IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LEVIRA, J.A., GALEBA, J.A. And ISMAIL, J.A.)

CIVIL APPEAL NO. 370 OF 2023

CONSOLATA MWAKISU ..... APPELLANT

VERSUS

THE DIRECTOR GENERAL,
NATIONAL SOCIAL SECURITY FUND ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam)

(Bongole, J.)

dated 12th day of December, 2011

in

Civil Appeal No. 118 of 2011

.....

JUDGMENT OF THE COURT

15th & 25th March, 2024

ISMAIL, J.A.:

The appellant and the respondent are estranged parties to the contract, whose relationship turned into a fiasco that has seen them engaged in long-drawn-out court proceedings that have scaled up the ladders. The instant appeal is the latest attempt by the appellant to save her employment and stage a re-entry into her former position.

The appeal arises from the decision of the High Court of Tanzania (Bongole, J) dated 12th December, 2014, in Civil Appeal No. 118 of 2011. The

decision upheld the ruling of the Resident Magistrates' Court of Dar es Salaam at Kisutu in Employment Cause No. 349 of 2005, and confirmed the holding that the respondent had legally exercised the right under section 42 (5) (then section 40A (5)) of the defunct Security of Employment Act, Cap. 574 (the Act), which allowed payment of compensation in lieu of reinstatement.

Brief facts constituting the parties' contestation in the matter are to the effect that on 31st July, 2003, the appellant's employment with the respondent was terminated on allegations of delayed or non-remittance of the sum of TZS. 344,000.00 collected by her. Dissatisfied with the termination, the appellant filed a complaint in the Conciliation Board at Temeke (the Board). By a decision handed down on 3rd August, 2004, the dismissal was reversed and, instead, reinstatement was ordered. The Board held the view that the sum in question was collected by a certain Ms. Zainabu Kidume and that there was no evidence that the same changed hands to the appellant.

The respondent preferred a reference to the Minister for Labour but the same was dismissed for being time barred. Besides dismissing the reference, the Minister upheld the Board's decision. Attempts to challenge the decision of the Minister, by way of prerogative orders, fell through when the application was dismissed for want of merit.

The appellant's efforts to realize the fruits of the Board's decision bred Employment Cause No. 349 of 2005 filed at the Kisutu court. As she did that, the respondent opted to circumvent the order for re-instatement by terminating the appellant and paying compensation. This decision was greeted with serious outrage from the appellant, partly because what was said to constitute the terminal benefits or compensation was consumed in debts that the appellant owed the respondent the details of which were communicated to the appellant on 10th November, 2003, and 12th February, 2008.

Unfazed by the respondent's contention, the appellant re-ignited the matter by filing yet another application for an order for payment of computed employment dues, which stood at TZS. 44,663,330.00; and reinstatement to her employment position. The application was argued by way of written submissions and a decision thereof was delivered on 4th March, 2010 (Mugeta, SRM as he then was). The court held that the application is destitute of fruits as reinstatement was a legitimate choice which could not be faulted.

This decision begrudged the appellant and her immediate response was to prefer an appeal to the High Court. The amended memorandum of appeal instituted on 11th October, 2013 carried six grounds of appeal which punched holes in the executing court's decision. The High Court (Bongole, J) found

nothing blemished in the decision of the executing court. In dismissing the appeal, the learned Judge held as follows:

> *"With respect, I do not think that the criticism levelled against the trial magistrate's finding [has] any justification. It is my considered view that the learned trial magistrate did not commit any error. In the upshot, this appeal lacks merit and it is hereby dismissed in its entirety with costs."*

In the appellant's eyes, this decision was too irking to live with. It triggered the appellant's quest for better justice through the instant appeal. The memorandum of appeal that instituted the appeal had eight grounds, a majority of which, as we shall shortly learn, were abandoned.

At the hearing of the appeal, the appellant enlisted the services of Mr. Ndurumah Majembe, learned counsel, whilst the respondent was represented by Mr. Karim Rashid, learned Senior State Attorney, assisted by Mr. Allan Shija, learned Senior State Attorney, and Ms. Grace Lupondo, learned State Attorney. Before hearing of the appeal got under way, the Court had a brief dialogue with Mr. Majembe on the tenability of six of the eight grounds of appeal in the light of the fact that some were purely factual and did not feature in the appeal to the High Court. The learned counsel saw sense and opted to whittle down the grounds to only two. In consequence, grounds three, four, five, six, seven and

eight were dropped. The surviving grounds of appeal are as reproduced hereunder:

1. *The learned appellate Judge erred in law and in fact for failure to make a finding on ground No. 3 of appeal to the effect that, the trial Magistrate in-charge erred in law to vacate (sic) himself without any application order dated on 21st April, 2009 made by the Principal Resident Magistrate of the same court at Kisutu.*

2. *In alternative to ground No. 1, the learned appellate Judge erred in law and in fact by confirming the trial Magistrate's order of vacating the order of his fellow Magistrate given on 21st April 2009.*

We heard both sets of counsel in their oral submissions which came as an addition to their written submissions whose filing was consistent with the provisions of rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009.

With regard to the above grounds of appeal which were argued in a combined fashion, the contention by Mr. Majembe was that section 24 (1) of the Act did not provide for any alternative to reinstatement of a dismissed employee. He contended that payment of compensation in lieu of reinstatement is an abhorrent practice which was disapproved in the case of

Paul Solomon Mwaipaya v. NBC Holding Corporation, Civil Appeal No. 68 of 2001 (unreported).

Mr. Majembe dwelt, as well, on the concurrent powers that judicial officers of the same court exercise in matters that they preside over. He argued that the known principle is that such officers should refrain from issuing conflicting decisions lest they dilute sanctity of the court, and that such officers become *functus officio* once they deliver their decisions. To fortify his argument, he referred us to the decision of the Court in **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser**, Civil Application No. 33 of 2012 (unreported). The argument advanced by the learned counsel was that it was wrong for the High Court to uphold the ruling of Mugeta, SRM (as he then was) who vacated the position of the same court, issued on 15th September, 2005 the latter of which was premised on the ground that section 24 (1) of the Act provides no leeway for implementation of the Board's decision other than by way of reinstatement. In his view, confirmation of the use of section 40A was an erroneous construction of the law.

Mr. Rashid's rebuttal submission took the same approach as that of his counterpart. He leapt to the defence of the decision of the High Court and took an exception to the contention that Mugeta, SRM (as he then was) became *functus officio* when he dealt with the matter. Addressing us on the propriety

of the action taken by the respondent, Mr. Rashid contended that refusal to reinstate was a remedy that was available under section 40A (5) of the Act, and that its invocation was in line with what the Court held in **Pius Sangali & Others v. Tanzania Portland Cement Co. Ltd**, Civil Appeal No. 100 of 2001; and **Dickson Saul Lutemba v. Cooperative and Rural Development Bank (1996) alias CRDB Bank Ltd**, Civil Appeal No. 70 of 2008 (both unreported), in which it was held that refusal to reinstate an employee and payment of compensation was an allowable right under section 40A (5) of the Act.

Mr. Rashid sought to distinguish the reasoning in the case of **Paul Solomon Mwaipaya** (supra), contending that the same represents an obsolete position and, therefore, distinguishable. He urged us to find no fault in the decisions of both lower courts. The learned counsel implored the Court to hold that the appellant's claims are lacking in merit and reject them out of hand.

Having scrupulously reviewed the record of appeal and the parties' contending submissions, we are of the view that these grounds of appeal and arguments by the counsel bring out one broad question that revolves around the propriety or otherwise of paying compensation under section 40A (5) instead of the only option of reinstatement under section 24 (1) of the Act.

We wish to state, for clarity, that what appeared as section 40A (5) in Act. No. 1 of 1975, was renumbered as section 42 (5) in the 2002 revised edition of the laws, while section 24 (1) was renumbered as section 25 (1) of the Act. Noting that the parties' disquiets reside in the interpretation of these two sections, we feel constrained to reproduce the substance of the said sections, as follows:

> *"25 (1) Subject to the provisions of this Part, where a reference is made to a Board under Head (b) of this Part, the Board-*
>
> *(a) shall decide whether the summary dismissal, proposed summary dismissal or deduction from wages, as the case may be, is, having regard to the circumstances of the breach and to any previous breaches of the Disciplinary Code, justified and appropriate, and shall confirm, reverse or vary the imposition of disciplinary penalties, and may make such consequential orders and directions as are provided in this section, according to its assessment of the culpability and record of the employer;*
>
> *(b) may in the case of an employee who has been dismissed or suspended pending the decision of the Board, order his re-engagement or re-instatement, as the case may be, or direct that the dismissal or proposed dismissal shall take effect (unless the*

employer re-engages or re-instates the employee) as a termination of employment otherwise that by dismissal, and may authorize the imposition of a lesser disciplinary penalty;

(c) may order the refund to the employer of any deduction and may authorize the imposition of a lesser disciplinary penalty;

(d) may approve the terms of any lawful settlement between the employer and the employee."

"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 35; 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 39."

Mr. Majembe has taken an exception to the applicability of section 42 (5) of the Act in the circumstances of this case. In his contention, this provision ceased to be an operative option the moment the respondent preferred reference to the Minister. Mr. Rashid has rebuffed that argument, contending that, whilst there was an attempt by the respondent to prefer a reference to the Minister, such efforts were thwarted when the reference suffered a setback that led to an adjudgment that the same was time barred. In the respondent's argument, refusal of the reference was as good as none was preferred. We are in agreement with Mr. Rashid's contention that a reference that has fallen through is no reference at all, as its determination did not alter the 'equation'. In our considered view, the Board's decision was an order against which no reference was made to the Minister, thus 'stillborn' and unable to scuttle the employer's exercise of right under the said provision.

This position is given credence by the fact that, subsequent to the determination by the Board, the appellant, through her advocates, Kilule & Co.

Advocates, moved the respondent to consider either reinstating the appellant or pay all her rights. This was communicated through a letter dated 3rd October, 2007 (pages 40 and 41 of the record of appeal) part of which reads as follows:

> *"We will appreciate the indulgence of your good Office by doing the needfui according to the law and thereby comply with the requirement of the law by either reinstating our client or [paying] all her rights according to the law within twenty-one (21) days..."*

Subsequent thereto, the respondent effected payment of what was considered to be the appellant's rights, which we construe to mean compensation within the meaning of section 42 (5) (i.e. 40 A (5)) as evidenced at pages 42 to 51 of the record of appeal. We are persuaded to believe that the appellant knew, all along, that payment of compensation and the respondent's refusal to reinstate her constituted a right accorded by the law and that its counsel's communication then suggested that this was a course of action it was open to, and we find nothing untoward in the respondent's decision to pursue this route. In our considered view, the respondent's decision is vindicated by our decision in **Dickson Saul Lutemba v. Cooperative and Rural Development Bank (1996) alias CRDB Bank Ltd** (supra) wherein we held:

> *"... in our respectful view, the novelty created by the Labour Laws (Miscellaneous Amendments) Act, 1975 was that where a reinstatement or reengagement has been ordered by the Board or Minister under section 42 (1) (i.e. 40A (1)) and the employer refuses or fails to comply with such order he is liable to pay the employee compensation spelled out in section 42 (5) (i.e. 40 A (5)).* ***The employer is not bound to receive the employee back even if the Board or Minister orders a reinstatement or a reengagement*** *(see also,* ***Dan Kavishe v. Arusha International Conference Centre's*** *case (supra). Parliament had thought it unfeasible, if not impracticable to order mandatory reinstatement or reengagement given the nature of an employment relationship which to a large measure also rests on continued trust and confidence between an employer and an employee."* [Emphasis is added]

The foregoing position was fortified in our subsequent reasoning in **Jawadu Juma Kamuzora v. Standard Chartered Bank (T) Limited**, Civil Appeal No. 15 of 2019 (unreported). In that case, this Court was invited to state the import of section 42 (5) of the Act. Relying on its earlier decision in **Pius Sangali & Others** (supra), the Court made the following observation:

"The above provision is straightforward. It imposed on the employer who refuses or fails to comply with the order of reinstatement or engagement, instead, to pay compensation to the employee in the form of an aggregate of, one, the statutory compensation computed in accordance with section 36 of the Act; and two, 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 dismissal..."

It does not occur to us that the **Paul Mwaipyana's case** (supra) that Mr. Majembe has premised his argument on, represents the position of the law as it currently obtains, and as was clarified in **Dickson Saul Lutemba** (supra) on the applicability of sections 25 (1) and 42 (4) of the Act. In the latter case, this Court observed:

"Having examined the relevant provisions of the Act in their entire context and harmoniously with the scheme therein and the intention of parliament, with respect, we are not persuaded that the legislative purpose was to create or impose two species of reinstatement regimes, one compulsory and the other voluntary, on the employer to reinstate an employee to his or her former position, ordered by the Board or Minister on a reference under sections 24 (1) (b) or 42 (4) (i.e.) 40A

(4)) and all arising out of summary dismissal of an employee. This also bearing in mind that under section 42 (2) (i.e. 40 A (2)) a reference to the Board or Minister may proceed as a reference under section 24, to add, the almost identical scope of the obligations and benefits provided for in both section 26 (1) (b) under PART III and 42 (4) (a) (i.e) 40A (4) under Part IV of the Act".

We are fortified in our position that Mr. Majembe's contention on the import of section 25 (1) was based on his fleeting review of the law, overlooking the potency of section 42 (5), as far as alternatives to reinstatement are concerned. Our reading of the law does not, by any stretch of imagination, convey any different view than that expressed in the just quoted excerpt, in that, the law does not impose parallel regimes that deal with reinstatements under section 25 (1) (b) and that which is covered by section 42 (4) of the Act. Both provisions have one convergence point and provide an option. This convergence point is section 42 (5) of the Act in which refusal to re-instate or re-engage constitutes an option which cannot be faulted. We entertain no doubt that the respondent was within his right to opt for this, provided that he eventually complied with the provisions that govern the payment of statutory compensation and terminal benefits.

In sum, we hold that the decision of the High Court which validated the executing court's decision is unblemished, and we find no reason to disturb it. Consequently, we hold that this appeal is not meritorious and we dismiss it. We make no order as to costs.

DATED at **DAR ES SALAAM** this 25th day of March, 2024.

M. C. LEVIRA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Judgment delivered this 25th day of March, 2024 in the presence of Mr. Martin Godfrey Sangira, learned counsel holding brief for Mr. Nduruma Majembe, learned counsel for the Appellant and Mr. Karim Rashid, learned Senior State Attorney assisted by Mr. Stephen Noe Kimaro, learned State Attorney for the Respondent is hereby certified as a true copy of the original.

A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL