the decision of the Conciliation Board was restored. The learned Principal Resident Magistrate further held that the appellant was not entitled to any other payments claimed in addition to what the respondent had already paid. This appeal is against this decision.

Mr. Ndolezi, learned counsel, advocated for the appellant and the respondent was represented by Mrs. Kashonda, learned counsel. A three point-memorandum of appeal was filed. In essence, these grounds are to the following effect: that the Principal Resident Magistrate Extended Jurisdiction, erred first, in reviewing the decision of the Conciliation Board. Second, that the Principal Resident Magistrate (Ext .Jurisdiction) erred in holding that the appellant had been paid all his claims and third, that the Principal Resident Magistrate (Ext. J.) erred in not holding that as a matter of law, as long as the Conciliation Board had not been challenged, the

respondent was bound to implement the decision as ordered by the Board.

Mr. Ndolezi, forcefully argued these grounds. He submitted that it was erroneous on the part of the Principal Resident Magistrate, Extended Jurisdiction, to interpret and give effect to the decision of the Conciliation Board contrary to the law. According to him, after the decision of the Conciliation Board ordering the reinstatement of the respondent in terms of the provisions of section 24 (1) (b) of the Act, the matter was proceeded under an inapplicable provision of the law. He maintained that instead of reinstating the appellant as ordered by the Conciliation Board, the respondent opted to terminate the service of the appellant with payment of terminal benefits. This, Mr. Ndolezi insisted, was contrary to the law. He said once the Conciliation Board had ordered the reinstatement of the appellant and no appeal had been preffered to the Minister, there was no option for the appellant but to implement the decision of the Board.

Furthermore, Mr. Ndolezi said that the decision of the Board to reinstate the appellant had to be implemented by invoking the provisions of section 25 of the Act and not section 40A (5) as happened in this case. He also contended that the Conciliation Board's decision having been dealt with in the District Court and on appeal before the Principal Resident Magistrate Extended Jurisdiction by invoking an inapplicable provision of the law was improper. Worse still, he went on, the Principal Resident Magistrate purported to review the decision of the Conciliation Board contrary to the law as well. In view of what he referred to as inconsistent decisions in the High Court and this Court regarding the application of sections 40A (5) and 24 (1) (b) of the Act, he urged the Court to clarify the position regarding the import and application of these sections. He prayed for the reinstatement of the appellant as ordered by the Conciliation Board or payment of the appellant's dues in view of the dissolution of the National Bank of Commerce.

Mrs. Kashonda, learned counsel, for the respondent responded to these submissions: First, that the appellant had absented himself

from his employment for about seven years after taking leave without payment. For this reason the appellant was not entitled to any payment for the period he was away from his work. Second, the Principal Resident Magistrate, (Ext. J.) was entitled to interpret the decision of the Conciliation Board in order to satisfy himself that the decision was properly implemented. Third, in lieu of reinstatement, the appellant had been fully paid his dues in accordance with the provisions of section 5A (5) of the Act. In support of this submission, she referred the Court to its decisions S.M. Msisi V Tanzania Railways Corporation, Civil Appeal No. 39 of 1995 and D.A.N. Kavishe V Arusha International Conference Centre, Civil Application No. 1 of 1987 (unreported).

We think the determination of this appeal hinges on the interpretation and application of sections 40A (5), 24 and 25 of the Act. From the submissions by counsel for both parties, it is apparent that the application of these provisions of the law have at times not been free from difficulty. It seems to us therefore that there is merit in the submission of Mr. Ndolezi, that the import of section 40A (5) of

the Act is perceived differently. This is evident from some of the decisions of the High Court to which our attention was called by learned counsel.

In this case, it is to be observed at once that the Conciliation Board's order for the reinstatement of the appellant made pursuant to the provisions of section 24 (1) (b) of the Act, was not appealed against to the Minister. In that situation, we agreed with Mr. Ndolezi that its implementation is provided for under section 25 (1) (a) and not section 40A (5) of the Act as happened in this case. Section 25 (1) (a) provides for the implementation of the orders of the Board. It provides that:

> 25. – Where, in the exercise of its powers under this Part, a Board orders –
>
> (a) the re-engagement or re-instatement of an employee, the employer shall (unless such employee refuses to be re-engaged or re-instated, as the case may be) re-engage or re-instate the

> employee in his former employment, from the date of the employee's summary dismissal --- (underlining supplied).

From the provisions of this section, we think it is unambiguously clear, that the order of the Conciliation Board had to be implemented by the respondent. There is no option for payment of statutory compensation or other benefit provided in lieu of reinstatement. In this case, instead of implementing the Board's decision by invoking the provisions of section 25 (1) (a) of the Act, section 40 A (5) was instead applied.

When the matter was referred to the District Court and then on appeal, both the District Magistrate and the Principal Resident Magistrate (Ext. J.) did not address this issue. Worse still, both the courts below, in their endeavour to interpret the Board's decision, unfortunately went beyond the scope and purview of the decision of the Conciliation Board. For instance, in the District Court where, all that was sought was the enforcement of the Conciliation Board as a

decree, the magistrate awarded claims pertaining to terminal benefits and the Principal Resident Magistrate (Ext. J.) also fell into the same error of reviewing the Conciliation Board's decision.

In fine, we agree with Mr. Ndolezi, that in the circumstances of the case, in the absence of an appeal to the Minister, in terms of the provisions of section 25 (1) (a) of the Act, nothing less than the reinstatement of the appellant as ordered by the Board was required. To deal with the matter under section 40A (5) of the Act as the courts below did, was clearly improper. The fact that the respondent was paid statutory compensation as urged by Mrs. Kashonda, did not cure the impropriety.

On the other hand, as a result of the amendment to the Act, brought about by the Labour Laws (Miscellaneous Amendments) Act, No. 1 of 1975, the Conciliation Board may also order the reinstatement of an employee under Section 40A (5) of the Act, which, in part, provides that:

40A – (1) Notwithstanding any other provision of this Act or of any other written law, where an employer terminates the employment of any employee or summarily dismisses any employee and the employee is aggrieved by such termination or dismissal, the employee may at any time before the expiration of fourteen days from the date on which such termination or dismissal takes effect, refer such termination or dismissal to the Board and the Board may, if it is satisfied –

(a) – (f)------

(5) Where a re-instatement or re-engagement has been ordered under this section and the employer refuses or fails to comply with the order –

(a) in the case of an order made by a Board against which no reference has been made to the Minister, within twenty-eight days of the order being made; or

(b) in the case of an order made by the Minister on a further reference to him, within fourteen days of the order being made by the Minister.

the employer shall be liable to pay the employee compensation of an amount equal to the aggregate of –

(i) the statutory compensation computed in accordance with section 35; and

(ii) a sum equal to twelve months' wages at the rate of wages to which the employee was entitled immediately before the termination of his employment or, as the case may be, his dismissal,

order the employer to re-instate or re-engage the employee.

Upon a close reading of this section, it is plain that under the provisions of sub section (5) (a) and (b) where the employer refuses or fails to comply with the decision of the Board against which no reference has been made to the Minister or where, reference has been made, the order of the Minister, he shall be liable to pay statutory compensation and twelve months' wages. So, the import and effect of the two sections are distinctly different. That is, in applying section 24 (1) (b) of the Act, the employer who terminates the services of an employee has no option but to implement the Board's decision to reinstate the employee. On the other hand if section 40A (5) is applied, the employer who refuses to comply with the order would be held liable to pay statutory compensation and twelve months' wages. This, it is to be observed, is described in general terms as an alternative or option to reinstatement, an aspect which is not available under section 24 (1) (b). In the instant case, had the matter been dealt with properly by invoking section 25 (1) (a) of the Act, the question of paying the statutory compensation as an alternative would not arise, it was not available.

Finally, we wish to observe briefly on Mr. Ndolezi's claim that there is need for clarifying the import and application of section 40A (5) of the Act in order to avoid conflicting and inconsistent decisions by the courts. From the foregoing analysis of sections 24 (1) (b), 25 (1) (a) and 40A (5), we can see no reason for conflict or inconsistency. On a proper construction and application of these sections, the legal position is crystal clear. That is, as observed earlier, once section 24 (1) (b) is invoked, there is no option available to the employer except to reinstate the employee as ordered by the Conciliation Board. On the other hand if the reinstatement is ordered under section 40A (5) the employer who refuses to comply with the order, is liable to pay statutory compensation and twelve months' salaries as set out under paragraph (b) (i) and of section 40A (5). This is as it were, the alternative open for the employer if he fails to effect the order for reinstatement. The Court reiterated this legal position in D.A.N. Kavishe V Arusha International Conference Centre, AR-Civil Application No. 1 of 1987. With respect to counsel, the other cases cited, namely, Mwanza Textile Ltd. V A. Masatu, Civil Appeal

No. 8 of 1988 and S.M. Msisi V Tanzania Railways Corporation, Civil Appeal No. 39 of 1995, (unreported) do not deal specifically with the import of section 40A (5). Rather, they deal first with the fact that section 28 of Act, ousts the jurisdiction of the court and second, the issue whether the Minister can qualify the order for reinstatement.

For the foregoing reasons, we are satisfied that the decision of the Conciliation Board was proceeded in the District Court and on appeal before the Principal Resident Magistrate (Ext. J.) on the basis of an inapplicable section of the law. The proceedings in the courts below were therefore improper. Accordingly, the appeal is allowed, the decision of the Principal Resident Magistrate (Ext. J.) and the District Court is set aside.

Consequent upon this decision, there remains the decision of the Conciliation Board to reinstate the appellant to be implemented. However, we are aware of the fact that with the dissolution of the National Bank of Commerce Limited with effect from 30.9.1997, it is

not feasible to effect physical reinstatement of the appellant at this time. It would be a futile exercise to make an order to that effect. In the event, it is ordered that the appellant is to be paid his entitlements applicable under the terms of employment from 28.5.1996, when he was dismissed, to 30.9.1997, when the National Bank of Commerce Limited was dissolved. It is so ordered. Costs to the appellant.

DATED at DAR ES SALAAM this 07th day of October, 2003.

A. S. L. RAMADHANI
**JUSTICE OF APPEAL**

D. Z. LUBUVA
**JUSTICE OF APPEAL**

H. R. NSEKELA
**JUSTICE OF APPEAL**

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




F. L. K. Wambali
**DEPUTY REGISTRAR**