

**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM**

MISC. CIVIL CAUSE NO.65 OF 2003.

**PAVISA ENTERPRISES APPLICANT
VERSUS
THE MINISTER FOR LABOUR YOUTHS DEV. & SPORTS
ATTORNEY GENERAL RESPONDENT.**

Date of last Order: 03/08/2006
Date of Ruling : 16/09/2007

RULING.

Mlay, J.

The Applicant through the services of Rutabingwa & Co Advocates, filed an application for leave to apply for the order of certiorari to quash the decision of the Minister for Labour Youth Development and sports, made in the exercise of the powers of the Minister, under Section 26 (2) of the Security of Employment Act, Cap 574.

The application was made under section 2 (2) of the Judicature and Application of Laws Ordinance, Cap 543, section 17 (2) of the Law Reform (Fatal Accidents and

Miscellaneous Provisions) Ordinance Cap 360 and section 95 of the Civil Procedure Code 1966. The application is also supported by the affidavit of the Managing Director of the applicant JOERGE DOERING and accompanied by the usual statement. The second Respondent who is the Attorney General, through Mr. MICHAEL JEREMIAH KAMBA, State Attorney filed a counter affidavit and also, a notice of Preliminary objection in which he raised a preliminary objection to the effect that:

“Without going to its merits, the application is incompetent and misconceived in that the Affidavit and Statement filed in support of the Application do not disclose any the grounds for the issuance of prerogative orders”.

The application was ordered to be argued by way of written submissions and at some stage, was dismissed for non appearance of the applicant, on grounds of failure to file written submissions.

However, upon an application by the applicant to set aside the dismissal order, the application was reinstated and

the applicant was granted an extension of time of 14 days, in which to file written submissions.

The order extending the time was made on 10/02/2006 in the presence of Mr. Brush advocate for the applicant and Oban, State Attorney. Until the time of writing this ruling, which is long after the expiry of 14 day from the date of the order to extend the time for filing written submissions, the applicant has not filed any written submissions or applied for a further extension of time, in which to do so.

In the circumstances, only the written submissions initially filed by the 2nd Respondent according to the initial order of the court are available for consideration in this ruling.

In the written submissions filed on behalf of the 2nd Respondent, two reasons have been given to support the preliminary objection. The first reason is that ***“the application for leave to apply for orders of certiorari by the applicant against the Respondent is incompetent and misconceived in that, the affidavit and statement filed in support of the application do not disclose any grounds for the issuance of prerogative orders”***.

The second reason has been given that ***“the reasons advanced by the applicant particularly in the 5th paragraph***

of the affidavit does not disclose triable issues which are subject to Judicial Review". The learned State Attorney submitted that; ***"the applicant is not aggrieved with the decision of the Minister, he is only mitigating as to what made him to terminate his employer (sic) one Deogratias Kakuna, which is not the case for Judicial Review"***. The learned State Attorney finally submitted that since the applicant is in principle not aggrieved by the decision of the Minister who ordered reinstatement, the applicant has failed to establish prima facie grounds for relief. Reference was made to the book JUDICIAL REVIEW LAW AND PROCEDURE by Richard Gordon QC, Sweet and Maxwell at page 130.

From the documents attached to the application for leave, it is established that the Applicant terminated he services of his employee, one DEOGRATIAS KAKURA. The employee referred the termination to the Labour Conciliation Board which found that the employer had terminated the employment in contravention of section 37 (1) and (2) of the Security of Employment Act, for not informing the employee the reasons for the said termination. Although the filed copy of the decision of the Conciliation Board is incomplete, it appears that the Board ordered the reinstatement of the employee.

The employer was aggrieved by the Decision of the Conciliation Board and appealed to the Minister for Labour.

The Minister exercising the powers under section 26 (2) of the Security of Employment Ordinance Cap 574, confirmed the decision of the Board. It is this decision which is intended to be challenged by way of the order of certiorari. In the supporting affidavit, the applicants Managing Director has deposed as follows:

1. I am the Managing Director of the applicant and I am conversant with the facts I am about to depose.
2. That the application for leave is based on the decision of the Minister for Labour.... Dated 20th March 2003 which confirmed the decision of the conciliation board which ordered rein statement of Deogratias Kakula and that he be paid all his benefits he is entitled to.
3. That the Minister's decision is administrative and there is no any other mode of challenging the same except by way of prerogative orders.
4. That for quite some time applicant has been facing stiff competition in its business operations as a result of which it was forced to out down its work force.
5. That due to the said sharp fall in production, applicant is likely to be affected by the order of the Minister if it is executed bearing in mind that

termination of the employee was due to the lack of business and the said employee will have to remain idle and applicant has no means of paying him accordingly”.

In the Statement, paragraphs 4 and 5 thereof, it is stated as follows:

“4 THE RELIEF SOUGHT FOR *is The applicant seek for an order of certiorari to call for and quash the decision of the Minister dated 20th March 2003 in the employment dispute member K2/U.10/FR /8803/6 which ordered the employee one Deogratias Kakura to be reinstated on ground that the employee was not informed of the reasons of his termination.*

5. THE GROUNDS UPON WHICH THE ABOVE RELIEF IS SOUGHT ARE.

The first respondent in reaching his decision dated 20th March 2003 grossly misdirected himself in law and facts as follows:-

- a) *The first respondent made an error in evidence by holding that the employee be reinstated on ground that he was not given the reasons of his termination and as verified by the letter dated 9th January 2001 which was given at his request in the event he secured an alternative job somewhere else.*
- b) *The first respondent erred in law and failed to act judiciously as there was evidence that all procedures were followed and the fact that the employee received all dues he was entitled to”.*

The preliminary objection is that the “**application is incompetent and misconnected in that the Affidavit and statement filed in support of the Application do not disclose any grounds for the issuance of prorogation orders”.**

As indicated at the beginning of this ruling, the application before this court at this point is one for leave to apply for the prerogative orders of certiorari. The applicant is at this stage, seeking the permission of this court to bring an application for certiorari. In the book “JUDICIAL

REMEDIES IN PUBLIC LAW Second Edition by clive Lewis
at page 263 it is stated:

“The requirement of permission is designed to filter out applications which are groundless or hopeless at an early stage. The purpose is to prevent the time of the court being wasted by busy bodie’s with misguided or trivial complaints of administrative error and to remove the uncertainty in which public Authorities might be left.....” [quoting the dicta or Lord Diplock in R.V.T. R.C, Exp National Federation of Self Employed and small business Ltd [1982] A.C.617 at p.643]

The learned author goes on to state that factors to be considered in determining whether to grant permission are:

1. The applicant must demonstrate that there is an arguable case that a ground for seeking judicial review exists.
2. The applicant is required to show sufficient interest in the matter to which the application relates.
3. That the applicant has acted promptly
4. The applicant has to show that there is no alternative remedy which exists.

The preliminary objection is wholly based on the first factor that the applicant does not have an arguable case that a ground for review exists. Upon scrutiny of what has been deposed in the supporting affidavit, particularly in paragraph 5 of the statement which sets out the grounds for the application, it is clear that the applicant is challenging the correctness of the decision of the Minister and intends by the order of certiorari, to ask this court to review the decision of the Minister on its merits. The purpose of certiorari to bring to the High Court the decision of an inferior body which has been made in excess or in abuse of power.

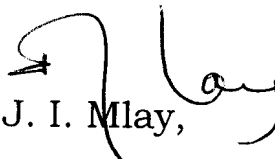
In the case of JOHN MWAMBEKI BYOMBALIRWA V THE REGIONAL COMMISSIONER AND REGIONAL POLICE COMMANDER, BUKOBA 1986 TLR 73 AT P. 75 Mwalusanya J stated:

“Judicial review is an important weapon in the hands of judges of this country by which an ordinary citizen can challenge oppressive administrative action and judicial review by means of prerogative orders (certiorari, prohibition and mandamus) is one of those effective ways employed to challenge

administrative action. It is my conviction that the courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state. Equally however it is important to realise that judicial review is not the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom a discretionary decision making power has been committed....."

In the intended application for the order of certiorari as shown in the grounds stated in the statement, the applicant will want this court to review the evidence and reach a different decision from that reached by the Conciliation Board and by the Minister for Labour. This can be done by this court in an appeal and not while exercising powers of judicial review. Judicial review is not an alternative to an appeal. It has not been alleged that the Minister acted in excess of his powers under section 26 (2) of the Security of Employment Act or that he abused the said powers, which would bring the decision within the scope of judicial review.

In the circumstance and for the reasons given above, I agree with the 2nd Respondent that the applicant has not demonstrated that there is a case for judicial review. The preliminary objection is accordingly upheld and this application for leave is accordingly rejected, with costs.


J. I. Mlay,
JUDGE.

Delivered in the presence of Ms Temi State Attorney and in the absence of the Respondent this 16th day of October 2007.


J. I. Mlay,
JUDGE.

16/10/2007

Words: 1,808