IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPEAL NO. 145 OF 2018

MANTRA TANZANIA LIMITED ..... APPELLANT

VERSUS

JOAQUIM BONAVENTURE ..... RESPONDENT

[Appeal from the Judgment and Decree of the High Court of Tanzania (Labour Division) at Dar es Salaam]

(Nyerere, J.)

dated the 6th day of April, 2018
in
Consolidated Revision Nos. 137 & 151 of 2017

.....

JUDGMENT OF THE COURT

12th June & 17th July, 2020

MWARIJA, J.A.:

The respondent, Joaquim Bonaventure was an employee of the appellant, Mantra Tanzania Limited. He was employed on 15/6/2007 in the position of Finance and Administration Manager. On 30/11/2013 he was terminated from employment. His termination resulted from the decision of the Disciplinary Committee of the appellant/employer (the Committee) in which the respondent was found guilty of two, out of four

disciplinary charges leveled against him. The charges were based on the allegation that he had misappropriated his employer's funds. The Committee was satisfied, first, that the respondent spent his employer's money amounting to TZS 4,205,353.00 in paying a company known as Network Freight forwarders an import duty for his private motor vehicle without the appellant's authorization. It found further that, the respondent had instructed the said Network Freight Forwarders to process his motor vehicle's import duty clearance documents in the name of the appellant. Secondly, the Committee found that the respondent did also take TZS 1,400,000.00 from the appellant's funds and used it to pay Insurance Premium for his private motor vehicle without prior authorization from the appellant.

The respondent was dissatisfied with his termination and therefore lodged a complaint before the Commission for Mediation and Arbitration (the CMA). He complained that he was unfairly terminated and prayed for an order reinstating him to his employment and payment of all his employment entitlements and benefits.

In its decision, the CMA held that, although the respondent's termination was substantially fair, it was procedurally unfair in that, he was

not given sufficient notice of hearing to enable him prepare himself for the hearing before the Committee. As a result, the CMA proceeded to award him terminal benefits in terms of compensation, repatriation expenses and subsistence allowance. In the whole, he was awarded a total of TZS 908,148,563.00.

Aggrieved by the award made by the CMA in favour of the respondent, the appellant applied for revision before the High Court (Labour Division); Revision No. 137 of 2017. The appellant challenged the CMA's finding that the respondent was unfairly terminated as well as the quantum of the award. On his part, the respondent was also dissatisfied with the finding of the CMA that his termination was substantially fair. He thus filed Revision No. 151 of 2017. The two revisions were consolidated and heard together.

In its decision, the High Court disagreed with the finding of the CMA that the respondent's termination was substantially fair. The learned High Court Judge was of the view that the respondent acted *bona fide* in using his employer's money to pay the import duty and insurance premium for his personal motor vehicle because he was, by the company's practice, allowed to use the appellant's funds provided that he refunds the spent

amount timely. On that finding, the learned Judge reversed the decision of the CMA to the effect that the respondent's termination was substantially unfair. She thus held that the respondent's termination was without valid reasons.

On the procedure which was adopted during the hearing before the Committee, the learned Judge upheld the finding of the CMA that the same was against the laid down rules. She agreed with the Arbitrator that the respondent was not given sufficient notice before the hearing. She upheld the finding that he was given only a one day's notice instead of two days period prescribed under rule 13 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007. Having so found, the High Court awarded the respondent a total of TZS 412,780,000.00 comprising of compensation of 12 months' salaries amounting to TZS 113,520,000.00 for unfair termination, one months' salary of TZS 9,460,000.00 in lieu of notice and subsistence allowance of TZS 270,000,000.00.

The appellant was aggrieved by the decision of the High Court hence this appeal in which, by its memorandum of appeal lodged on 28/8/2018, has raised 7 grounds of appeal as follows:-

"1. That unlike the Arbitrator, the High Court Judge having failed to properly analyse and examine evidence on record, grossly erred in fact and in law, in deciding to the effect that the Respondent's acts of misappropriating the Employer's (Appellant's) money did not amount to a misconduct within the meaning of the law or the Appellant's policy and thus concluded that the termination of the Respondent's contract of employment was for no valid reasons.

2. That like the Arbitrator, the High Court Judge having failed to properly analyse and examine evidence on record, erred in law to decide to the effect that the termination of the Respondent's contract of employment was procedurally unfair due to giving a short notice for the Respondent to attend a disciplinary hearing, despite the glaring evidence on record to show that such alleged short notice was not prejudicial to the Respondent's case.

3. That like the Arbitrator, the High Court Judge having failed to properly evaluate facts of the case, in deciding as she did pertaining to the discretional powers of the Court to determine the amount of compensation, erred in law in not

making a finding that given the facts of this case the Respondent was not entitled to any compensation.

4. *That the High Court Judge having misconceived the law pertaining to pleadings relating to the matter to be referred to the Commission for Mediation and Arbitration (CMA), erred in law in concluding to the effect that once an employee alleges unfair termination in the CMA FORM NO. 1, that, for all purposes of pleadings, means and encompassed everything which would be considered to be invalid reason or/and procedurally unfair.*

5. *That the High Court Judge erred in law in upholding a finding of the Arbitrator on a matter relating to procedurally unfair termination despite of oblivious deviation from the pleadings (CMA FORM NO. 1).*

6. *That like the Arbitrator, the High Court Judge erred in law in entertaining and deciding on some crucial issues to the merits of the case basing on matters not forming part of the pleadings, and without considering the fact that*

the same were brought in the Commission out of the prescribed time under the law.

7. *That like the Arbitrator, in deciding on the issue relating to repatriation and subsistence allowances in the way and manner, the High Court Judge erred in law and in fact not considering the fact that the Respondent bears a blame for his unwarrantable delay to submit to the Appellant his claims for such allowances, and as such not entitled to such colossal amount of money as it was ordered by the High Court Judge."*

At the hearing however, the appellant's counsel abandoned the 2nd ground of appeal and argued the remaining grounds.

Upon being served with the record and memorandum of appeal, the respondent filed a notice in terms of Rule 94 (1), (2) and (3) of the Tanzania Court of Appeal Rules, 2009 as amended, in which he raised a cross appeal consisting of the following four grounds:-

"1. That the Trial Judge made an error in law by failing to grant the relief of reinstatement as sought by the Respondent/Complainant at CMA

through CMA Form No. 1 even after holding that the Respondent's termination of employment was substantively and procedurally unfair. The relief of compensation was awarded contrary to ***Section 40 (2) of the Employment and Labour Relations Act, No. 6 of 2004.***

2. *That the Trial Judge made an error in law by awarding a compensation of twelve (12) months only to the Respondent without regard to the provisions of* ***Section 40 (2) and (3) of the Employment and Labour Relations Act, No. 6 of 2004*** *which required the Appellant to pay the Respondent an amount of twelve (12) months wages in addition to wages due and other benefits if the Appellant refuses to reinstate the Respondent.*

3. *That the Trial Judge made an error in law by reducing the rate of subsistence allowance to the tune of TSHS. 150,000/= per day contrary to the*

applicable calculation formula provided under ***Section 43 (1) (c) of the Employment and Labour Relations Act, No. 6 of 2004 and Regulation 16 (1) & (2) of the Employment and Labour Relations (General) Regulations, GN No. 47 of 2017.***

4. *That the Trial Judge made an erred in law by failing to award the Respondent his basic wage of TZS 11,311,359.00 and other legal entitlements thereto."*

At the hearing of the appeal, the appellant was represented by Mr. Audax Vedasto, who was being assisted by Mr. Timon Vitalis, learned advocates. On his part, the respondent had the services of Mr. Richard Rweyongeza, learned advocate.

As alluded to above, whereas the appellant has raised seven grounds of appeal, the respondent predicated his cross-appeal on four grounds. For reasons which will be apparent herein, we do not intend to consider each of the grounds raised by the parties in their respective appeals. We

say so because of the pertinent issue raised by the respondent in ground 1 of his cross-appeal. Submitting in support of that ground of the cross-appeal, Mr. Rweyongeza argued that, after having found that the respondent's termination was both substantially and procedurally unfair, the learned High Court Judge was enjoined to grant the reliefs sought by the respondent in his Referral of Dispute to the CMA form (CMA Form No. 1). Relying on the provisions of s. 40 (1) and (2) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] (the ELRA), the learned counsel stressed that the High Court erred in awarding compensation of 12 months' remuneration instead of granting the respondent's prayer for reinstatement and other consequential reliefs provided for under those provisions of the ELRA.

In response, Mr. Vedasto conceded that the High Court did not consider the respondent's prayer for reinstatement although he sought an order to that effect in his CMA Form 1. The learned counsel argued however, that the High Court properly exercised its discretion under s. 40 of the ELRA thereby awarding compensation to the respondent instead of reinstating him to his employment. According to the learned counsel, it was due to the cause of the respondent's termination and the nature of his

employment which formed the basis of the High Court's decision. To bolster his argument, Mr. Vedasto cited the cases of **Henry Hidaya Ilanga v. Manyema Manyoka** [1961] E.A. 705, **Elia Kasalile and 17 others v. Institute of Social Work**; Civil Application No. 187/18 of 2018 and **National Microfinance Bank v. Leila Mringo and 2 others**; Civil Appeal No. 30 of 2018 (both unreported).

From the record and the submissions of the counsel for the parties, there is no dispute that in his CMA Form No. 1, the respondent complained that he was unfairly terminated and sought, among other reliefs, an order reinstating him to his employment. In paragraph 4 thereof which requires the party referring a dispute to the CMA to state the outcome which he seeks to obtain, he indicated that he was seeking the following reliefs:

" - *Reinstatement.*

- *Payment of contractual benefits.*
- *All other legal benefits including allowances etc."*

[Emphasis added]

There is also no dispute that, although in its decision, apart from upholding the CMA's finding that the respondent's termination was procedurally

unfair, the High Court found also that the termination was substantially unfair because the CMA erred in finding him guilty of the disciplinary charges levelled against him.

Despite that finding, the High Court did not consider the respondent's prayer for reinstatement which was one of the reliefs sought in CMA Form No. 1. Under s. 40 (1) of the ELRA, reinstatement to employment is one of the remedies which an employee may be granted when it is found that he was unfairly terminated from his employment. Since the respondent had prayed for that relief, it is imperative that, after having found that his termination was substantially and procedurally unfair, the High Court ought to have considered whether or not to grant that relief.

In our considered view therefore, by omitting to do so, the High Court strayed into an error. The argument by Mr. Vedasto that the learned High Court Judge properly exercised her discretion in granting compensation to the respondent instead of ordering his reinstatement is with respect, incorrect. This is because of the obvious reason that the learned Judge did not at all consider that crucial issue and therefore, the question of exercise of discretion does not arise.

That said and done, our next task is to consider the effect of the irregularity and make a decision on the way forward. In our considered view, the omission to consider whether or not to grant the relief sought by the respondent vitiated the impugned decision because it left that crucial issue undetermined. It is for this reason that, as stated above, the need for considering the grounds of appeal and the other grounds of the cross-appeal does not arise.

On the way forward, it is trite principle that when an issue which is relevant in resolving the parties' dispute is not decided, an appellate court cannot step into the shoes of the lower court and assume that duty. The remedy is to remit the case to that court for it to consider and determine the matter. For instance, in the case of **Truck Freight (T) Ltd v. CRDB Ltd**; Civil Application no. 157 of 2007 (unreported), the Court held as follows:-

> *"If the lower court did not resolve the controversy between the parties, rightly or wrongly, what can an appellate court do? We cannot step into its shoes. We therefore, allow the appeal and quash the decision.... We order that he (the trial Judge) either decides the issues which were framed and*

agreed upon by the parties or, if he is of the firm opinion that the issue of the governing law on execution of what is crucially important for the just determination of the suit, then he should re-open the hearing and let both learned counsel address him."

In another case, **Alnoor Shariff Jamal v. Bahadur Ebrahim Shamji,** Civil Appeal No. 25 of 2006 (unreported), the appellant filed a petition in the High Court (Commercial Division) seeking extension of time within which to file a petition to set aside the award of the Sole Arbitrator. In its decision, the High Court invoked the provisions of Art 107A and 107B of the Constitution of the United Republic of Tanzania as well as the court's inherent powers under s. 95 of the Civil Procedure Code [Cap. 33 R.E. 2002] (now R.E. 2019) and proceeded to remit the Award to the Sole Arbitrator to reconsider the time within which the appellant was to pay the awarded amount. The High Court did not determine whether or not there was sufficient ground for granting the appellant extension of time to set aside the Arbitration's award, which was the crucial issue before it.

The Court held that the omission was a fatal error. It observed as follows as regards the exercise by the High Court, of its inherent powers to

decide the petition while abandoning the matter which was before it for determination:-

> *"... the argument that the judge was empowered to use the court's inherent powers to remit the Award for reconsideration does not hold water because as we have already said earlier, the use of inherent powers is not intended to do away with basic principles governing court proceedings."*

Like in the **Truck Freight case** (supra), the Court made an order remitting the case to the High Court for it to proceed to determine the crucial issue which in that case, was whether or not there was sufficient cause for granting the appellant's petition for extension of time to set aside the Award of the Sole Arbitrator.

The circumstances of the present case are similar to those of the cases cited above. In the circumstances, having found that the omission vitiated the impugned decision, we hereby quash that judgment and remit the case to the High Court for it to render a decision after having considered the reliefs sought by the respondent.

Since this appeal arises from a labour dispute, we make no order as to costs.

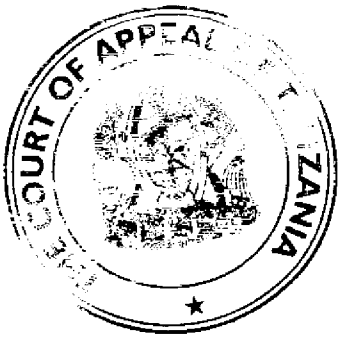
DATED at **DAR ES SALAAM** this 15th day of July, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 17th day of July, 2020 in the presence of Mr. Timon Vitalis, learned counsel appeared for the Appellant and Mr. Theodori Primus, learned counsel appeared for the Respondent is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL