IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KISANGA, J.A., SAMATTA, J.A., And TROSO, Ag.J.A)

CIVIL APPEAL NO. 52 OF 1996

BETWEEN

SEPH SINDE WARIOBA ..... APPELLANT

AND

STEPHEN MASATU WASSIRA ... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Mwanza District Regidtry, sitting at Musoma)

(Lugakingira, J.)

dated the 30th day of August, 1996

in

Miscellaneous Civil Cause No. 25 of 1995

JUDGMENT OF THE COURT

KISANGA, J.A.:

During the 1995 general election the first respondent, Mr. Stephen Masatu Wassira, was elected Member of Parliament for Bunda constituency, but subsequently his election was nullified by the High Court (Lugakingira, J.) upon an election petition filed by the appellant, Mr. Joseph Sinde Warioba. In the course of dealing with that petition the trial judge found that the respondent had committed an act of corrupt practice, but declined to certify the same to the Director of Elections in terms of section 114 of the Elections Act. The appellant was aggrieved by such omission, hence this appeal.

Both at the trial and in this appeal the appellant was represented by Mr. J. S. Rweyemamu and Dr. J. T. Mwaikusa, learned advocates, while Mr. M. Marando and Dr. M. Lamwai, learned advocates, appeared for the first respondent; Mr. Malamsha, learned Senior State Attorney, was for the second respondent, the Attorney General. The memorandum of appeal contains only one ground of complaint, namely:-

> "That the learned trial judge erred in law when, having correctly found the Respondent to have committed corrupt practices, he declined to certify to the Director of Elections that the Respondent is guilty of corrupt practices."

The trial judge declined to certify to the Director of Elections because corrupt practice was not made the subject for certifying to the Director under section 114 of the Elections Act. In other words section 114 of the Elections Act provided for certifying to the Director of Elections the finding of illegal practice only, not corrupt practice. Section 114(1) of the Elections Act says:-

> "114(1) Where the Court determines that a person is guilty of any illegal practice, it shall certify the same to the Director of Elections ... ..."

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Counsel for the respondent had contended before the High Court that in the absence of any reference to "corrupt practice" in the provision, there could be no basis for requiring that Court to certify any finding of corrupt practice to the Director of Elections. To counter that argument, counsel for the appellant submitted that the omission to require findings of oorrupt practice to be certified to the Director of Elections was simply through inadvertence. During this appeal counsel arguments again centred on this point to a very large extent, and the immediate question which falls for consideration now is whether the omission was deliberate or was through inadvertence.

In support of the submission that the omission was through inadvertence, Dr. Mwaikusa traced the legislative history of the offence of corrupt practice. This history shows that corrupt practice was made an electoral offence under the Elections Act No. 1 of 1985. Thus under section 114(1) of the Act, for instance, the High Court which had jurisdiction to hear eleotion petitions then was required to report to the Director of Elections any findings of corrupt or illegal practice. In 1990, however, the law was amended by Act No. 13 of 1990 whereby the offences of corrupt practice were removed from the Elections Act. Thus sections 94, 96, 97, 98, 100, 102(1)

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and 107 of the Act relating to corrupt practices were repealed, and section 114, partly relating to corrupt practice, was also repealed but replaced by provisions which no longer made reference to corrupt practice but to illegal practice only. So that under sub-section (1) of section 114, for instance, the obligation to certify to the Director of Elections lay in relation to findings of illegal practice only, and not any findings of corrupt practice as had been the case before. By Act No. 20 of 1990 the offences of corrupt practice were transferred to the Prevention of Corrupt Act. In other words, after coming into operation of Act No. 20 of 1990 all electoral offences of corrupt practice were dealt with not under the Elections Act but under the Prevention of Corruption Act. The offences of illegal practice, however, were not transferred to the Prevention of Corruption Act; they continued to be dealt with under the Elections Act. Thus under section 114 (1) of the Act the finding of any illegal practice, following an election petition, was to be certified to the Director of Elections. Under the 1990 legislation the duty to so certify was cast on the Electoral Commission which was, under that Act, vested with the jurisdiction to hear and determine election complaints, while under the Elections (Amendment) Act No. 6 of 1992 the duty to so certify was cast on the High Court after the jurisdiction to hear and determine election petitions was restored to that court.

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And lastly, by the Elections (Amendment) Act No. 8 of 1995 the offences of corrupt practice were brought back to the Elections Act. Thus sections 94, 96, 97, 98, 100, 102(1) and 107 relating to corrupt practices and which were repealed by the 1990 legislation, were re-enacted by the 1995 legislation. However, corrupt practice was not restored in section 114, meaning that under sub-section (1) of that section, for example, the Court was not enjoined to certify to the Director of Elections any findings of corrupt practice as had been the case under the 1985 legislation.

Dr. Mwaikusa submitted that the omission to restore corrupt practice in that provision was merely an oversight, and that it cannot have been intended. In support of this view he referred us to the Objects and Reasons for the Bill to enact the 1995 legislation in which it is stated, inter alia, that:-

> "Clauses 15, 16, 17, 18 and 19 propose to restore into the Elections Act the offences relating to bribery, treating and corrupt practices which had been removed from the Act in 1990. The proposal is intended to enable the offences to be dealt with as part of the electoral process rather than through a separate criminal process under the Prevention of Corruption Act, 1971. It is also intended to facilitate the process of a free and fair election."

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It is clear from this that the purpose of the Bill is to re-introduce into the Elections Act the offences of corrupt practice which had been removed from that Act in 1990. Counsel, therefore, contended that there can be no rational explanation why Parliament should restore corrupt practice in sections 94, 96, 97, 98, 100, 102(1) and 107 but deliberately omit to restore it in section 114. Such omission, counsel maintained, can only be explained on the basis of an oversight or inadvertence.

In response to that, Dr. Lamwai took the view that corrupt or illegal practices as re-introduced by sections 94, 96, 97, 98, 100, 102(1) and 107 of the Act envisage that the proceedings relating to the trial of those offences will be of a criminal nature in which the charge is laid, the Director of Public Prosecutions appears and, if the charge is proved, conviction is entered. The nature of the proceedings envisaged by section 114(1), however, is different. That provision envisages proceedings where no charge has been laid, the Director of Public Prosecutions does not appear and, if the offence is proved, the court does not convict, but merely determines that the person concerned is guilty of illegal practice. Therefore, counsel contended, the omission to restore corrupt practice in section 114(1) was deliberate in as much as the proceedings envisaged by that section are not of a criminal nature; they are those which end up not with a conviction but with a mere determination of guilt.

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With due respect to Dr. Lamwai, we could not accept this argument. The determination referred to under section 114(1) that a person is "guilty" of an illegal practice, is consistent with a criminal trial because such determination or finding is normally followed by a conviction. Therefore, if an elections court is empowered under the provision to make such a determination or finding in respect of illegal practice, there is no good reason why it should not be equally empowered to make the same finding in respect of corrupt practice under that provision, which is in fact what the trial court did in the present case.

But what is even more important is this: If, as Dr. Lamwai argues, corrupt or illegal practice as restored by sections 94, 96, 97, 98, 100, 102(1) and 107 envisaged that the trial of these offences will be of a criminal nature, then the question is: Why is illegal practice also retained under section 114(1) where it is envisaged that the trial of that offence under the Act will not be of a criminal nature? In other words, if Dr. Lamwai is right, then one would expect consistency whereby both offences i.e. corrupt and illegal practices are confined within the ambit of sections 94, 96, 97, 98, 100, 102(1) and 107 and that the offence of illegal practice would be deleted from section 114. This was not done. Yet, in our view, it cannot be said that the omission to delete illegal practice from section 114 was through inadvertence. For, it is conceivable that there will be instances of

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alleged illegal practices in which the Director of Public Prosecutions does not consider it fit to institute criminal proceedings. In that oase the elections court has to deal with the allegation or allegations to see whether or not they are proved. It cannot reasonably be said that where the court finds that the allegation of illegal practice is proved the court should sit back and do nothing, the court must act. Therefore, Parliament must have deliberately retained the reference to illegal practice in section 114 in order to cater for such situations, i.e. to empower the court to deal with persons found guilty of illegal practice.

Likewise there will be instances of alleged corrupt practices in which the Director of Public Prosecutions does not consider it fit to mount prosecution, in which case the elections court has to deal with the matter, as was the case in the present case. Once again if the court finds, as indeed it did in this case, that the allegation of corrupt practice is established, can the court reasonably be expected to sit back and do nothing? We think Parliament cannot have intended so, especially considering the seriousness with which the society views the offence of corruption.

As was demonstrated earlier, Parliament deliberately retained the reference to illegal practice in section 114 to empower the election court to deal with persons found guilty of that offence where the Director of Public Prosecutions does not institute criminal proceedings.

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In our view, there can be no good reason for thinking that Parliament would exempt persons found, by an elections court, guilty of corrupt practices where the Director of Public Prosecutions has not taken up the matter. It is for this reason that we tend to agree with Dr. Mwaikusa's submission that the omission to re-introduce corrupt practice in section 114 was through inadvertence, especially as the Objects and Reasons for the relevant Bill make it abundantly clear that the intention was to bring back the offences of corrupt practice to the Elections Act.

Mr. Marando objected to any reference to the Objects and Reasons of the Bill for the purposes of discovering the intention of Parliament when enacting the 1995 legislation to re-introduce corrupt practices into the Elections Act. He contended that for the purposes of discovering that intention, the Objects and Reasons were irrelevant and should not be looked at at all. However, learned counsel did not cite any authority in support of this view. For our part, we think that the Objects and Reasons for the Bill are relevant and that we are entitled to look at them in trying to discover the intention of Parliament when enacting the law in question.

Given then that the clear intention of Parliament was to restore corrupt practices into the Elections Act, there is no indication that such restoration was meant to be

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effected only in some parts of the Act and not in others. We could not gather any such indication from the Objects and Reasons for the Bill to enact the law in question. We also had the occasion of glancing through the relevant pages of the Hansard. The debate over the Bill focussed on total condemnation of corruption and the great need to stamp it out from the electoral process. There was no indication whatsoever that corruption was to be treated or viewed with less seriousness in any of the provisions of the Act, or that the intended restoration of the offence was to be effected only in some parts of the Act and not in others. In other words there can be no rational explanation why Parliament should decide to restore corrupt practice in respect of sections 94, 96, 97, 98, 100, 102(1) and 107 only but deliberately omit to do so in respect of section 114 of the Act.

We are, therefore, firmly of the view that the omision to restore corrupt practice in section 114 of the Act was through inadvertence, and the question that now follows is, what is the remedy? In order to remedy this, Dr. Mwaikusa urged us to interpret or construe section 114 as including, or extending to, corrupt practice, so that corrupt practice is placed side by side with illegal practice and both are treated equally under that provision, as indeed they are in sections 94, 96, 97, 98, 100, 102(1) and 107. To do so, learned counsel went on, would avoid absurdity in the operation of section 114 and would prevent that provision from being discriminatory in its effect.

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Both Dr. Lamwai and Mr. Marando as well as Mr. Malamsha strongly opposed this submission and contended that to do so would amount to amending the statute by adding words to it which is the function of the Legislature, adding that all that the court can do is to take note of the inadequacy in the law, if the court is satisfied that such inadequacy in fact exists, and draw the attention of the Legislature to it for its remedial action.

We have considered carefully counsel submissions for both sides. We think that this is a fit case where, as submitted by Dr. Mwaikusa, the court should interpret section 114 as including or extending to corrupt practice. The view that nothing should be added to a statutory provision was widely accepted by the courts in England during the nineteenth and the first half of the twantieth centuries. Thus for instance, in R. v. Judge of the City of London Court [1892] 1 Q.B. 273 at p. 290 the Court of Appeal (per Lord Esher, M.R.) said, inter alia, that:

> "... If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity."

Re-affirming that view, the House of Lords (per Lord Atkinson) in the case of Vacher and Sons Ltd v. London Society of Compositors [1913] A.C. 107 at p. 121 said:-

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> "... But, as Lord Halsbury laid down in Cooke v. Charles A. Vogeler Co., a Court of law has nothing to do with the reasonableness or unreasonableness of a provision of a statute, except so far as it may help it in interpreting what the Legislature has said. If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results."

However, over the years this position has changed, and the view today is that in interpreting a statutory provision the court may, in a fit case, read words into the provision. Thus, for instance, in Kammis Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd. /1970/ 2 All ER 871 at p. 893 the House of Lords (per Lord Diplock) adopted what was described as the "purposive" approach, instead of the literal approach, and imputed to Parliament "an intention not to impose a prohibition inconsistent with the objects which the statute was designed to achieve, though the draftsman (had) omitted to incorporate in express words any reference to that intention."

That approach was re-echoed and elaborated upon by the Court of Appeal in Nothman v. Barnet London Borough Council /1978/ 1 All ER 1243 at p. 1246 where Lord Denning, M.R. said:-

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"The literal method (of construction) is now completely out of date. It has been replaced by ... ... the 'purposive' approach. ... ... In all cases now in the interpretation of statute we adopt such a construction as will promote the general legislative purpose underlying the provision. It is no longer necessary for the judges to wring their hands and say: There is nothing we can do about it. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it - by reading words in, if necessary - so as to do what Parliament would have done had they had the situation in mind."

Consistent with such holding, the Court declined to adopt the literal approach, and instead read words into the provision of the statute which it was construing. We find these last two cases to be very persuasive.

As stated earlier, the Objects and Reasons for the Bill to enaot the Elections Act No. 8 of 1995 make it manifestly clear that the intention of the proposed legislation was to re-introduce corrupt practices into the Elections Act. But that intention was implemented only in part in that corrupt practice was not restored in section 114. Yet there is nothing in the Objects and Reasons for the Bill, or indeed anywhere else in so far as we could gather, to show or suggest that that intention

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was to be carried out only with respect to some sections of the Act and not others. So that to the extent that corrupt practice was not restored in section 114 that section was, in one real sense, incomplete. That is to say, the section does not reflect or fulfil the aim or intention of the Legislature which was to bring back the Elections Act to the status which it was in prior to the 1990 amendment to it. Had the attention of Parliament been drawn to that point at the time of enacting that law we feel certain that Parliament would readily have taken steps to make the provision complete. Therefore, on the strength of the two cases of Ballrooms and Nothman above which we have found to be very persuasive, the Court would be justified to interpret section 114 as including or extending to corrupt practice, in order to promote or give effect to the general legislative purpose of restoring corrupt practices to the Elections Act.

Such construction is even more justified for the purpose of removing the absurdity which arises from the literal construction of section 114. As rightly contended by Dr. Mwaikusa, section 114 when construed literally, leads to an absurdity in that it empowers the court to certify to the Director of Elections findings of illegal practice but gives no such power in relation to corrupt practice. Corrupt practice is not in any way less serious than illegal practice; indeed the learned trial judge

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was of the view that corrupt practice was the more serious of the two. It would, therefore, be absurd, as Dr. Mwaikusa submitted, for Parliament to empower the elections court to certify for sanctions persons found guilty of illegal practice but to let those found guilty of corrupt practice go scot free, especially considering the fierce war which the society has been waging against corruption in recent years, and continues to do so in the present day. Had Parliament been appraised of such blatant absurdity at the time of enacting the Act, it would have taken steps to remove it; we feel justified to construe section 114 in such a way as to achieve just that which Parliament had set out to do, and no more.

Again such construction is justified in order to remove the discriminatory effect of section 114 which would arise from the literal construction of that provision. Section 114, literally construed, would be discriminatory in its effect because, as already noted, it empowers the court to certify for sanctions persons found guilty of illegal practices while conferring no such power on the court in respect of those found guilty of corrupt practice which is a similar or even more serious offence. This would contravene Article 13(2) of the Constitution of the United Republic which in effect prohibits the enactment of any law which is either directly discriminatory or is discriminatory in its effect.

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Dr. Lamwai's reply to this was twofold. First, if section 114 is discriminatory in its effect, the section is nonetheless saved under Article 30(2) of the Constitution of the United Republic which permits the making of laws that derogate from the guaranteed rights on the grounds of national interest. With due respect to the learned counsel, however, we cannot see how discriminating between persons found guilty of illegal practice and those found guilty of corrupt practice can be said to promote, preserve or protect the interests of the nation.

Alternatively, Dr. Lamwai submitted that if section 114 is discriminatory in its effect then the remedy is not to read the words corrupt practice into it because that would amount to amending the section which the court has no power to do. In his view the remedy is to initiate in the High Court proceedings to have that section struck down for being inconsistent with the Constitution. Again, with due respect to Dr. Lamwai, we could not agree. The issue of construing section 114 was properly before the Court, and the Court is satisfied that literal construction of that section would render it discriminatory in its effect and hence ultra vires the country's Constitution. In those circumstances we are of the view that the Court is justified, and indeed has a duty, to construe the provision in a manner that brings it into conformity with the Constitution, and it would not be necessary or even desirable to wait for Parliament to amend the section. The question of striking

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down section 114, as Dr. Lamwai submits, does not arise because that question was not before the Court; what was before the Court was whether or not section 114 should be construed literally.

We have, therefore, decided to adopt the purposive approach in interpreting section 114 in order to promote the legislative object or purpose of restoring corrupt practices to the Elections Act, and to remove the absurdity and the discriminatory effect which would arise from the literal construction of that section. Underlying the need to remove the discriminatory effect is the need, as demonstrated above, to bring that section into conformity with the country's Constitution. The construction which we have decided to adopt entails reading into the section the words "corrupt or" immediately before the word "illegal" whenever it occurs in that section. But in so doing we desire to make it clear that we are not amending the section. As amply demonstrated earlier, these words are not being invented by the Court, and they are not being used in that section for the first time. They were originally used by Parliament in the 1985 Elections Act. Although they were deleted from the Act by the 1990 amendment, Parliament sought to restore them by the 1995 amendment but through inadvertence the words were not restored in section 114. So that all that we are doing is to read into the section the words which Parliament itself had originally used in the 1985 Elections Act, deleted them

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from the Act in 1990 and subsequently sought to restore in 1995 but, through inadvertence, omitted to restore them in section 114. Those words are not in any way attributable to the Court; they are the words of Parliament itself; they are the very choice of Parliament and therefore, we cannot properly be said to be amending the law by merely reading into section 114 the words which are Parliament's own choice. But speaking generally, even if Parliament had not specifically used those words in the 1985 electoral legislation, the Court would still be justified to use those words, or words to that effect, in order to achieve exactly that which Parliament had set out to do, and which it would have done, had the situation been brought to its attention at the time of passing the Elections (Amendment) Act 1995.

It was also contended that reading the words "corrupt or" into the section would lead to the court finding the respondent guilty of an offence the consequences of which were not known to him at the time of its commission. That would offend the rule against retroactivity. However, we can find no merit in this. If under section 114 the court certifies to the Director of Elections that a person is guilty of corrupt practice, the consequences that follow would include deleting from the register of voters the name of the person so certified, and the disqualification of that person

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for a period of five years from registering as a voter or from voting, But those are precisely the same consequences that follow under section 96 of the Act when a person is convicted of corrupt practice. Therefore it is not correct to say that the consequences of committing the offence of corrupt practice were not known at the time the respondent committed it.

And lastly it was submitted for the respondent that section 114 was in the nature of a penal provision in so far as it required a person found guilty of illegal practice to be certified, for sanctions, to the Director of Elections. As such, therefore, it was contended, the provision ought to be construed strictly so as not to include, or extend to, corrupt practice. Our view of the matter is that where, as in this case, strict conatruction gives rise to absurdity or discriminatory effect of the provision, such construction or approach should not be adopted and that is what we have done.

Thus, for the reasons set out above, we feel justified to read the word "corrupt or" into section 114 and it is not necessary or desirable to wait for Parliament to amend the law. We, therefore, uphold Dr. Mwaikusa's submission and find that the learned trial judge, having found that the respondent was guilty of corrupt practice, wrongly declined to certify the same to the Director of Elections. The appeal is

allowed with a direction to the trial Court to certify to the Director of Elections in terms of section 114(1) of the Elections Act. The appellant shall have his costs.

DATED [illegible] this 2nd day of October, 1997.

R. H. NSANGA
JUSTICE OF APPEAL

B. A. SAMATTA
JUSTICE OF APPEAL

J. A. MROSO
Ag. JUSTICE OF APPEAL

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

(M. S. SHANGALI)
DEPUTY REGISTRAR