IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CIVIL APPEAL NO 35 OF 2009

1. ATTORNEY GENERAL
2. MINISTER FOR LABOUR } ..... APPELLANTS

VERSUS

NATIONAL BANK OF COMMERCE LTD..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at mwanza)

(Sumari, J.)

dated the 25th day of July, 2008
in
Misc. Cause No. 3 of 2007
.....

JUDGMENT OF THE COURT

22 & 28 FEBRUARY, 2011

MASSATI, J.A.:

This is an appeal against the decision of the High Court (Sumari,J.)granting the orders of certiorari and mandamus against the decision of the Minister for Labour dated 6th December, 2006.

The facts of the case are that one LUCAS MASANJA, who appeared as the third Respondent in the application before the High Court, (but not a party in the present appeal) was an employee of the present Respondent (the National Bank of Commerce). He was stationed in Mwanza. In November, 2001 he was dismissed from his employment on the ground of misconduct. He referred the dispute to the Mwanza Conciliation Board. In its decision dated 12/7/2006 the Board ordered that he be reinstated with full benefits. The employer preferred a reference against that decision to the Minister under the provisions of the erstwhile Security of Employment Act(Cap 387- R.E. 2002). After finding that the reference did not accompany a statutory Form No. 7 made under section 51 of the Security of Employment Act, (Cap 574) (now S.53 of Cap 387) the Second Respondent made the following decision:-

KARATASI NA. 8

"(i) *MKURUGENZI MTENDAJI*
NBC LTD
S.L.P 1863
DAR ES SALAAM

(ii) *KATIBU WA TUICO (M)*
MWANZA
NDUGU LUCAS B. MASANJA
S.L.P 1074
MWANZA

Kuhusu LUCAS MASANJA (Jina la mfanyakazi) aliyeajiriwa na NBC LTD.

Baada ya kufikiria rufani iliyoletwa kwangu kuhusu uamuzi wa Baraza la Usuluhishi NYAMAGANA katika shauri la mfanyakazi aliyetajwa hapo juu, nimeamua kama ifuatavyo:-

KWA MUJIBU WA KIFUNGU 42 CHA SHERIA YA USALAMA KAZINI SURA YA 387 R.E. 2002 NAAMUA KWAMBA HAKUNA RUFAA MBELE YA WAZIRI KWA SABABU MWAJIRI HAKUJAZA KARATASI YA 7 YA RUFAA KAMA KIFUNGU CHA 51 CHA SHERIA YA USALAMA KAZINI KINAVYOLAZIMU. HIVYO UAMUZI WA BARAZA LA USULUHISHI WA KUMRUDISHA KAZINI MFANYAKAZI UTEKELEZWE.

Tafadhali mfahamishe mfanyakazi ipasavyo.

Tarehe 6/12/2006

Sahihi .....
MHE. JOHN CHILIGATI (MB)
WAZIRI WA KAZI

Nakala kwa:
Mwenyekiti,
Baraza la Usuluhishi
S.L.P 118 Nyamagana
Mwanza

This decision is carried in Form No. 8 in the second schedule to the Security of Employment (Disciplinary Proceedings) Regulations 1969.

The Respondent was aggrieved by the Minister's decision. After obtaining leave, she filed an application for the prerogative orders of certiorari and mandamus, which as shown above, was granted by the High Court. The Appellants were aggrieved, hence the present appeal.

At the hearing of the appeal, Ms MONICA OTARU, learned Principal State Attorney, appeared for the Appellants.

The respondent, who, according to the records was duly served, did not appear. Lucas B. Masanja, who was the third Respondent in the High Court but not in the present appeal, but was served, was also present. For purposes of record, Mr. Masanja informed the Court that he

had preferred a separate appeal in this Court, but had reached an amicable settlement with the respondent and had withdrawn the appeal. In view of the circumstances, we allowed Ms Otaru, to argue the appeal in the absence of the Respondent.

The Appellant preferred three grounds of appeal, namely:-

"i. That the learned judge erred in law and facts to hold that failure to fill form No. 7 was not sufficient reason for the Minister not to hear the applicant's reference.

ii. That the learned judge erred in law and facts to issue certiorari and mandamus as prayed by the respondent without taking into account the fact that the appeal before the Minister was improperly filed (sic).

iii. That the learned judge erred in law and facts by allowing the player (sic) prayed by applicant, which resulted the violation (sic) of the order mandatory use of proper procedure" (sic).

Although Ms OTARU, argued the first and third grounds together and finished with the second, the gist of her complaints is this:-

> *Since section 53 (51) of the Security of Employment Act (Cap 387) empowers the Minister to prescribe forms for use under the Act and since the section uses the word "shall" in applying such prescribed forms, and since section 53 (2) of the Interpretation of Laws Act (Cap I – R.E. 2002) provides that whenever the word "shall" is used, it means, it must be performed. and since Form No. 7 was prescribed for the purposes of accompanying a reference under the Act, it ought to have been used in preferring the respondent's reference. Since the respondent did not use Form No. 7 the reference was not properly before the Minister, who was therefore, right in rejecting it. Since there was no reference*

before the Minister, the latter could not make any decision that could be the subject of the order of certiorari, and lastly since Form No. 7 was not filed, the Minister could not be ordered to hear the reference by an order of mandamus.

In supporting her arguments, she referred us to a number of decisions by this Court and the High Court, such as **SHABANI NASSORO AND ANOTHER V TANZANIA PORTLAND CEMENT CO & ANOTHER** (1996) TLR 96 and **GODWIN NDEMESI & KAROLI ISHENGOMA V TANZANIA AUDIT CORPORATION** (1995) TLR 200 (CAT). On the above grounds Ms Otaru, prayed that the appeal be allowed.

The decision of the matter in the High Court and in this Court revolves around the wording of section 53 of the Security of Employment Act (Cap 387). That section provided (as the statute is no longer in force) as follows:

"(53). The Minister may prescribe forms to be used for the purposes of this Act and any form prescribed ***shall be used****, with such variations for the matters and in the cases for which they are prescribed."*

At the centre of the controversy is the phrase ***"any forms prescribed shall be used."*** The learned judge of the High Court held that:-

"The essence of ..... Form No. 7 is just to inform the Minister that the reference ..... has been filed. Failure to attach it or accompany it is not mandatory under section (sic) 53(2) of Cap 387. Why because S. 53(2) is not in existence....."

Our modest attempt to understand the last two sentenceS of the above paragraph leads us to infer that what learned judge meant was that filing of Form No. 7 was not mandatory. However, the learned judge wrongly quoted the appellant's argument in referring to "section 53(2) of Cap 387." At page 7 of her ruling, the learned judge attributed this to the State Attorney's argument. But with respect, there the State Attorney, expressly referred to "section 53(2)" of the Interpretation of Laws Act and not section 53(2) of the Security of Employment Act, which as the learned judge rightly remarked, never existed. This misapprehension about what law was applicable in interpreting the word "shall" in section 53 of the Security of Employment Act, is clearly demonstrated in the ruling of the learned judge. In her ruling, she herself never made reference to section 53(2) of the Interpretation of Laws Act (Cap I – R.E. 2002), but dismissed the reference to section 53(2) of Cap 387 which she thought was referred to by the appellants, but which was not.

Be that as it may, we think the real issue here is whether the word "shall" used in section 53 of the Security of Employment Act (Cap 387) (or section 51), in relation to the use of forms prescribed by the Minister

means, it is mandatory, and if so, whether its omission is necessarily fatal.? Ms Otaru was of the view that the word meant it was mandatory and its omission was fatal and she based her argument on section 53(2) of the Interpretation of Laws Act and the several decisions as referred to above. But when we referred her to section 2(2) (b) of the Interpretation of Laws Act, section 50 of the Security of Employment Act, and section (143(3) of the Employment Act (Cap 366 – R.E. 2002) she had a change of heart, and submitted in turn that the use of the form No. 7 was not necessarily fatal in the context and spirit of the labour law regime. We couldn't agree with her more. We shall explain.

It is true that section 53(2) of the Interpretation of Laws Act directs that whenever the word "shall" is used in any written law, it means that function must be performed. But section 53(2) of the Interpretation of Laws Act, should not be read in isolation from section 2(2) of that Act. Section 2(2) provides:-

"The provisions of this Act shall apply to and in relation to every written law, and every public document whether the law or public document was enacted, passed, made or issued before or after the commencement of this Act, unless in relation to a particular written law or document;

(a) Express provision to the contrary is made in an Act,

(b) In the case of an Act, the intent and object of the Act or something in the subject or content of the Act is inconsistent with such application or,

(c) In the case of subsidiary legislation the intent and object of the Act under which that subsidiary legislation is made is inconsistent with such application.

Recently, the full bench of this Court in Criminal Appeal No. 118 of 2010 (unreported) **BAHATI MAKEJA V R** considered the **ramifications** of the word "shall" in section 293(2) of the Criminal Procedure Act, read along with section 53(2)and section 2(2)(a) and (b) of the Interpretation of Laws Act, and concluded that the word "shall" in the CPA was not imperative, but relative to the provisions of section 388 of the CPA. What this decision means is that:-

(i) Section 53(2) of the Interpretation of Laws Act should always be read in conjunction with section 2(2) of the Act

(ii) Section 53(2) of the Act only applies where a particular Act or written law does not provide to the contrary or if by its contents, its application (i.e section 53 (2) would defeat the purpose of the particular written law or would be in-consistent with such law.

In the present case, to get the object of the Security of Employment Act, the Act, should be read as a whole. Going through the Act, we

stumbled across section 50 which enshrines the guiding principles in the application of the Act. It provides:-

> *"50. Subject to the provisions of the Act, which excludes the jurisdiction of the courts, the provisions of Part XII of the Employment Act shall apply mutatis mutandis in relation to any question, difference or dispute between an employer and an employee arising out of the decision of the Minister or a Board under this Act as they apply in relation to the questions differences or disputes referred to in that Part."*

This then takes us to the Employment Act (Cap 366 – R.E. 2002). Part XII of the Employment Act, relates to **REMEDIES, JURISDICTION AND PROCEDURE OF COURTS.** In the light of section 50 of the Security of Employment Act, it means that the guiding principles of procedure applicable under the Employment Act should also be applicable under the Security of Employment Act. Section 143 prescribes the procedure and the

guiding principles applicable in proceedings subsequent to reports to a Magistrate's Court. Of particular interest is s. 143(3) which reads:-

> *(3) The provisions in the Civil Procedure Code shall in so far as they may be applicable, apply to proceedings under this section.*
>
> ***Provided that the magistrate shall hear and determine such, proceedings according to substantial justice and without undue regard to technicalities of procedure."*** (Emphasis supplied).

From the provisions of the Security of Employment Act, the principles guiding the application of the Employment Act, and the Interpretation of Laws Act, we are certain in our minds that the object of the provisions of the Security of Employment Act is also to do substantial justice without undue regard to technicalities of procedure. The word "shall" in section 53 of the Security of Employment Act therefore ought to be read against this background. First, we must note that there is nothing

suggest that if a reference is made in any modified form or without the form, the reference would be invalid. And in view of the provisions of section 50 of the Security of Employment Act and section 143(3) of the Employment Act, the word "shall" in section 53 of the Security of Employment is also relative and has to be interpreted in the light of whether non compliance in filing the prescribed forms advances or hinders substantial justice.

Form 7 is required to accompany the employer's memorandum of reference to the Minister. It is available under the 1st schedule to the Security of Employment (Disciplinary, Proceedings) Regulations GN 98 of 1969. We have looked at the said form. This is how it looks like:-