IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUNUO, J.A., RUTAKANGWA, J.A., And MASSATI, J.A.)

CIVIL APPEAL NO. 53 OF 2008

TANZANIA BREWERIES LIMITED ..... APPELLANT

VERSUS

MOHAMED KAZINGUMBE ..... RESPONDENT

(An Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam

(Mandia, Oriyo, Shangwa, JJJ.)

dated 13th day of April, 2007
in
Civil Appeal No 125 of 2005

JUDGMENT OF THE COURT

14 September, 15 & October, 2009

RUTAKANGWA, J.A.:

The Respondent was working as the Appellant Company's Human Resources Manager up to 16th March, 1998 when he was dismissed from the job. He was aggrieved by the dismissal. He lodged a complaint with the Labour Commissioner.

The Labour Commissioner referred the dispute to the Industrial Court of Tanzania, henceforth the I.C.T., for an enquiry. He did so under section 6 (2) of the now repealed Industrial Court of Tanzania

Act, 1967, henceforth the Act. Enquiry No. 47 of 1999 of the I.C.T. or the Enquiry, was opened.

The Enquiry was conducted by Mwipopo. J. The latter was the Chairman of the I.C.T. The Chairman of the I.C.T. was appointed by the President of the United Republic of Tanzania under section 17 (1) of the Act. The Act provided for the appointment of only one Chairman of the I.C.T. who was to be a judge of the High Court of Tanzania, and a number of Deputy Chairmen who were not judges. In the exercise of its original jurisdiction, the I.C.T. was duly constituted when presided over by the Chairman or a Deputy Chairman being assisted by two assessors. In Enquiry No. 47 of 1999, the Chairman sat with two assessors.

Mwipopo, J. delivered the ruling of the I.C.T in the enquiry on 17th July, 2004. The appellant was dissatisfied with the ruling and the award emanating therefrom. It applied for revision of the same under section 28 of the Act.

The composition of the I.C.T. while sitting to hear a revision application was clearly spelt out in section 28 (2) of the Act. It read as follows:-

> *"28 (2) – The Court shall, when exercising jurisdiction under subsection (1) be properly*

constituted, ***if it is presided over by the Chairman*** *sitting with two Deputy Chairmen and two Assessors, all different from those who sat on the Court when it first heard the dispute."*
[Emphasis is ours.]

Anyone aggrieved by any decision of the I.C.T had a right, under section 27 (1C), to challenge it in the High Court.

In hearing the revision application of the Appellant, the I.C.T. was presided over by the Chairman (Mwipopo, J.) and two Deputy Chairmen (Sambo and Mipawa), sitting with two assessors (Pazi and Machingu). The application was dismissed. The appellant was aggrieved and lodged an appeal (Civil Appeal No.125 of 2005) in the High Court at Dar-es-Salaam.

In that appeal, the appellant had preferred four (4) grounds of appeal. These were as follows:-

"(a) That the court erred in law in holding that misappropriation was incomplete because there was mere preparation and no asportation.
(b) That the Court erred in law and fact where it held that the Respondent's acts were minor misconducts punishable by reprimand ' onyo

kali la maandishi,' and did not amount to fraudulent and dishonest behaviour.

(c) *That the court erred in law and fact where it held that even if the Respondent is guilty of minor misconduct still he did not enjoy the said three crates because they remained in the hands of the Appellant.*

(d) *That the Court erred in law and fact in that it had no Jurisdiction to entertain revision as it was improperly constituted."*

The respondent resisted the appeal and urged the High Court to affirm the decision appealed against.

In determining the appeal before it, the High Court found it convenient to confine itself to the last ground of appeal. In answering this ground of complaint the High Court said:-

> *".... We are of the opinion that there was nothing untoward in the Chairman of the Industrial Court presiding over the original proceedings and revisional panel. Section 28 (1) of the I.C.T. sets out the composition of revisional panel as the Chairman sitting with two Deputy Chairmen and two assessors different from those who sat on the court when it first heard the dispute. Section 2 of the Industrial Court Act defines Chairman thus:-*
>
> > *'Chairman 'means the Chairman, appointed under section 17;'*
>
> *Since Section 17 which constitutes the Industrial Court of Tanzania establishes the post of Chairman for purposes of*

original jurisdiction under section 16 of the same Act, and since section 28 (2) which constitutes the revisional court also refers to the Chairman as appointed under section 17, the law envisaged the chairman of the I.C.T. to sit both in original jurisdiction and in revisional proceedings. ***Unwholesome as the situation is,*** *it is the law as currently provided. For this reason we dismiss the fourth ground."* [Emphasis is ours].

We have provided the emphasis because we, too, have similar sentiments and we agree with this apt observation.

On the first three grounds of appeal, the High Court said:-

".... We are of the settled opinion that the issues raised in the first three grounds are issues of fact not law, though the second and third are shown as issues of mixed fact and law .... It is an established principle of law that an appellate court, as we are, cannot interfere with a decision of a lower court based on findings of fact unless the findings are so grotesque as to occasion a failure of justice. This being the case, we cannot say there is an error made by the lower courts warranting intervention by this court. We therefore find the first three grounds not established and we dismiss them."

The appellant was dissatisfied with the entire decision, and hence, this appeal, which was urged by Mr. Cuthbert Tenga, learned advocate, on behalf of the appellant. The respondent fended for himself in resisting this appeal.

The appellant has lodged a memorandum of appeal containing only two grounds of appeal. The gist of the two complaints is that:-

(a) the learned appellate judges erred in law in dismissing its appeal in total disregard of their elaborate arguments going to establish that there was a breach of the cardinal principle of natural justice to the effect that no one shall be a judge in his own cause, and

(b) that the learned appellate judges erred in law in not rendering any decision on grounds of appeal (a), (b) and (c).

In his brief but focused submission in support of the appeal, Mr. Tenga lucidly took us through established law to the effect that in the administration of justice, two principles of adjudication are fundamental and paramount. The two, he pressed, should be strictly observed by judicial and quasi-judicial bodies. These are that:-

(i) No man shall be condemned unheard, and,

(ii) No man shall be a judge in his own cause (***Nemo judex in causa sua).***

A decision arrived at in breach of these rules or principles or any one of them, he stressed, is a nullity. He cited to us a number of very persuasive authorities in support of his stance. He accordingly urged

us to hold that Mwipopo J. acted in breach of the second principle and his participation, in the revisional proceedings nullified the same.

We should point out at once that we are in full agreement with the submission of Mr. Tenga on the importance of observing and giving full effect to the two cardinal principles of natural justice when one is determining the rights, duties and/or obligations of others. We are equally settled in our minds that it is settled law that failure to observe these rules will in almost all cases invalidate the decision, even if the same decision would have been arrived at had there been no violation of them. Therefore the overriding need of complying with the rules of natural justice cannot be over - emphasized again here. That is all we can say, in passing before directing our minds to the grave complaint against the Chairman of the I.C.T. and the appellate judges who condoned the apparent violation of the rule against bias by Mwaipopo, J. in Revision No. 20 of 2004.

The respondent, as expected, urged us to dismiss this ground of appeal because Mwipopo, J. sat on the panel, not because he wanted to be a judge in his own cause, but because the law explicitly required him to sit on the panel. There is, therefore, no dispute here on the crucial fact that Mwipopo, J. sat on a panel which decided the

appellant's application for the revision of his own decision and award in Enquiry No. 47 of 1999. This, on the face of it, was a manifest breach of the ***nemo judex in causa sua*** rule. What, then, were the legal consequences of this breach to the decision of I.C.T. ***in the peculiar circumstances of this case?***

We appreciate that many invaluable treatises, articles, etc, have been written and published appraising the inviolability of the principles of natural justice in the work of dispensing justice. Many judicial pronouncements have also been made on the issue in many decided cases by courts and tribunals in diverse jurisdictions.

Indeed, Mr. Tenga as already alluded to, has referred us to some of these treatises and not less than ten decided cases. In our quest for a satisfactory answer to this particular ground of complaint we have read all these references in favour of his cause and indeed even more than those cited to us. From our study of the voluminous material at our disposal, one clear fact has emerged. This is that the concept of natural justice as a navigation guide towards the achievement of substantive justice has two sides. The common side is the one elaborated on or advocated by Mr. Tenga. The other side, like the legendary African Pangolin, is rarely encountered in real life

and/or practice. This is that occasions may arise when a man may be required, to be a judge in his own cause. This can arise under two clear situations. These are under the doctrine of necessity and/or where Parliament so directs. We shall elaborate a bit.

In an illuminating article by Plucknett, ***"Bonham's Case and Judicial Review"*** (1926) 40 Havard L.R. 30, cited by S.A. de Smith in his ***JUDICIAL REVIEW OF ADMINISTRATIVE ACTION***, at page 140, it is asserted that, *"[I]t is doubtful whether a court ever held a statute to be void solely because it made a man a judge in his own cause..."* The learned authoritative author (de Smith) relying on a number of decided cases, further affirms:-

> *"... That Parliament is competent to make a man judge in his own cause has long been indisputable;"* (ibid).

But he adds this valid caveat:-

> *"... but the courts continue to uphold the common law tradition by declining to adopt such a construction of a statute if its wording is open to another construction"* (ibid).

We accept the assertion that a statute may expressly or by necessary implication exclude the application of natural justice. This

is because, subject to the provisions of the Constitution, *"Parliament in its wisdom, in passing an Act must be taken to know the general law"* (see: **FISHER v. BELL** [1961] 1 Q.B. 394 at p. 399) and must be taken to be acting in good faith for the benefit of the common good. See, also ***UNION OF INDIA v. TULSAM PATEL,*** (1985) 3 SCC 398, pp. 478-9 or AIR 1985 SC 1416, as well as ***RASH LAL YADAV (DR) v. STATE OF BIHAR,*** JT 1994 (4) SC 228, p. 241, which are cited approvingly by Justice G.P. Singh in his treatise entitled "***PRINCIPLES OF STATUTORY INTERPRETATION,"*** 8TH ed. (2001) at page 348, a book cited to us by Mr. Tenga.

Mr. Tenga, in support of his uncontested contention, also referred us to pages 220 – 238 of the book by M.P. Jain and S.N. Jain, ***"PRINCIPLES OF ADMINISTRATIVE LAW",*** 4th ed. But we have to observe here that had the learned advocate perused page 260 of the 5th edition (2007), he would have come across this indisputable assertion:-

> *"... Natural justice is implied by the courts when the parent statute under which an action is being taken by the Administration is silent as to its application. Omission to mention the right of*

hearing in the statutory provision does not ***ipso facto*** *exclude hearing to the affected person.* ***But a statute can exclude natural justice either expressly or by necessary implication.*** *The Supreme Court has observed in this regard:*

'The Principle of natural justice does not supplant the law but supplements the law. *Its application may be excluded either expressly or by necessary implication:" See,* ***DR. UMRAO S. CHAUDHURY v. STATE OF M.P.,*** *(1994) 4 SCC 328 at page 331, as well as* ***STATE OF UTTAR PRADESH v. VIJAY K. TRIPATHI,*** *AIR 1995 S.C. 1130.*

This Court was of the same view in the case of ***VIP ENGINEERING & MARKETING LTD & 2 OTHERS V. CITIBANK TANZANIA LTD***, Civil Reference Nos. 6, 7 and 8 of 2006 (unreported). However, we quashed the decision of the trial High Court in the latter case, on the ground of failure to observe the ***audi alteram partem*** rule, as the law governing those proceedings did not bar at all the application of the principles of natural justice.

Secondly, it is trite to say that unless the statute provides otherwise, the implication of natural justice will require absence of

bias: see G.P SINGH (supra) at page 351. But this requirement may be dispensed with under what is now known as the ***doctrine of necessity***. The essence of this doctrine is that "*if there is no other person excepting A to decide the issue, the doctrine of necessity will make it imperative on him to decide the issue inspite of any allegation of bias:*" see, for instance, ***ELECTION COMMISISION OF INDIA V. SUBRAMANTAN SWAMY,*** SC 1810, page 1817 para. 5. At page 164 of his book, de Smith (supra)makes this apt observation:-

> *"An adjudicator who is subject to disqualification at common law may be required to sit* ***if there Is no other competent tribunal or if a quorum cannot be formed without him."*** [Emphasis is ours].

One of the commonly cited cases in vindication of this doctrine is ***THE JUDGES v. ATTORNEY GENERAL FOR SASKATCHEWAN*** (1937) T.L.R. 464. In that case the judges of Saskatchewan were held to be required ***ex necessitate*** to decide on the constitutionality of legislation rendering them liable to pay income tax on their salaries. In our own jurisdiction, there was a time when the National Election Commission was mandated by the law to constitute itself into a court

to hear and determine petitions challenging the validity of the Parliamentary elections it had itself conducted and supervised. Under this head also, may be added the power of a court to commit a person for contempt of itself.

When these two situations were drawn to the attention of Mr. Tenga, he quickly pointed out that the facts of this case do not make it fall within the ambit of these exceptions. He was of this view because to him, contrary to the construction put to section 28 (2) of the Act, the law did not in anyway exclude the application of the principle of ***nemo judex in causa sua*** in revisional proceedings. By the words *"the Chairman", he said, it was meant a Chairman of the panel sitting to determine the revision application and not the Chairman of the I.C.T. He placed much reliance on the words "all different from those who sat on the court when it first heard the dispute."* To him, in order to avoid any absurdity, the correct interpretation to be put on the words ***"all different"*** ought to be that none of the members of the I.C.T. who constituted the panel in the original case should sit on revisional proceedings. This argument is attractive and if he be correct, then the rule against bias was grossly violated. But is Mr. Tenga correct in his construction of section 28(2)?

We understand that one of the canons of statutory construction is the presumption against absurdity. The presumption enjoins us to construe a statute "*in such a manner as to give it validity rather than invalidity:*" see, ODGER'S, **CONSTRUCTION OF DEEDS AND STATUTES**, 5th ed, at page 263. Here, we are facing a case of two competing alternative constructions. In such a situation, it was held in the case of **FRY v. I.R.C**. [1959] Ch. 86 at pg. 105 that:

> *".... The court, then, when faced with two possible constructions of legislative language, is entitled to look at the results of adopting each of the alternatives respectively in its quest for the true intention of Parliament."*

We are in full agreement with the above rule as we fully subscribe to the holding of Lord Esher, M.R. in **R.V. JUDGE OF CITY OF LONDON COURT** [1892], Q.B. 273 at pg.290. He held:

> *"**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."*[Emphasis is ours].

We take it as appreciated by all that the function of courts, under our Constitution, is to expound the law and not to legislate. In expounding the law we rely upon the actual intention of the legislature. Lord Radcliffe had this to say in **ATTORNEY-GENERAL FOR CANADA v. HALLET & CAREY LTD.** [1952] A.C. 427 at p. 449:-

> *"There are many so-called rules of construction that courts of law have resorted to in their interpretation of statues but the paramount rule remains* ***that every statute is to be expounded according to its manifest and expressed intention."*** [Emphasis is ours].

It was again said by Lord Reid in **WESTMINSTER BANK LTD v. ZANG** [1966] A.C. 181 at P.222, that:-

> *"But no principle of interpretation of statutes is more firmly settled than the rule that the court must deduce the intention of Parliament from the words used in the Act. If those words are in any way ambiguous – if they are reasonably capable of more than one meaning or if the provision in question is contradicted by or is incompatible with any other provision in the Act, then the court may depart from the natural*

meaning of the words in question; but beyond that we cannot go."

We fully subscribe to these holdings and adopt them because they are in accord with our fair senses for justice and our Constitutional mandate which is based on our recognition of the doctrine of separation of powers. The aforesaid doctrine is, of course, subject to the clear provisions of the Constitution guaranteeing the full enjoyment of the Basic Human rights by all.

With the above in mind, we have carefully studied the entire Act. We have found out that the word *"Chairman"* has been consistently used therein to refer to the Chairman of the I.C.T. This then, leads us to one of the established rules of statutory construction. This rule was stated with much precision in the case of **FARREL v. ALEXANDER** [1976] 2 ALL ER 721, P. 736 (HL) thus:-

"... where the draftsman uses the same word or phrase in similar contexts, he must be presumed to intend it in each place the same meaning."

We have dispassionately applied our minds to the language used in section 28 (2) of the Act. We have found it to be clear, plain and

unambiguous. It is clear that Parliament expressly intended the Chairman of the I.C.T. always to be a member of the panel sitting in all revisionl proceedings, regardless of whether the impugned decision and award were delivered by him or her. The use of the definite article *"the"* was not accidental but was intentional. This article is particularly used to refer to somebody or something that has already been mentioned or is easily understood or is the only, normal or obvious one of that kind. Parliament in all its wisdom, would not have used it out of sheer negligence and/or ignorance of its proper use.

We have found the use of the word *"the Chairman"* in section 28(2) of the Act, not incompatible with any other provision in the Act. For this reason, it is our firm opinion that the words, "*all different from the ones who sat on the court when it first heard the matter,*" coming later in the provision, do not refer to the earlier specifically singled out Chairman of the I.C.T. In order to give full effect to the clear intention of Parliament, and therefore avoid amending the law, unjustifiably, we have found ourselves in full agreement with the learned appellate judges of the High Court who held that in the exercise of its revisional powers, the I.C.T. was to be constituted by its Chairman, sitting with two Deputy Chairmen and two assessors. It

was these latter four persons who were barred, if any one of them had sat in the proceedings giving rise to the revision application. We are also in agreement with the first appellate judges on their observation that this situation was "*unwholesome*", but as we think we have sufficiently demonstrated above, it was not unusual or strange in our jurisprudence and/or in the jurisprudence of other countries. The law permits that.

In our perusal of the record of appeal, we have found incorporated therein a copy of the ruling of the I.C.T. in Revision Nos. 4A and 4B of 2005 between the **AGHA KHAN HOSPITAL AND RAMADHANI BAKARI AND 106 OTHERS.** This ruling is found between pages 126 and 141 of the record of appeal. It is stated in the ruling, at page 138, that the Chairman of the I.C.T. had previously taken steps to remedy this anomaly by advising the appropriate authorities to amend the law so as to bar the Chairman from sitting in revisional proceedings emanating from a matter he had heard and determined in the court's exercise of its original jurisdiction. It is stated in that ruling that the proposal was roundly rejected by the appropriate authorities. We have taken judicial notice of this ruling. The observations of the I.C.T. in that ruling, which dismissed a

challenge on the competence the Chairman sitting in revision of a matter he had previously determined, confirm our finding that the initiators of the legislation and Parliament had clearly intended the Chairman of the I.C.T. to sit in revision proceedings in any event.

That being the case, the I.C.T. would not have been properly constituted under section 28 (2) of the Act if the Chairman were to be excluded. Professor Sir William Wade & C. Forsyth in their book entitled **"ADMINISTRATIVE LAW"** 7th ed, at pages 476 – 7 lucidly state that:-

> *"But there are many cases where no substitution is possible, since no one eise is empowered to act. Natural justice then has to give way to necessity for otherwise there is no means of deciding and the machinery of justice or administration will break."*

We agree. In the case before us there was no room for substituting the Chairman of the I.C.T. Natural justice, therefore, was displaced not only by the doctrine of necessity but also expressly by clear statutory provisions, that is, by Parliament. We accordingly find no merit in the first ground of appeal and it is hereby dismissed.

its duty and/or jurisdiction in refusing to determine conclusively grounds of appeal (a), (b) and (c). Up to this point in time they remain undetermined. We would not wish to speculate on what would have been the decision of the High Court on these three grounds. As a result, we cannot purport to render our decision on what was not decided by the High Court. What is in our power is to order the High Court to hear and give a conclusive reasoned decision on the three grounds of appeal and make consequential orders, which incidentally were not asked here. We accordingly allow the second ground of appeal. We quash and set aside that part of the High Court judgment which held that the court was not seized with jurisdiction to decide issues of facts and/or mixed facts and law. For this reason we remit the record of the High Court to it with directions to determine conclusively grounds of appeal (a), (b) and (c) which it declined to determine. The totally newly constituted High Court and the parties may agree to start afresh or proceed on the basis of the submissions already on record.

In fine, this appeal partly succeeds and partly fails for reasons given herein. We order each party to bear its/his own costs on the appeal.

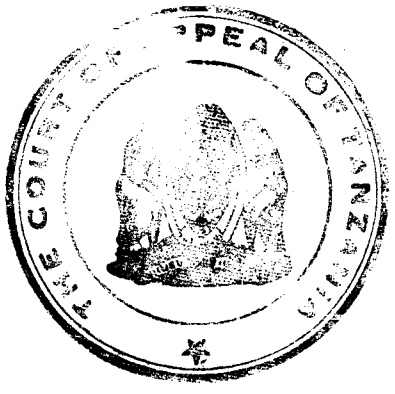
DATED at DAR ES SALAAM this 9th day of October, 2009.

E.N. MUNUO
AG. CHIEF JUSTICE

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASATI
JUSTICE OF APPEAL

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



N.N. CHUSI
DEPUTY REGISTRAR