IN THE HIGH COURT OF TANZANIA

AT ARUSHA

CIVIL APPEAL NO. 19 OF 2004

(Original Arusha District Court employment Cause No. 57 of 2000)

NEW SAFARI HOTEL (1967) LTD.....APPELLANT

VERSUS

KAPISTRANT CHALE & 68 OTHERS .....RESPONDENTS

JUDGMENT

R. SHEIKH, J.

This is an appeal from the decision, a ruling and order, of the Arusha District Court in employment cause No. 57 of 2000.

In November 2000, the 1st respondent- KAPISTRANT CHALE instituted Employment cause No 57 of 2000 against the appellant in the Arusha District Court, on his own behalf and on behalf of 68 others ex-employees of the appellant, NEW SAFARI HOTEL (1967) LIMITED. The suit was instituted by way of a plaint. The respondents sued the appellant for underpayment of their terminal benefits and allowances following termination of their employment

contracts. The appellant had raised several preliminary objections concerning the legal competence of the proceeding. The same were dismissed. At the trial four (4) plaintiffs testified. The amount claimed totaled T.shs. 51,223,549. In a ruling made immediately after a submission of no case to answer by the defendant the District Court awarded the respondents a sum of T.shs. 512,223, 549 as terminal benefits with costs. The appellant being aggrieved by the Ruling and order made after the submission of "a no case to answer" has filed this appeal.

The Memorandum of Appeal Contains eight (8) grounds of appeal which read as follows:-

1. That the learned District Magistrate erred in law in entertaining the Employment cause that was instituted wrongly by a plaint instead of by way of a Report by a Labour Officer in accordance with the provisions of the Employment Ordinance, Cap 366.
2. That the learned District Magistrate erred in law when he held that the plaintiff's non-compliance of the provisions of

Order I rule 8 of the Civil Procedure Code that requires prior leave of court before instituting a representative action was a more curable technicality of procedure.

3. Since the case before the District Court was an Ordinary employment case and not a constitutional petition, the learned District Magistrate misdirected himself in law in adopting principles applicable to constitutional cases in disposing the contentious statutory issues that week before him.

4. That the honourable District Magistrate erred in law and in fact when he held that

    a) G.N. No 330 A/98 did not refer to the appellant company and consequently the appellant was not a public corporations within the meaning of the public corporation Act 1992, as amended.

    b) The case was not bad for nonjoinder of the Parastatal Sector Rearm Commission (PSRC) as a necessary party.

5. That the learned District Magistrate misdirected himself in law and fact in holding that the evidence that was adduced on behalf of the plaintiffs was sufficient to put the appellant on the defence.
6. That having ruled that the appellant had a "case to answer" the learned District Magistrate grievously erred in law in than and there passing judgment and condemning the appellant to pay money without affording it the opportunity to tender evidence in rebuttal.
7. The learned District Magistrate misdirected himself in law and fact in finding that the appellant had not paid the respondents their terminal benefits in accordance with law.
8. The learned District Magistrate erred in fact in ordering the appellant to pay the respondents the sum of shs. 512,223,549/= instead of the sum of shs 51,223,549/= only that was claimed by the respondents.

The appeal was strongly resisted by the respondents. In his written submission Mr. Mughwai learned counsel for the appellant argued and sought to impugn the decision of both points of law as well as on the merits. In my view, however, those grounds on issues of law can only be properly examined after the grounds raising points/issues of law have been disposed of (see the case of DAIKIN AIR v. HARVARD UNIVERSITY (1995) T.L.R. at page 1).

I will accordingly begin with those issues first.

Mr. Mughwai asserted that the District court had erred in granting the respondents terminal benefits totaling shs 512,223,549/= a sum ten times more that what they had claimed and prayed for in the plaint.

It is not disputed that the sume awarded to the respondent was more than what they had claimed that the claim totaled shs 51,223,549 (echibit P3 Annexure A 4) In respouse to this assertion Mr. Makange learned counsel for the respondents has submitted that under prayer (c) of the prayer trial was in the exercise of its

discretion powers empowered and entitled to grant a relief which has not been specifically pleaded.

In their plaint the respondents had made the following prayer:-

The plaintiffs pray for judgment and decree against the defendant as follows:-

a) An order for payment of outstanding and underpaid terminal benefits as pleaded in paragraph 5 above;

b) Costs of the suit

c) Any other reliefs which the court deems fit to grant paragraph 5 of the plaint reads: "5. That by virtue of the Agreement mentioned in paragraph 4 supra the defendant agreed to take over existing liabilities, safeguard the interests of the existing employees and in the event of unavoidable reduces pay terminated benefits package amounting to shs.114,697,164.

As said earlier it is not disputed that the plaintiffs' Claim totaled shs 51,223,549/= only as evidenced by the schedule of claims

(exhibit P 3. Indeed there is no evidence which would entitle them to payment of shs, 512,223,549 that they were awarded. Assuming the plaintiffs claims were proved, I agree entered with Mr. Mugwai that the respondents are not entitled to save what had been pleaded and claim A, and proved in court. Prayer (c) for any other relief in itself cannot empower the trial court to grant judgment for an amount greater that what had been pleaded and proved. This ground of appeal has merit and is herby allowed.

Grounds 1, 2 and 3 were argued together.

As regards ground 3 I agree entirely with learned counsel for the appellant that the trial court had erred in dismissing the appellant's objection on the competence off the suit filed by the plaintiffs as mere procedural matters which should not obstruct enforcement of basic rights guaranteed under the constitution. What was before the District Court was a suit for non payment/underpayment of terminal benefits and was in no way

related to article 13 (3) of the constitution of the United Republic guaranteeing access to courts of Law.

The principle enunciated in the BAWATA case which was a constitutional matter relied on by the trial court was inapplicable. Indeed Order I rule 8 makes it mandatory of leave of the court of be obtained before institution of a representative suit (see Ballonzi v. Registered Trustees of CCM (1996) T.L.R. 203) The procedure prescribed under order I Rule 8 is a fundamental requirement and not a mere technicality of procedure (see K.J. Motors v. Richard Kishamba and Others (CAT/DSM) Civil Appeal No. 74/1999, unreported.

I must agree with the appellant that the trial court erred in ruling that the power of attorney instrument attached to the plaint sufficed for purposes of compliance to Order 1 rule 8 of the C.P.C. Ground 2 is allowed. Indeed the trial court erred in its finding that non compliance with the provisions of Order 1 rule 8 of the C.P.C requiring leave of the court prior to institution a mere technicality that can be easily disposed with Grand 1

too has merit. The procedure for dealing with a labour dispute between an employer and an employee was provided for under section 130 of the Ordinance where a labour officer before whom a labour dispute is reported is unable to effect a settlement he may submit a written report to a magistrate setting out the facts of the case.

The plaintiff's claim was wrongly filed as a plaint.

As regards ground 5 it is true that only 4 out of the 69 plaintiffs testified. The other 65 did not testify on behalf of themselves. Order XVIII rule 2(10 of the C.P.C requiring each plaintiff to prove his allegations was clearly not complied with. Therefore the claims of the 65 plaintiffs who did not testify remained mere allegations which lacked proof. It would have been different had claim been filed as a representative suit.

Regarding ground 6 Mr. Mugwai submitted that the District court had erred in deciding the case immediately after the submission of no case to anser, that it should have

ascertained whether the defendant interned to call witnesses to give evidence in rebuttal of the respondent's evidence.

Indeed as stated have in the District court had decided the case in its ruling immediately after the submission of no case to answer by Mr. Mughwai learned counsel for the defendant. At the close of the plaintiffs' case Mr. Mughwai on behalf of the defendant company submitted that there was no case to answer Mr. Mugwai's contention was that the evidence which was adduced by the 4 plaintiffs out of the 69 plaintiffs was so unsatisfactory and unreliable that it had not shifted the burden of proof on to the defendant, and that the plaintiffs had not discharged the burden of proving their claims. Mr. late Shikely the then learned counsel for the plaintiffs made a reply at the end of which he invited the court to evaluate the evidence adduced by each of the four witnesses and make a finding on the facts in issue on a balance of probabilities. In its ruling the trial court reviewed the evidence before it and made a finding that the plaintiffs proved their claims, and that the defendant had a case to answer.

The trial magistrate then concluded as follows:-

From what I have stated above the defendant has a case to answer and he is ordered to pay plaintiff's shs 512,223,549/= and costs of this case"

Without more a do I will say that the trial court made a grave error in deciding the case immediately after that the case immediately after the submission of no case to answer. At that stage all that she was required to do was to exprars her opinion as to whether there was a case for the defendant to answer. At no time before or during his submission did Mr. Mughwai indicate or elect not to call evidence. Indeed learned counsel for the defendant in his submission indicated clearly that the defendant had "solid evidence" to present. After the submission of no case to answer the Hon. Magistrate did not ascertain whether or not defendant intended to call no witnesses. In this case the defendant did not lose his right to call evidence and denying him that right was a serious error by the trial court. The defendant was denied his fundamental right to make its defence. Unfortunately I cannot order a retrial before another magistrate since as I have stated herein the proceedings week flawed and in

competent as initial. Nonetheless the respondents are at liberty to commence appropriate proceedings in a court of competent jurisdiction.

Sgd.

R. SHEIKH

JUDGE

2/01/2009

Date : 5/3/2009

Coram : J. Karahimaha, Ag Dr.

Appellant:

For the Appellant; present

Respondents ; Present

For the Respondents: Present

B/C Priscilla.

Mr. Mughwai for the Appellant

Mr. Mugwai: The trial was fixed for Judgment. We are ready.

Respondents;

We are ready to receive the judgment too.

Court: Judgment delivered in chambers on 5/3/2005 in the presence of both parties.

Sgd.
J. KARAHIMAHA
Ag. DISTRICT REGISTRAR
ARUSHA
5/3/2009

Court; Right of Appeal fully explained.

Sgd.
J. KARAHIMAHA
Ag. DISTRICT REGISTRAR
ARUSHA
5/3/2009

I hereby certify this to be a true copy of the original.

DISTRICT REGISTRAR
ARUSHA
18/3/09

/MM