IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO.13 OF 1997

CRDB (1996) LIMITED..... APPLICANT

VERSUS

THE MINISTER FOR LABOUR & YOUTH

DEVELOPMENT..... RESPONDENT

JUDGEMENT

KALEGEYA, J:

The Applicant, CRDB (1996) Ltd, prays to this court for orders of Certiorari and Mandamus - that the Respondent's decision delivered on 3/3/97 in respect of Martin Rutahakana be removed into court and quashed.

Facts which stand out undisputed are that One Martin Rutahakana who worked with the Applicant and who was at the same time an OTTU branch chairman and stationed at the head office Dar es Salaam, was, on 9/1/95 promoted and transferred to Tabora Zonal Office as a Zonal Human Resources officer. On 27/1/95 the said Rutahakana, in writing refused the transfer. The Applicant proceeded to institute disciplinary proceedings against him. On 28/9/95 he was summarily dismissed for insubordination. Rutahakana challenged the dismissal before the Conciliation Board. On 13/11/96 the Board cleared him and ordered for his reinstatement. On 28/11/96 the Applicant challenged that decision by filing reference to the Respondent. On 3/3/97 the

Respondent upheld the Board's decision and ordered for Martin's reinstatement. Applicant still aggrieved tried this avenue by applying for prerogative orders.

Mr Mwakipesile advocated for the Applicant while Mr Songoro, State Attorney, appeared for the Respondent. Parties made their submissions in writing. The Respondent were late in filing their submission but the court did grant the required leave.

Mr Mwakipesile vigorously argued that in upholding the Board's decision the Respondent did not act reasonably and in the interest of justice but rather arbitralily; that he did not correctly perceive the relevant laws, Rules and Regulations hence an apparent error of law. He insisted that their argument that the Board was not properly constituted, in that one Mrs Mpasisingo who in her capacity as a Deputy Labour Officer and who had persistently supported and encouraged Rutahakana not to go on transfer was the one who was the chairperson to the Board, was ignored. The Applicant further submitted,

> "The Applicant Bank had never ever had any Regulation under which can employee of the Bank could refuse a transfer just like that."

Clarifying on the alleged breach, Applicant referred to "Kanuni za UTUMISHI ZA Benki"(Kanuni 2.2.4) which state,

> "1 Any employee while in the Bank's service shall serve the bank at such places as the bank may from time to time direct. The bank

reserves the right to transfer any employee from one station to another if the exigencies of service so demands

2. Any employee who refuses to comply with an order regarding transfer will be liable to disciplinary action which may include summary dismissal".

In response, Mr Songoro, submitted that the Applicant acts as if it is not aware of the BANK'S PERSONNEL SERVICE MANUAL (Staff Regulations) where in clause 2.2.4.3 it was (then) provided,

"Employees who are OTTU Branch chairman and Secretary shall not be transferred without the approval of the Appointing Authority, who will in turn effect it after clearance with the nearest District OTTU Organ".

He insisted that the Applicant misinterpreted the Respondent's decision. He explained that the Minister (Respondent) did not reach the decision on assumption that Rutahakana could refuse a transfer but that he decided on the basis that,

"1. The said Martin Rutahakana was OTTU Branch chairman in the Applicant Company

2. That in the Applicant Company there was internal mandatory procedures to be followed

in order to effect the transfer of Martin Rutahakana

3. That the Applicant Company did not follow this internal procedure which was laid down by the company itself

4. Therefore the transfer of the employee was not properly made and punishment imposed by the applicant was based on wrong assumption that the transfer was properly effected".

The decision of the Minister intended to be assailed runs as under,

"2. Baada ya kufikiria rufani iliyoletwa kwangu kuhusu uamuzi wa baraza la usuluhishi D'Salaam katika shauri la Mfanyakazi aliyetajwa hapo juu nimeamua kama ifuatavyo - KWA MUJIBU WA KIFUNGU CHA 26(2) CHA SHERIA YA USALAMA KAZINI 1964 NAUTHIBITISHA UAMUZI WA BARAZA LA USULUHISHI KUWA MFANYAKAZI ARUDISHWE KAZINI KWA SABABU UONGOZI WA CRDB ULIKIUKA UTARATIBU ULIOJIWEKEA WENYEWE KWA KUMHAMISHA MFANYAKAZI AMBAYE NI KIONGOZI WA TAWI LA CHAMA CHA WAFANYAKAZI BILA KUPATA IDHINI YA OFISI YA CHAMA CHA WAFANYAKAZI WILAYA".

From the records availed to this court and whose correctness

was conceded to by parties; it is undisputed that the Applicant's staff regulations (then) prescribed that an employee of the Applicant, holding the position of OTTU chairman or Secretary, could not be transferred without, first, the approval of Applicants "Appointing Authority", and secondly, without clearance with the nearest District OTTU Organ. Martin Rutahakana was the OTTU Branch chairman at the Applicant's head office. He was transferred from Dar es Salaam to Tabora. No clearance was sought and secured from the District OTTU Organ. It is clear therefore that the transfer was not proper and this is the gist of the Boards' and Respondents' decision. That said however, after due analysis I have found that both the Board and Minister (Respondent) dealt and concluded on only the issue of whether the transfer of Rutahakana was properly made. But, there was yet another issue of whether Rutahakana was lawfully entitled to refuse the transfer; and whether this was an act of insubordination which could lawfully earn him a dismissal.

Here, we should be careful. We should carefully put a dermacation between what the applicant could do in order to have its act categorised as a proper transfer of Rutahakana, and, Rutahakana's acts which could be termed insubordination. Treading on Respondent's submissions and the decision quoted above one is left with no doubt that both the Board and the Minister fully dealt with issue one but did not deliberate on the second issue save concluding that the dismissal was unlawful.

Deliberating on this issue also was very necessary because clause 2.2.4.3 of the staff Regulations on which the Respondent seems to peg his decision deals only with transfers and does not deal with insubordination. It does not say that any employee who is transferred without the two conditions prescribed in the said clause being met is entitled to refuse the transfer.

It is clear therefore that both the Board and the Minister erred in not deliberating on one of the issues before them, and arriving at a conclusion by relying on an irrelevant clause. Here I should not be misunderstood - I am not saying that they should not have arrived at the decision they did but what I am saying is that in arriving at that conclusion they should have properly deliberated on the issue before them but they did not.

The above apart, the Applicant submitted unchallengedly that the chairperson of the Conciliation Board was the very Deputy Labour Officer who deliberated on the matter before it was sent to the Board and that she was the one encouraging Rutahakana not to go on transfer and that therefore she was biased. The learned State Attorney did not submit on this.

The rule against bias can not go with this kind of situation. Having been a labour officer who deliberated on the matter before it went to the Board, and more specifically, having been the one encouraging Rutahakana not to go on transfer (we should take it to be true for it was not challenged) sitting as a chairperson of a Board which has to deliberate that very issue on

appeal cannot fail to attract suspicion if not direct presumption of bias. When considering the existence of such breach the court has to look for real likelihood of bias. As was persuasively observed in R V Gough (1993) A.C. 646 at page 670,

> "Having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him".

In the circumstances of this case there is no way Mrs Mpasisingo could escape from bias - in any case, justice should not only be done but it must be shown to be done. Normal mind cannot believe that she acted without bias even if she did.

Mr Songoro for the Respondent submitted that the court cannot inquire how the Minister arrived at a conclusion in making the decision but that it can consider whether or not the procedure in the statute has been followed or whether the rules of natural justice were observed in determining whether the decision is valid, and cited (CA) DR Kallage versus Esso Tanzania Ltd, civil Appeal No.10 of 1982 (DSM Registry) and Mahona Vs

University of Dar es Salaam (1981) TLR 55, and urged this court to conclude that the decision is not tainted in anyway. While conceding to the principles of law stated, I think, I have sufficiently demonstrated, contrary to what the learned State Attorney would wish us to believe, that the Board breached the rule against bias, and that both the Board and the Minister failed to deliberate on the relevant issue before then. These defects cannot allow the decision to stand.

The Applicant urged this court to quash the Respondent's decision and to order him to hear and determine the reference before him denovo. In the circumstances of this case, as I have shown, the defects commenced at the Conciliation Board level so that's where rectification should start.

In conclusion therefore the decisions, both of the Minister/Respondent and of the Conciliation Board, are quashed and set aside. Hearing denovo to be made before a properly Constituted Board.

L.B. Kalegeya

JUDGR.

Delivered on 4/3/99