IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., AND KEREFU, J.A.)

CIVIL APPLICATION NO. 393/01 OF 2017

COCA COLA KWANZA LTD ..... APPLICANT

VERSUS

CHARLES MPUNGA & 103 OTHERS ..... RESPONDENTS

(Application for leave to appeal to the Court of Appeal against the decision of the High Court of Tanzania at Dar es Salaam)

(Shangwa, Wambura, and Mgaya, JJ.)

dated the 25th day of October, 2010
in
Misc. Civil Appeal No. 10 of 2008

.....

RULING OF THE COURT

2nd & 24th June, 2020

MWARIJA, J.A.:

In this application, the applicant, Coca Cola Kwanza Ltd. is seeking leave to appeal to the Court against the decision of the High Court of Tanzania at Dar es Salaam (Shangwa, Wambura and Mgaya, JJ.) in Misc. Civil Appeal No. 10 of 2008. In that case, the High Court upheld the decision of the defunct Industrial Court of Tanzania (the ICT) in Revision

No. 23 of 2007 arising from Inquiring No. 4 of 2004 decided by the Deputy Chairman of that court.

The respondents, Charles Mpunga and 103 Others were employees of the applicant. They were terminated from employment on 30/8/2003 on retrenchment ground. They were aggrieved by their employer's act of terminating their employment and therefore filed a labour dispute in the ICT. They complained that the applicant did not follow the laid down procedures on the retrenchment exercise, particularly the requirement of holding consultative meeting between it and the field branch of the workers' trade union (TUICO) before making the decision to terminate them.

Having considered the sworn statements of Hamisi Ally Lilah and Jimka Ally Jimka tendered in support of the employees' case and the applicant's oral evidence given by Mario Mahunge as well as the availed voluntary agreement shown to have been entered into between the applicant and its workers on 29/7/2003, the learned Deputy Chairman found that the respondents were unfairly terminated. He was of the view that the voluntary agreement relied upon by the applicant was invalid

because, according to the evidence, consultation between the applicant's management and TUICO was held on 30/8/2003 after the respondents had been served with letters of termination in the morning of that date. In arriving at that finding, the Deputy Chairman acted on the sworn statements of *inter alia* Jimka Ally Jimka who was at the material time, one of the members of TUICO at the applicant's field branch. Having found that the respondents were unfairly terminated, the Deputy Chairman awarded them compensation to the tune of 24 months' salaries each in lieu of reinstatement.

The applicant was aggrieved by the decision of the Deputy Chairman and thus applied for revision before the panel of the ICT. The application was dismissed for want of merit. Aggrieved further by the decision of the ICT, the applicant appealed to the High Court. The appeal was similarly dismissed for want of merit. The High Court agreed with the finding of the ICT that, from the evidence, the retrenchment exercise was marred by procedural irregularities. It therefore declared that the respondents were unfairly terminated. However, with regard to the awarded compensation, the High Court reduced the amount to 12 months' salaries. That is, it

awarded each of the respondents a compensation of an amount equal to 12 months' salaries.

Undaunted, the applicant intended to appeal to the Court against the decision of the High Court. It thus moved that court under s.5 (1) (c) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002] (now R.E. 2019) for leave to appeal. That application was dismissed on 30/10/2012. Dissatisfied, the applicant has now come to this Court by way of a second bite after being granted extension of time on 21/8/2017 in Civil Application No. 63/01 of 2017.

The application, which was brought under *inter alia,* Rule 45(b) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), is supported by an affidavit sworn by Erick Ongara, the Human Resources Officer of the applicant. According to the notice of motion, the ground upon which leave to appeal is sought is as follows:

> *"1. That the judgment of the High Court is tainted with illegality as it did not take into account that the award of the full bench of the Industrial Court dated*

7.11.2008 in application for revision No. 23 of 2007 which partly upheld the award of the Industrial Court in Enquiry No. 4 of 2004 dated 01.08.2007 were procured by taking into consideration a sworn written statement of evidence which did not form part of the Respondents' evidence as it was withdrawn by the Respondents before cross examination".

At the hearing of the application, the applicant was represented by Mr. Arbogast Mseke, learned counsel while the respondents had the services of Mr. Mashiku Sabasaba, also learned counsel.

Mr. Mseke started his arguments by adopting the written submission which he had filed in compliance with Rule 106(1) of the Rules. In his submission, the learned counsel contended that there are critical legal issues arising in the decision of the High Court which call for consideration of the Court. He pointed out that the main issue which requires consideration is the legality or otherwise of the High Court's decision to uphold the finding of the ICT that the respondents were unfairly

terminated basing its finding on the sworn statement of Jimka Ally Jimka while that statement was withdrawn by the respondents and was, as a result, not subjected to cross-examination.

Mr. Mseke went on to argue that, in the circumstances, the ICT acted on the statement without affording the applicant the right to challenge it. Relying on the decisions of the Court in, *inter alia,* the cases of **Abbas Sherally & Another v. Abdul Sultan Haji Mohamed Fazalboy,** Civil Application No. 33 of 2002 and **Bank of Tanzania v. Said A. Marinda and Others**, Civil Application No. 74 of 1998 (both unreported), in which the Court underscored the duty of affording a party the right to be heard before any adverse action is taken against it, the learned counsel submitted that the raised point deserves consideration by the Court. On that submission, he prayed that the application be granted.

In reply, Mr. Sabasaba who had earlier on filed a written reply to the applicant's written submission in compliance with Rule 106(7) of the Rules resisting the application, submitted briefly that on reflection, he found it apposite not to oppose it. He however, prayed that the hearing of the

application be expedited given the length of time which the case has been pending in court.

From the unopposed submission of Mr. Mseke for the applicant, the issue for our determination is whether or not the application has merit. It is trite principle that an application for leave to appeal to the Court of Appeal may be granted only where it is established that there is a contentious legal point worth consideration of the Court. – See for example the cases of **National Bank of Commerce v. Maisha Musa Uledi (Life Business Centre),** Civil Application No. 410/07 of 2019 (unreported) and **Nurbhai N. Ratansi v. Ministry of Water, Construction, Energy, Land and Environment and Hussein Rajabhali Hirji** [2005] TLR 220. In the former case, we observed as follows:

> *"In an application for leave to appeal, what is required of the court hearing such an application is to determine whether or not the decision sought to be appealed against raises legal points which are worth consideration of the Court of Appeal"*

In the latter case, the Court was satisfied that the omission by the trial judge to determine the appeal on merits but instead acted on

extraneous matter to dismiss it, raised a contentious legal issue calling for consideration of the Court. In that regard, the Court held as follows:

> *"The complaint that the High Court judge did not deal with the appeal on its merits but instead dismissed it on other grounds which did not feature in the trial is a contentions legal point worth consideration of the Court of Appeal"*

In the case at hand, the High Court upheld the decision of the ICT which was based on *inter alia,* the sworn statement of evidence of Ally Jimka Ally, who was one of the members of TUICO. The ICT acted on that statement, which had been withdrawn by the respondents, and found that consultative meeting between the applicant's management and TUICO on behalf of the employees was held after the respondents had been served with letters of termination.

In our considered view, the point of law raised by the counsel for the applicant on the validity or otherwise of the evidence which had been withdrawn but still acted upon by the ICT to arrive at its decision is worth consideration of the Court so as to determine whether the High Court erred

in upholding the decision of the ICT. In the circumstances, we agree with the learned counsel for the parties that the application has merit.

In the event, leave is hereby granted to the applicant to appeal to this Court as prayed.

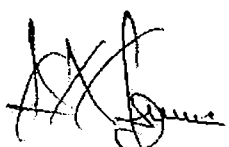
DATED at **DAR ES SALAAM** this 17th day of June, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The ruling delivered this 24th day of June, 2020 in the presence of Mr. Shepo Magirari, learned counsel for the Applicant and 33rd Respondent, Sultani Abdala and 104th Respondent, Edga Mrope appeared in person is hereby certified as a true copy of the original.



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL