IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(CORAM: MANDIA, J., ORIYO, J. AND MIHAYO, J.)

MISC. CIVIL CAUSE NO. 43 OF 2004

1. DR. META K. KAPALATA AND 239 OTHERS **2. ALOYCE BENJAMIN GOHALIMU (Member of the COTWU (T) Field Branch - NASACO**	**APPLICANTS**

VERSUS

1. THE ATTORNEY GENERAL **2. NASACO** **3. PSRC**	**RESPONDENTS**

R U L I N G

Oriyo, J.

The first applicants, Dr. Kapalata and 239 others were complainants in Trade Enquiry No. 3 of 2001 in the Industrial Court of Tanzania. They were formerly employees of the second respondent, NASACO; and their services were terminated on 4/10/1999. The second applicant is one of the complainants and since he was also a member of

COTWU's field branch at NASACO, was entrusted by the other applicants to pursue their grievances in the matter.

Using the services of M/S Shivji Law Chambers Advocates the applicants applied for three distinctive prerogative orders as follows:-

1. ***CERTIORARI*** *to remove into this court and quash the findings in the Ruling of the Industrial Court delivered on 8/3/2002 that:-*

(i) The voluntary and/or joint agreement between the COTWU (T) trade union branch and NASACO under which the redundancy of the applicants was effected was operative and enforceable as an ordinary contract, although it was not registered in terms of Section 39 of the Industrial Court Act, 1967, No. 41/67.

(ii) The complainants were retrenched and not made redundant and that the term ***"retrenchment"*** *and*

"redundancy" *did not mean the same thing nor did they have same or similar effect in law.*

(iii) *The Industrial Court could not determine the preliminary objection on the validity or otherwise of the said redundancy exercise because the said court was not in a position to grant the relief/order of reinstatement.*

2. DECLARATION that:-

(i) *The redundancy exercise effected under the agreement resulting in the termination of the applicants was null and void and without effect in law.*

(ii) *The applicants were and have always been in the employment of NASACO.*

3. MANDAMUS *to command the Industrial Court, differently constituted to hear and determine*

the granting of appropriate relief consequent upon the orders of Certiorari and Declaration according to law, practice and procedure.

The first respondent, the Attorney General and PSRC, the third respondent, filed affidavits in response to the application. The second respondent, NASACO did not participate in the proceedings and its interests were said to be taken care of by the third respondent; through the services of Chipeta and Associates, Advocates. In their separate counter affidavits, the respondents basically opposed the application and supported the impugned decision of the Industrial Court.

The applicants application was supported by the affidavit of ALOYCE BENJAMIN GOHALIMU, the second applicant. Several reasons were advanced in support of the application but for the purposes of our decision we shall first consider ground one which we think is the crux of the matter. It is stated:-

1. *The Honourable Chairman of ICT erred in law in holding that the agreement under which redundancy was effected was operative and binding as an ordinary*

contract under the Law of Contract when:-

(a) The said agreement between NASACO and trade union representatives did not amount to a contract but was only a collective agreement.

(b) In the alternative, even if it amounted to a contract, it was not operative and enforceable for reasons that it was not registered and therefore fell within the provisions of Section 39(6) of the Industrial Court Act.

The brief background of the application is that after the termination of employment with the second respondent, the applicants were aggrieved and complained to the Labour Commissioner who forwarded the matter to the Industrial Court as a Trade Enquiry in terms of the Industrial Court

Act. When summoned to the Industrial Court the applicants raised a preliminary objection that the voluntary/joint agreement between the applicants and the second respondent which had set out the **"modus operandi"** of the redundancy exercise was not registered contrary to SECTION 39 of the Industrial Court of Tanzania Act. Therefore, the joint agreement was inoperative and not binding in terms of SECTION 39 (4). On that basis the applicants had submitted in the Industrial Court that lack of registration of the joint agreement before the termination of the applicants rendered the whole exercise null and void. The Industrial Court overruled the preliminary objection and held, interalia, that lack of registration of the voluntary joint agreement reduced it into an ordinary contact between the parties and was operative and enforceable in law. Following the decision of the Industrial Court on 8/3/2002, the applicants were not satisfied; hence the present application for judicial review. In the meanwhile, Trade Enquiry No. 3of 2001 is still pending at the Industrial Court.

We have studied the opposing submissions of parties on the matter and we are of the settled view that our primary duty here is to determine the legal status or otherwise of the voluntary agreement. There is no dispute that as of the termination date on 4/10/1999, the voluntary agreement had not been registered with the Industrial Court in terms of SECTION 39 (4) of the Industrial Court Act as

amended. Also not in dispute is that the termination exercise was done on the basis of the unregistered voluntary agreement. At the Industrial Court, the second respondent's response to the preliminary objection was that lack of registration of the voluntary agreement was immaterial and could not affect the legality of the termination of the applicants. Annexture "AG3" to the affidavit of Aloyce Benjamin Gohalimu is a copy of the second respondents response to the applicants preliminary point of objection.

At page 10 thereof the second respondent stated in Kiswahili as follows:-

> *"Kwa misingi hiyo basi, MLALAMIKIWA anaiomba Mahakama hii tukufu, kutupilia mbali hoja hii ya pingamizi la awali* ***kwa vile kutokusajili makubaliano ya upunguzwaji wa walalamikaji katika uchunguzi huu haliathiri wala kuukosesha utekelezaji huu nguvu za kisheria*** *hivyo halina msingi" (emphasis ours)*

SECTION 39 (4) of the Industrial Court Act as amended by Act 25 of 1982, Labour Laws (Miscellaneous Amendments) Act, 1982 provides:-

"No voluntary agreement shall be operative or binding on the parties thereto unless it is registered by the Industrial Court:

Provided that where the Industrial Court does not register a voluntary agreement within three months the employer and the employee may commence implementing the voluntary agreement."

The Court of Appeal of Tanzania had an opportunity to consider the import of the proviso to Section 39 (4) in the case of SAID MSANGULE & 2 OTHERS VS. SOKOINE UNIVERSITY OF AGRICULTURE, Civil Appeal No. 9 of 1999 DAR ES SALAAM, (unreported). At page 4 of the cyclostyled judgment the court stated:-

"The provision makes it abundantly clear to us that a voluntary agreement becomes operative three months after it has been submitted to the Industrial Court for registration irrespective of whether or not it has been registered with that court."

Unlike the case in the appellate court, there is no evidence on record in the case at hand that the voluntary agreement had been presented for registration to the Industrial Court at all. Here, there was neither a registered voluntary agreement nor a "deemed" registered agreement pursuant to the proviso of Section 39(4) (supra) under which the termination of the applicants was carried out. The law as stated in Section 39 (4) is clear and unambiguous in that a voluntary agreement is inoperative and not binding on parties unless it is registered with the Industrial Court.

On whether the unregistered voluntary agreement was a legal contract binding and enforceable between the parties, it was submitted for the interested party that the common law position has been modified to suit the local conditions in Tanzania. Without naming the instruments of such modification, it was a mere statement that

> *"Voluntary Agreements are enforceable contracts in Tanzania."*

Unfortunately counsel did not go further to reconcile that blunt submission and the clear provisions of the law today as stated in Section 39 (4) above.

The basis of the Industrial Court's decision to overrule the preliminary points of objection by the applicants was that the Voluntary Agreement was capable of being

implemented as an ordinary contract. In our considered view and with due respect, the Industrial Court erred on this. A Voluntary Agreement made under Section 39 (1) of the Industrial Court Act is a special type of agreement which is reached between a trade union on behalf of employees on one side and the employer on the other; in respect of wages or terms of services of the employees. A Voluntary agreement is therefore not on ordinary contract under the Law of Contract or an ordinary contract of employment.

Having made a finding that the voluntary agreement between the applicants and the second respondent was unregistered and therefore in-operative and not binding in law and that a Voluntary Agreement is not an ordinary legal contract; does it justify the issue of the order or CERTIORARI to quash the decision of the Industrial Court as applied for by the applicants? The guiding principles upon which the order of Certiorari can issue were laid down by the Court of Appeal of Tanzania (Nyalali, C.J., Makame, J.A., and Ramadhani, J.A.) in the case of **SANAI MIRUMBE AND ANOTHER VS. MUHERE CHACHA** [1990] TLR 54 as follows:-

> *(a) Taking into account matters which it ought not to have taken into account;*

(b) Not taking into account matters which it ought to have taken into account;

(c) Lack or Excess of jurisdiction;

(d) Conclusion arrived at is so unreasonable that no reasonable authority could ever come to it;

(e) Rules of natural justice have been violated;

(f) Illegality of procedure or decision.

All said and done, we have no doubts in our minds that the decision of the Industrial Court of Tanzania which overruled the preliminary objection of the applicants was flawed.

On the basis of the principles set out in the decision of SANAI MIRUMBE (supra), this is a fit case for the issue of the order of Certiorari.

In the final result, the applicants have made out their case; and accordingly we grant the prayer for an order of Certiorari to quash the decision of the

Industrial Court of Tanzania in Trade Enquiry No. 3 of 2001 dated 8/3/2002.

Consequently, an order of Mandamus is issued to command the Industrial Court of Tanzania to proceed with the matter pending before it on the basis of our decision.

We have not made a finding on whether the applicants were retrenched or made redundant because having made the decision that we did on the status of the Voluntary Agreement; it would be a mere academic exercise.

The applicants will have the costs of the application.

Dated at Dar es Salaam this 18th day of November, 2005.

W.S. Mandia
JUDGE

K.K. Oriyo
JUDGE

T.B. Mihayo
JUDGE

1,811 words