IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CORAM: MUNUO, J. A, RUTAKANGWA, J. A. & KILEO, J. A.

CIVIL APPEAL No. 103 OF 2004

MIC TANZANIA LIMITED .....APPELLANT

VERSUS

1. MINISTER FOR LABOUR AND YOUTH DEVELOPMENT .....1ST RESPONDENT
2. ATTORNEY GENERAL.....2ND RESPONDENT

(Appeal from the ruling and order of the High Court of Tanzania at Dar es Salaam)

(Kyandо, J.)

Dated the 11th day of October, 2002
in
Misc. Civil Cause No. 9 of 2000

JUDGEMENT OF THE COURT

7th Nov. & 12th Dec. 2006

RUTAKANGWA, J.A.

This is an appeal against the ruling and order of the High Court of Tanzania (Katiti J.) at Dar es Salaam, in Misc. Civil Cause No. 91 of 2000 which was delivered by Kyando, J. on 11th October 2001.

The background to this appeal is briefly as follows. The appellant company was the employer of one Gilliard Ngewe. The appellant summarily dismissed the said Mr. Ngewe on 20th November, 1998 under the provisions of the Security of Employment Act, 1964, then Cap. 574 (now Cap. 387 R. E. 2002). Being aggrieved, Mr. Ngewe made a reference to the then Dar es Salaam Conciliation Board (the Board). The Board reversed the appellant's decision and instead ordered that Mr. Ngewe's services be terminated with full benefits. Mr. Ngewe was again dissatisfied. He made a further reference to the Minister for Labour and Youth Development (the Minister). The Minister quashed the Board's decision and ordered that Mr. Ngewe be reinstated in his former employment. The appellant was aggrieved but it had no right of appeal. It resorted to judicial review.

The appellant filed Misc. Civ. Cause No. 91 of 2000 (the application) in the High Court at Dar es Salaam. In the said application by Chamber Summons, the appellant was seeking the following orders:-

(a) Extension of time within which to apply for leave to apply for orders of certiorari,

(b) ***Subject to the granting of extension of time,*** *to be granted leave to file an application for an order of certiorari to quash*

the decisions of the Board and the Minister and

(c) *Stay of execution of the decisions of the Minister and the Board.*

The competence of the application was challenged by the Respondents in this appeal who were also the respondents in the application. The challenge, by way of preliminary objection, was to the effect that:-

(a) *the orders being sought were misconceived and bad in law for "mixing up an order for extension of time, order for leave and stay of execution in one chamber summons" and*

(b) *the prayer for stay of execution was misconceived as there was no leave which had been granted by the court which would have formed the basis for the order to stay the execution of the two decisions.*

The two points of preliminary objection were argued by way of written submissions. After considering these submissions the learned High Court judge upheld the first point of preliminary objection. However, instead of striking out the application for being incompetent, he proceeded to determine it on the merits. At the end

of the exercise he ruled that the appellant wrongly dismissed Mr. Ngewe. He ordered for his reinstatement and as a result he rejected the prayer for an order of stay of execution. The appellant was aggrieved and it lodged this appeal.

The memorandum of appeal contains five grounds of appeal. All the same, after carefully considering the oral submissions of Mr. Mchome, learned advocate for the appellant, and Mr. Chidowu, learned State Attorney for the Respondents, we are of the settled opinion that the appeal can be conclusively disposed of by determining grounds of appeal two (2) and three (3).

The gist of the second ground of appeal is that the learned High Court judge erred in law in essentially holding that the application was incompetent in so far as it combined three prayers in one Chamber Summons. In the third ground of appeal the appellant is contending that the learned judge erred in law in determining the application on merit without giving them a hearing.

In support of the second ground of appeal, Mr. Mchome submitted that there is no law which forbids the combination of more than one prayer in one Chamber Summons. He referred the Court to a High Court decision in TANZANIA KNITWEAR LTD vs SHAMSHU ESMAIL (1989) T. L. R. 48 wherein it was held that such a combination is favoured by the Courts.

With respect to the third ground of appeal, Mr. Mchome submitted that the learned judge was only supposed to rule on the submissions in favour and against the points of preliminary objections and nothing more. Counsel for both sides, admittedly, had focused their written submissions on that issue only and not on the merits or demerits of the application whose competence was under inquiry. Mr. Mchome adamantly maintained that by going out of his way and determining not only the merits of the adjudged incompetent application and also the merits of the appellant's decision, the learned judge exceeded his jurisdiction and condemned them unheard thereby breaching one of the cardinal rules of natural justice.

For these two reasons, Mr. Mchome urged the Court to allow the appeal with costs. He further prayed that the High Court ruling be quashed and set aside and the matter be remitted to the High Court for a full hearing according to law.

On his part, Mr. Chidowù urged the Court to dismiss the appeal with costs. According to him, the learned judge reached the decision after making proper investigation and arriving at proper conclusions of fact and law.

Mr. Chidowu, without elaborating, maintained that the application was incompetent for containing three distinct prayers in one Chamber Summons. He attempted to distinguish this case from

that of TANZANIA KNITWEAR LTD ((Supra) on the basis that the prayers in the latter case were not the same as the ones the appellant was seeking in this case. He went further and submitted that, after all, this Court is not bound by the decision of the High Court.

On the other ground of appeal, Mr. Chidowu defended the High Court judge against attack by arguing that he never went to the merits of the application. According to Mr. Chidowu, the learned judge only "investigated and found out that the penalties imposed were prejudicial to the employee". He was, however, not forthcoming on whether or not that was the appropriate stage in the proceedings to rule on such issues.

In determining this appeal we shall first examine whether the learned High Court Judge was correct in holding that in this particular case the application was misconceived and bad in law and, therefore, incompetent.

In upholding the preliminary objection, the learned judge said:-

> *I have had omnipresent opportunity to consider the pros and cons about the issue of multiplicity of prayers in a single application. While I have respect to the cited authority I think practicality*

militate (sic) the combination of applications. For example, Rule 2 of ORDER XLIII of the Civil Procedure Code has this wording:

> *"Every application to the court made under this Code shall unless otherwise provided be made by Chamber Summons supported by affidavit"*

Although Cap. 360 provides for such a procedure I would under section 95 make inherent power make it applicable to writs. As every application must be supported by affidavit, the essentials of such affidavit if multiple in single application single affidavit is likely to cause confusion and even derail justice for it may not be possible for the respondent to be able to identify the wood from the tree or cause him unnecessary labour. He may not be able to confine facts for each prayer, for each application as he is able of his knowledge he is able to prove, in case of interlocutory application which statements are for (sic) his belief and reason for so believing or in the alternative facts are for interlocutory application. I am for such reservations inclined to agree with the

learned State counsel that the resulting confusion would blur the decision making process. I would uphold the objection.

It is clear from the above extract that the respondents were upheld on their point of preliminary objection not because the course of action adopted by the appellant was contrary to any procedural law, but because the learned judge had reservations about its practicality. He also only gave a fleeting reference to the authority cited to him by counsel for the appellant.

In the TANZANIA KNITWEAR LTD case (Supra), the application had united **two distinct applications**, namely one for setting aside a temporary injunction and another for issuance of a temporary injunction. Objection was taken against such a combination on the ground that it was bad in law. Mapigano, J.(as he then was) held:

In my opinion the combination of the two applications is not bad at law. I know of no law that forbids such a course. Courts of law abhor multiplicity of proceedings. Courts of law encourage the opposite.

The learned Senior State Attorney in this appeal has invited us to disregard the holding of Mapigano, J. because we are not bound

by it. Indeed we are not bound by it and there is no direct decision of this Court on the issue. However, that cannot be a hindrance to us in our endeavours to ensure that substantive justice always prevails. After all, judicial process is not a discovery process but a creation process. Having so observed, we hold that the ruling of Mapigano, J. on the issue cannot be faulted, and we are respectfully in agreement with him.

It is also our settled view that the holding of Katiti, J. was predicated more upon fears than practicality and that is why he went on to determine the main application on merit. If the position he took is sustained on only those grounds, it would lead to undesirable consequences. There will be a multiplicity of unnecessary applications. The parties will find themselves wasting more money and time on avoidable applications which would have been conveniently combined. The Courts' time will be equally wasted in dealing with such applications. Therefore, unless there is a specific law barring the combination of more than one prayer in one Chamber Summons, the Courts should encourage this procedure rather than thwart it for fanciful reasons. We wish to emphasize, all the same, that each case must be decided on the basis of its own peculiar facts.

Having perused the Chamber Summons and its supporting affidavit as well as the respondents' Counter affidavit in the High Court, we are satisfied that the three prayers were properly

combined in one Chamber Summons. They were not diametrically opposed to each other, but one easily follows the other. Once extension of time is granted then an application for leave follows. As the respondents appear to concede, once leave is granted then the court may, in its discretion, grant or refuse to grant an order for stay of execution of the challenged decision. Viewed from this perspective, the reason for combining the three prayers in one chamber summons becomes obvious. The application was, therefore, competently before the High Court. We accordingly allow the first ground of appeal.

Having held that the application before him was incompetent, the learned judge was supposed to strike it out. He did not do so. Instead, as we have already indicated above, he proceeded to consider its merits. He eventually ruled that "the Board's decision is not susceptible to writ jurisdiction". He accordingly held that the application for extension of time was "misconceived" and rejected it. He further delved into the evidence tendered before the Board and concluded that Mr. Ngewe suffered "double jeopardy" because the appellant punished him twice, by imposing fine penalties and "an omnibus sentence of summary dismissal". He accordingly decided that under those circumstances leave to apply for orders of certiorari could not be granted. As if that was not enough he ended up setting aside the summary dismissal penalty and ordered the reinstatement of Mr. Ngewe.

Our major concern here is whether the learned judge was right in deciding the merits of the application after he had held that the same was incompetent, let alone his bold move to quash the employer's decision and order reinstatement. With due respect, we are of the decided mind that he was not. At best he only could have expressed his opinion without any detailed discussion on the merits of the application. After all, it is now trite law that once an appeal or application is found to be incompetent, the only option is to strike it out even if no objection had been raised to it.

The nothingness of incompetent proceedings was underscored by this Court in the case LEONSI SILAYO NGALAI VS HON. JUSTINE ALFRED SALAKANA AND THE ATTORNEY GENERAL, CIVIL APPEAL No 38 OF 1996 (unreported). This Court said:

> *.....The second aspect is whether this Court may adjourn an appeal which is incompetent, in order to allow the appellant to take necessary steps to cure the incompentency. This court has said it before that* ***an incompetent appeal amounts to no*** *appeal. It follows therefore that the court cannot adjourn what it does not have. Under such circumstances, what the court does is to strike the*

purported appeal off the register (emphasis is ours).

So as there was no application before the High Court, according to the ruling of the learned judge, it was an exercise in futility to purport to determine it on the merits. No valid and enforceable orders could be made in application which was not before the High court.

Of course we have already held that the application was competent. However, we cannot uphold the orders made therein by the learned judge subsequent to his holding that the application was incompetent. This is because the appellant was condemned unheard as we have already shown herein. The decision which was arrived at in utter disregard of the rule of natural justice is no decision at all. It is a nullity. We accordingly partly allow the third ground of appeal, in so far as the appellant was condemned unheard on the merits of its application for extension of time, leave to apply for orders of certiorari and stay of execution. The entire ruling appealed from is therefore, quashed and set aside.

All said, the appeal succeeds to the extent shown in this judgement. The record of the High Court is remitted to it so that the

application may be heard on its merits. The appellant to have its costs in this appeal. It is so ordered.

DATED at DAR ES SALAAM this 12th day of December, 2006

E. N. MUNUO
JUSTICE OF APPEAL

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL.

I certify that this is a true copy of the original.

S. M. RUMANYIKA
DEPUTY REGISTRAR