

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO 50 OF 2012

(From Employment Cause No. 373 of 1999-Resident Magistrate's Court of Dar es Salaam at Kisutu-H.S. Msongo-RM)

ALLY MBELWA ABDALLAH.....APPELLANT

VS

TWIGA CHEMICALS INDUSTRIES.....RESPONDENT

JUDGMENT

Date of last Order: 18-09-2012

Date of Judgment: 12-12-2012

JUMA, J.,

In this appeal, the appellant, Ally Mbelwa Abdallah, is challenging the ruling dated 24th March 2006 of the Resident Magistrate's Court at Kisutu in Employment Cause Number 373 of 1999. In that ruling, H.S. Msongo-RM had ordered a stay of execution of a drawn order and directed that the respondent Twiga Chemicals Industries should pay the appellant his statutory compensation; instead of reinstating the appellant back to his employment as the Minister for Labour had earlier ordered.

There are two basic grounds of appeal calling for my determination. First, the appellant contends that in the absence of any appeal against the decision of the Minister which had ordered his reinstatement, the learned trial magistrate should not have ordered a stay of the execution without assigning reasons. In his second ground, appellant contends that the subordinate court should not, in *lieu* of his reinstatement back to his employment, have ordered payment of statutory compensation contrary to what the Minister had ordered.

In order to appreciate the thrust behind the two grounds of appeal, it is important to revisit the background facts leading up to this appeal. Appellant Ally Mbelwa Abdallah was once employed by the respondent Twiga Chemicals Industries. Sometime in September 1994 appellant was suspended when he faced criminal charges in court. Despite his acquittal, respondent all the same terminated his employment on 28 February 1996. Appellant first went to the Conciliation Board to contest the termination. The Conciliation Board ordered his reinstatement. The Minister of Labour upheld the decision of the Conciliation Board.

With the decision of the Minister in his favour, appellant filed Employment Cause No. 373 of 1999 at the

Resident Magistrate's Court seeking his reinstatement and also payment of arrears of his salaries, increments, transport, lunch, rent allowances, payment in lieu of leave. He also wanted a refund of medical expenses effective from 1st September 1994. In the alternative to the reinstatement, the appellant asked to be paid twelve months wages and statutory compensation.

To move the Resident Magistrate's Court, the appellant employed sections 25, 27 and 48 of the **Security of Employment Act** and also Order XXX Rule 9, section 33 of the **Civil Procedure Code, Cap 33**.

Appellant faced a setback on 16 July 2001 when Mwankenja-SDM dismissed his application but only ordered the respondent to reimburse him the medical bills which the appellant had incurred from the date he was suspended in 1994 to the date of his termination. It appears that the appellant was aggrieved and he filed a Civil Appeal Number 286 of 2001 in this Court. Kileo, J. (as she then was) quashed the decision of Mwankenja-SDM and left it to the appellant to decide what appropriate steps to take if he wishes to pursue the matter.

Following the decision of Kileo, J. (as she then was) declaring the decision of Mwankenja (Senior District Magistrate) as a nullity, the District Labour Office of

Temeke Area (through its letter dated 8th September 2003 ref. TEM/30/ Vol. V/21) requested for the leave of the Resident Magistrate-in-Charge of the Resident Magistrate's Court of Dar es Salaam at Kisutu, to file a fresh Employment Cause Number 373 of 1999. Records show that following this intervention by the Temeke Area Labour Office, Mr. Ally Mbelwa Abdallah decided to file his chamber summons application supported by an affidavit seeking his reinstatement and other remedies. The hearing of the application was assigned to Mbaga-RM on 22 September 2003. This fresh chamber summons application was opposed by the respondent Twiga Chemical Industries who on 13th November 2003 filed a counter affidavit together with a Notice of Preliminary Objection. In the first ground of objection, the respondent contended that the affidavit which supported Mr. Mbelwa Abdallah's application was incurably defective. In the second ground, the respondent contended that Mr. Mbelwa Abdallah's application was brought under the provisions of the **Security of Employment Act, 1964** which were not applicable. In his Ruling on 21st June 2004, Mbaga-RM citing the decision of Kyando, J. of this Court in **Dar es Salaam Water and Sewerage Authority vs. Dorah Shemdolwa Civil Appeal No. 163 of 2001** noted that Mr.

Mbelwa Abdallah should not have applied for reinstatement by way of Chamber Summons. That is, the procedure of executing the Order of the Minister or the Labour Conciliation Boards is not by filing Chamber Summons application but by way of Execution Proceedings. The learned Resident Magistrate held that Mr. Mbelwa Abdallah should have filed the decision of the Minister or of the Labour Conciliation Board and then the execution proceedings would then proceed. Mbaga-RM dismissed Mr. Mbelwa Abdallah's application and directed him to commence execution proceedings afresh.

Appellant set in motion the Execution Proceedings by filing the decision of the Minister at the Resident Magistrate's Court. My perusal of the record found a drawn order dated 4th November 2004:

*The General Manager
Twiga Chemical Industries (T) Ltd
DAR ES SALAAM*

WHEREAS *By an order from the decision of the Minister for Labour dated on 26 day of October, 1998 it has been ordered that the Complainant/Applicant should be re-instated back to his former employment.*

AND WHEREAS *to date the Respondent has not complied with the said order/decision.*

That you the said General Manager, Twiga Chemical Industries (T) Ltd.

AND hereby ordered to re-instate back the Complainant/Applicant to his former employment.

Given under my Hand and the Seal of the Court this 4th day of November 2004.

SENIOR RESIDENT MAGISTRATE

On behalf of the appellant, Advocate T.A. Hyera submitted that the magistrate executing the Order of the Minister should not have ordered a stay of execution without assigning any sound reasons and in the absence of any appeal against the order of the Minister responsible for employment matters. Further, the learned Advocate submitted that the magistrate executing the Order of the Minister erred in law when she ordered the payment of statutory compensation contrary to the specific order of the Minister. By so doing, Mr. Hyera submitted, the learned Magistrate assumed the power to vary the order of the Minister which she did not have in law.

On behalf of the respondent, Advocate Nicholas Mwakasege submitted that the basis or reasons behind the learned magistrate's order of stay of execution are contained in affidavit and submissions of the parties which were made before her, which shows that the appellant

received a cheque conveying his statutory benefits. The learned Advocate also submitted that there was no need for the respondent employer to refer the matter back to the Minister because the appellant had received the cheque to manifest his accepting his statutory benefits in compliance with section 40A (5) (b) (i) and (ii) of the now repealed **Security of Employment Act, CAP 387 R.E. 2002**.

From the pleadings, record of proceedings at the subordinate court and submissions of the learned Advocates on grounds of appeal, the main issue for my determination is whether the learned Resident Magistrate had the power to issue an Order that the appellant should be paid statutory compensation instead of being reinstated back to his employment as the Minister had earlier ordered. For an answer, I need not go far from sections 41, 42, 43 and 44 of the **Security of Employment Act** before this law was repealed by the **Employment and Labour Relations Act, 2004**. I shall reproduce the relevant provisions for the purposes of establishing whether the Resident Magistrate's Court had the authority in law to vary the Order of reinstatement which the Minister had issued:

41. (1) *Where a Board makes an order for the payment of statutory compensation against*

an employer, the employer may, within fourteen days of receiving notice thereof, refer that order to the Minister and the Minister shall consider every such reference and either confirm or reverse such order, and, in the exercise of his functions under this section, the provisions of section 40 shall apply mutatis mutandis to the Minister as they apply to a Board.

(2) Where an employer makes a reference to the Minister in respect of any order of the Board under this Part, the order shall be suspended until the reference is decided by the Minister.

42 (5) Where a re-instatement or re-engagement has been ordered under this section and the employer refuses or fails to comply with the order—

(a) in the case of an order made by a Board against which no reference has been made to the Minister, within twenty-eight days of the order being made; or

(b) in the case of an order made by the Minister on a further reference to him, within fourteen days of the order being made by the Minister,

the employer shall be liable to pay the employee compensation of an amount equal to the aggregate of—

(i) the statutory compensation computed in accordance with section 36; and

(ii) a sum equal to twelve months' wages at the rate of wages to which the employee was entitled immediately before the termination of

his employment or, as the case may be, his dismissal,

and such compensation shall be recoverable in the same manner as statutory compensation, the payment of which has been ordered under section 40. [Emphasis provided]

43. The decision of the Minister on a reference to him under section 41 or section 42 and, subject to any decision on a further reference to the Minister therefrom, the decision of a Board under section 40 shall be final and conclusive and shall be binding on the parties to the reference, and, subject as aforesaid, such decision may be enforced in any court of competent jurisdiction as if it were a decree.

44. (1) No suit or other civil proceeding, other than proceedings to enforce a decision of the Minister or the Board on a reference under this Part, shall be entertained in any civil court with regard to the liability of an employer to pay, or the entitlement of an employee to, any statutory compensation.

(2)....

My reading of the above-cited provisions, specifically section 42 (5) (b) of **Security of Employment Act**, leaves me in no doubt that if the respondent as an employer was not satisfied with the decision of the Minister to reinstate the appellant, he should have first resorted to a further

reference back to the same Minister within fourteen days of the order of reinstatement having been made by the Minister. It is only after the Minister has decided on that further reference from the employer and the employer still refused to reinstate the employee when the employer shall be liable to pay the employee the statutory compensation. It was not open to the respondent to seek the variation of the Order of the Minister during the execution proceedings.

During the execution proceedings the respondent Twiga Chemicals Industries claimed that it had already paid the appellant his dues which included his twelve months wages (Tshs. 204, 000/=) in *lieu* of reinstatement. With due respect, it was not within the power of the learned Resident Magistrate to vary that Order of the Minister outside the strict procedure prescribed by section 42 (5) (b) of the **Security of Employment Act** while conducting the execution proceedings. The question whether or not the Cheque was paid to the appellant was not a matter for the subordinate court to determine. This question should have been canvassed before the Minister during the reference in order for the Minister to amend his order before being sent for execution at the subordinate court.

While I agree that under the repealed **Security of Employment Act** the employer is not ultimately bound to receive a terminated employee back even if the Minister on further reference to him, orders his reinstatement, but the statutory procedures leading up to the payment of statutory compensation in *lieu* of reinstatement must be strictly be followed by both the employer and the subordinate court executing the Order of the Minister.

In the upshot, I find that the appellant Ally Mbelwa Abdallah has every reason to feel aggrieved by the Order dated 24th March 2006 of the Resident Magistrate's Court at Kisumu in Employment Cause Number 373 of 1999. I shall allow his appeal and I hereby direct the immediate reinstatement of the appellant back to his former employment from the date of his termination. Respondent shall pay the costs.



I.H. Juma
JUDGE
12-12-2012.

Judgment is delivered in the presence of the appellant Ally Mbelwa Abdallah and Mr. Abdul Maggid Suleiman Katakweba (Personnel Manager of Twiga Chemicals Industries).



I.H. Juma
JUDGE
12-12-2012

