IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MMILLA, J.A., NDIKA, J.A., And LEVIRA, J.A.)

CIVIL APPEAL NO. 234 OF 2017

NKWABI SHING'OMA LUME ..... APPELLANT

VERSUS

SECRETARY GENERAL, CHAMA CHA MAPINDUZI ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Mwanza)

(Bukuku, J.)

dated the 10th day of January, 2017
in
Miscellaneous Civil Appeal No. 01 of 2013

.....

JUDGMENT OF THE COURT

20th & 25th March, 2020

NDIKA, J.A.:

Nkwabi Shing'oma Lume, the appellant herein, has appealed to this Court against the judgment of the High Court of Tanzania at Mwanza (Bukuku, J.) dated 10th January, 2017 in Miscellaneous Civil Appeal No. 01 of 2013. The impugned decision reversed the decision of the Resident Magistrate's Court of Mwanza at Mwanza ("the RM's Court") in execution proceedings in Miscellaneous Civil Application No. 54 of 2012.

For an understanding of the context in which the appeal has arisen as well as the issues involved, we propose to provide the essential facts of the case as follows: The appellant was employed by the Secretary-General, Chama cha Mapinduzi, the respondent herein, as Assistant Secretary cum Accountant for Magu District with effect from 1st July, 2002 on a contract that entailed a twelve-months' probation period. After the probation period, he entered into a five-year contract with the respondent running from 20th August, 2003 up to 19th August, 2008. On 23rd February, 2004 the respondent wrote him a letter terminating his employment with effect from 1st March, 2004. Dissatisfied, he successfully contested the termination by referring the matter to the Conciliation Board for Nyamagana District ("the Board"), which, by its decision dated 10th August, 2005, ordered the respondent to reinstate the appellant in his employment as per the contract and also pay him salary arrears for the whole period between the termination of his service to reinstatement. That decision was made pursuant to section 25 (1) (b) of the Security of Employment Act, Cap. 387 ("the SEA").

Resenting the aforesaid decision, the respondent referred the matter to the Minister responsible for labour matters on 19th October, 2005. Nonetheless, the said reference bore no fruit as the Minister struck it out on

25th March, 2006 for being time-barred. Undaunted, the respondent approached the High Court of Tanzania at Mwanza seeking judicial review of both decisions of the Minister and the Board. Once again, luck was not on the respondent's side as the High Court (Mackanja, J.) on 6th February, 2009 dismissed the matter on account of being time-barred.

In terms of the provisions of section 28 (1) (c) of the SEA, the appellant, then, applied to the RM's Court vide Miscellaneous Civil Application No. 26 of 2009 for execution of the decision of the Board as upheld by the Minister. The court (Hon. Masesa, R.M.) granted the matter on 31st March 2009, ordering that the appellant be reinstated in his employment and that he be paid salary arrears in the sum of TZS. 11,567,647.50, computed from the date of the dismissal up to 31st March, 2009. Nonetheless, that order was not complied with for more than three years. So, on 10th July, 2012 the RM's Court issued a warrant of attachment against the respondent for the decretal sum that had then accumulated to TZS. 27,260,544.00. The respondent had to pay up the said sum or risk attachment of its motor vehicle with registration number T.479 BJK.

The respondent, it seems, was still disinclined to comply with the Board's order and so, it applied to the RM's Court vide Miscellaneous Civil

Application No. 54 of 2012 for the court to not only stay the warrant of attachment but also to verify and/or reverse the Board's decision. The RM's Court (Hon. Rumisha, R.M.) held that the respondent was at liberty either to reinstate the appellant in his employment or to refuse to do so but pay compensation as per section 42 (5) (d) (ii) of the SEA. Certainly, the envisaged compensation was a payment of twelve months' salaries at the rate of the monthly salary paid before the contested dismissal was made.

The appellant was dissatisfied, hence he appealed to the High Court vide Miscellaneous Civil Appeal No. 01 of 2013. The High Court (Bukuku, J.) allowed the appeal faulting the RM's Court for holding that the respondent was at liberty to pay compensation in lieu of reinstatement. The learned Judge took the view that in terms of section 26 (1) (a) of the SEA the respondent had no option but to reinstate the appellant in his employment. She added that the RM's Court erred in invoking section 42 (5) (d) (ii) of the SEA, giving the option of payment of compensation in lieu of reinstatement, that was inapplicable. While the learned Judge was conscious that what remained to be done was the implementation of the Board's decision by reinstating the appellant in his employment, she ultimately observed and held thus:

> *"I am mindful of the fact that the appellant was summarily dismissed on 23/2/2004 which is approximately twelve years now. I don't think it is feasible to effect physical reinstatement of the appellant back to employment much as the respondent, who is his employer, still exists. For that matter, I am not prepared to make an order which cannot be implemented."*

On the above reasoning, the learned Judge proceeded to order the respondent to pay "the appellant salary arrears to be calculated in accordance with the law, as ordered by the Conciliation Board, that is, from the date of his summary dismissal up to the date of full payment." The appellant was aggrieved by that decision which he now challenges on two grounds thus:

1. *That, the learned High Court Judge erred in law when she omitted to make an order for reinstatement of the appellant back to his employment.*
2. *That, the learned High Court Judge erred in law when she omitted to consider and determine prayers (c), (d) and (e) in the Memorandum of Appeal to the High Court.*

At the hearing of the appeal, the appellant appeared in person, unrepresented; whereas the respondent had the services of Mr. Fidelis Cassian Mtewele, learned counsel.

The appellant began his oral argument by adopting his grounds of appeal as elaborated in the written submissions he had lodged. He then bemoaned that the Board's decision in his favour was yet to be executed. In his argument, however, he observably drifted off the course as he argued that had the reinstatement been effected he would have continued with his service on permanent and pensionable terms until 27th January, 2019 when he was due to retire at the age of sixty years. That the respondent had not remitted any of his monthly statutory contributions from 1st March, 2004 to the then National Social Security Fund (NSSF) thereby denying him an accumulation of the statutory 180 monthly contributions to qualify for pension.

On being queried by the Court as to the essence and the propriety of the application before Hon. Rumisha, R.M. as well as the decision thereon, the appellant conceded that the execution proceedings were evidently muddled at that stage as the court seized the matter and went awry by attempting to correct the Board's decision instead of executing it. He also

argued that the learned High Court Judge, on appeal, messed up the matter further instead of correcting the RM's Court's error and remitting the matter to the executing court for the Board's decision to be enforced. All the same, he implored that his appeal be allowed and that an order be made for the Board's decision to be implemented fully and that his NSSF contributions be remitted for the period up to 27th January, 2019.

Mr. Mtewele agreed that the RM's Court had no power to verify or validate or review the Board's decision as affirmed by the Minister. He submitted that the High Court, on appeal, ought to have nullified the lower court's proceedings and decision thereon. Given the circumstances, the learned counsel urged us to invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 ("the AJA") and nullify the offending proceedings of the RM's Court and the decision thereon in tandem with those of the High Court that stemmed from a nullity.

As for the way forward, Mr. Mtewele conceded that the appellant was entitled to the reliefs as adjudged by the Board and affirmed by the Minister and that the executing court should implement the Board's order as it is. However, he was categorical that the appellant's reinstatement in his employment entailed restoring him to the position he had under his five-year

contract, no more no less. He disputed the claim that the appellant's employment was converted into a contract of service on permanent and pensionable terms.

Rejoining, the appellant reiterated the contention that his five-year contract was transmuted into a contract on permanent and pensionable terms as was the case with his successor in office, one Mr. David Gewe, as evidenced by his contract dated 1st August, 2007 at page 108 of the record of appeal. We understood him to mean that if the respondent had reinstated him in employment as had been ordered, he would have continued to serve on permanent and pensionable terms, as Mr. David Gewe, until his retirement at the age of sixty years.

We have examined the record of appeal, the memorandum of appeal, the appellant's written submissions and list of authorities filed and taken account of the oral submissions of the parties. In our considered view, we do not need to address the two grounds of appeal lodged by the appellant as this appeal turns on the legality and propriety of the proceedings before the RM's Court and the decision thereon in Miscellaneous Civil Application No. 54 of 2012.

Before we deal with that issue, we wish to remark that we found it somewhat disquieting that certain documents relating to the proceedings before the RM's Court in its capacity as the executing court were rather haphazardly and incorrectly cited to have been issued or made by the District Court of Nyamagana at Mwanza. Here we have in mind, for instance, the warrant of attachment of 10th July, 2012 and the ruling of Hon. Rumisha, R.M. dated 1st February, 2013 in Miscellaneous Civil Application No. 54 of 2012. This sorry state of affairs was further perpetuated in the High Court's Judgment, the subject of this appeal, as the learned appellate Judge referred to the ruling appealed from as one made the District Court of Nyamagana. When we raised this disturbing aspect of the proceedings to the parties at the hearing, they acknowledged the errors but viewed them as trifling. We agree with them. Since it is evident on the record that all the execution proceedings were lodged in the RM's Court and that there was obviously no transfer of the proceedings to the District Court, the citation errors alluded to are innocuous and inconsequential. We ignore them.

We advert to the issue on the legality and propriety of the proceedings before the RM's Court and the decision thereon in Miscellaneous Civil Application No. 54 of 2012.

To begin with, it is common ground that the Board's decision, as affirmed by the Minister, was final and conclusive and that it could be enforced by any court of competent jurisdiction as it if it was a decree of a court. Indeed, that position is in consonance section 28 (1) of the SEA, which provides thus:

> *"(1) The decision of the Minister on a reference to him under section 26, and, subject to any decision on a reference to the Minister therefrom, the decision of a Board on a reference to it under this Part-*
>
> *(a)* ***shall be final and conclusive****; and*
>
> *(b) shall be binding on the parties to the reference, and the relationship between the parties in consequence of the matters in respect of which the reference was made shall be determined accordingly; and*
>
> *(c)* ***may be enforced in any court of competent jurisdiction as if it were a decree.****"* [Emphasis added]

As alluded to earlier, the RM's Court (Hon. Masesa, R.M.), having been moved to enforce the decision in terms of section 28 (1) (c) of the SEA in Miscellaneous Civil Application No. 26 of 2009, granted the application on 31st March 2009. To be sure, the court ordered that:

> *"The Respondent General Secretary of Chama cha Mapinduzi (CCM) to comply with the decision of the Minister responsible for labour matters to reinstate the applicant back to employment with payment of wages due and (sic) the period of December, 2003 to March 2009."*

The above order remained unsatisfied for more than three years. Then, the troubling phase of the dispute followed up after the executing court had issued the warrant of attachment as alluded to earlier. It began with the respondent applying to the RM's Court vide Miscellaneous Civil Application No. 54 of 2012 under sections 38, 68 (e) and 95 of the Civil Procedure Code, Cap. 33 RE 2002 ("the CPA") not only for the warrant of attachment to be lifted but also for the court to:

> *"verify and/or reverse the correctness of the decretal amount of TZS. 27,260,544.00 and* ***the legality of the order to reinstate back to employment in terms of the repealed laws.***"[Emphasis added]

Although in terms of section 38 of the CPC the RM's Court, as the executing court, was empowered to hear and determine all questions arising between the parties relating to the execution, discharge or satisfaction of the Board's decision, in the matter at issue it did not deal with any question

relating to the warrant of attachment or the exactness of the decretal sum. Instead, it became preoccupied with the examination or review of the legality of the Board's decision, which, as already stated, was final and conclusive in terms of section 28 (1) (a) of the SEA quoted above. It is evident from the said court's ruling that the learned Resident Magistrate drifted from his remit by reviewing the ordered reinstatement. He thus ended up ruling that:

> *"... I find that the respondent is entitled to payment of twelve months' salaries at the rate of the salary paid immediately before being fired. No more the respondent is entitled to."*

We are decidedly of the view that the learned Resident Magistrate had no jurisdiction to review or examine the Board's decision but to enforce it.

Certainly, we are aware that in enforcing any decision under section 28 (1) (c) of the SEA, the executing court is further endowed with discretion in terms of section 28 (2) of the SEA. We find it instructive to extract the aforesaid provisions, albeit at length, to illustrate that the said discretion does not include any power to review, validate or vary a decision of the Board:

> *"(2) In addition to its powers to execute any decision which requires the refund of any wages deducted or,*

expressly or by implication, the payment of any sum to an employee where a dismissal is ordered to take effect as the termination of employment, ***a court in which it is sought to enforce a decision of the Minister or a Board may make and enforce such orders as are necessary for the specific performance of any decision for the re-engagement or re-instatement of any employee*** *(notwithstanding that the court would not have power apart from this subsection to make or enforce such orders and* ***may award damages for the failure of the employer to carry out any such decision as if he had dismissed the employee concerned wrongfully****, and, if Part IV of this Act is in operation in relation to the employee concerned, such damages shall include the statutory compensation provided for in that Part)."* [Emphasis added]

We wish to emphasise that the learned Resident Magistrate's purported review or validation of the Board's decision does not fall within the ambit of the above subsection, which, in essence enacts the power to issue or make ancillary orders for specific performance of a decision of the Board.

It is settled that the issue of jurisdiction for any court is so basic as "It goes to the very root of the authority of the court to adjudicate upon cases of different nature" and this must always be ascertained at the

commencement of any proceeding – see, for instance, **Fanuel Mantiri Ng'unda v. Herman M. Ng'unda & Others,** Civil Appeal No. 8 of 1995; and **Richard Julius Rukambura v. Issack N. Mwakajila & Another,** Civil Appeal No. 3 of 2004, (both unreported).

Consequently, we would conclude that the RM's Court's proceedings and decision thereon are a nullity to the extent that the learned Resident Magistrate strayed and reviewed without jurisdiction the Board's decision to determine its legality. Unfortunately, this error skipped the attention of the learned High Court Judge who, also, in her judgment slipped into the same error.

For the above reasons, we are, therefore, constrained to invoke our revisional powers under section 4 (2) of the AJA and proceed to nullify the RM's Court's proceedings and decision thereon in Miscellaneous Civil Application No. 54 of 2012. Since the decision of the High Court was based on a nullity, it suffers the same consequences as the decision of the RM's Court. Thus, it is similarly nullified. In the result, we order that this matter be remitted to the RM's Court at Mwanza for finalization of the execution of the decision of the Board from where it left off before Hon. Masesa R.M. in

accordance with the law. This matter being a labour dispute not attracting awards of costs, we make no order as to costs.

DATED at **MWANZA** this 24th day of March, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered this 25th day of March 2020, in the presence of the Appellant in person, and Mr. Fidelis Cassian Mtewele, counsel for the Respondents is hereby certified as a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL