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IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 57/02

TANZANIA RAILWAYS WORKERS UNION (TRAWU)

ON BEHALF OF D.F.MSITU & 196 OTHERS..... APPLICANT

Versus

PSRC ..... RESPONDENT

TRC ..... RESPONDENT

R U L I N G

JUNDU, J:

This is an application for an order of certiorari to remove to this Honourable court and quash the decision of the Industrial Court of Tanzania dated 21st day of September, 2000 in consilidated revision application No. 17 of 1999 and for an order of mandamus to make an award be issued. It has been make under Section 2 (2) of the Judicature and Application of Laws Ordinance, Section 17 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance (Amendment Act 1968) and Section 95 of the Civil Procedure Code, 1966. It has been supported by the affidavit of one Gregory Makula, an Assistant Secretary General of Tanzania Railway Workers Union (TRAWU), the Applicant. On the other side, the Respondents have opposed the application and have filed a counter affidavit of Angelista Mukundi, a Principal Legal Officer of the Second Respondent.

The facts deponed in the affidavit of Gregory Makula for the Applicant show that between 22nd and 23nd December 1992, Central Joint Industrial Counsil, a policy maker organ of the Second Respondent met on Morogoro to consider among other things the retrenchment of some of the employees of the Second Respondent and that after the said meeting the Second Respondent and the Applicant were supposed to sit together to make an argeement for the retrenchment of the employees which would be registered with the Industrial Court of Tanzania and that there was no such a meeting and agreement for retrenchment. It has been deponed further in the said affidavit that in or about June, 1993, 859 employees of the Second Respondent were retrenched by her and that 197 of them protested the retrenchment and that the said 197 employees came from

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different branches of the Second Respondent in Tanzania and that before the retrenchment there was no agreement between the Applicant and the Second Respondent on the terms of retrenchment and that there were no meetings between the 35 branches (save for two branches namely Karakana Branch and Makro Makuu Branch) of the Applicant in the country and the Second Respondent on the retrenchment. It was further deponed in the said affidavit that the retrenched employees came from all branches in the country save for the said two branchs and that the said employees were not consulted on the said retrenchment. It was alleged further in the said affidavit that the Applicant filed a case in the Industrial Court of Tanzania which found as a fact that there was no consultation between the Applicant and the Respondent save for the two aforesaid branches and that the said court on 10th September, 1999 on irrelevant premises and without facts held that the Second Respondent was not in good financial status hence it awarded the retrenched employees each with twelve (12) months salary instead of reinstatement. It was deponed further that as a result of the said ruling of the said court, the Applicant applied for a review thereof and the Second Respondent applied for a cross review, and in its ruling the said court ruled that there was consultation (without any evidence) with all the branches of the Applicant and the Second Respondent. The deponent of the affidavit has alleged that the said court in its review confused the minutes of the Central Joint Industrial Council as an agreement between the Applicant and the Second Respondent, therefore, the Applicant is of the view that there is an error of law on the face of the record in the said ruling and that the said court took irrelavent consideration when it ruled that the retrenched employees be paid twelve months salary instead of reinstating them.

On the part of the Second Respondent, one Angelista Makundi, a principal legal officer deponed a counter affidavit opposing the application. It is alleged in the said counter affidavit that after the Joint Central Committee, (which is the same organ referred above as the central Joint Industrial Council) meeting held on 22nd and 23nd December, 1992 in Morogoro which had resolved that 859 employees of the 2nd Respondent organisation be retrenched, the 2nd Respondent had meetings with leaders of the workers union at each branch of the said Respondent's organization to deliberate on the names of employees who were to be retrenched and thereafter the 2nd Respondent entered into agreements with the

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leaders of the workers union at each branch to retrench the employees and that the said agreements were not required to be registered with the Industrial Court nor was the Second Respondent required to sit with the Applicant to prepare any agreement. The deponent of the Counter Affidavit has appended to the said counter affidavit copies of the minutes of the Joint Central Committee meeting held on 22nd and 23nd December, 1992 and the copies of the agreements entered between the 2nd Respondent and the leaders of the workers union branches as ANNEX "B".

It is further alleged in the said Counter Affidavit that it had been re-agreed during the Joint Central Committee meeting that 859 employees were to be retrenched in 1992 and 1993 by the 2nd Respondent and that the employees who are challenging the retrenchment are 196 retrenched in 1993 and were all based in Dar es Salaam working at the 2nd Respondent Head Office and Workshop, therefore, they do not comprise of employees from up country stations. In the said Counter Affidavit, it is denied that the Industrial Court confused the minutes of the Joint Central Committee meeting with the agreements to retrench the Applicants and it is also denied that there is an error of law on the face of the record in the decision of the Industrial Court of Tanzania.

In its reply to the said Counter - Affidavit, one Gregory Mahulo, an Assistant Secretary General of the Applicant deponed that the purpoted agreements between the 2nd Respondent and the union branches in 1993 are not true because the said agreements were not tendered at the first hearing in the Industrial Court nor before this court when an application for leave for prerogative orders was made by the Applicant and that one Abdurhaman Hussein who attended the Central Joint Council meeting at Morogoro could not act as a member of management for the Second Respondent as he was a member of OTTU in the capacity of a branch secretary at the Head Office. It was further deponed in the said reply to counter affidavit that the 196 employees of the Second Respondent were not all based in Dar es Salaam.

This court had ordered the parties to argue the application by way of written submissions which were duly filed on the dates required.

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since the Applicant did not consult the union branches of the Applicant on the retrenchment of the 197 members who were employees of the Second Respondent, the application for orders of centievari and mandamous be granted.

On her part, Ms.Rwechungura, learned counsel for the 2nd Respondent in her submission has vehemently opposed the application. She has identified three basic issues which she considers as important to be determitiddby this court in order to establish whether there were irregularties in in hearing and determining consolidated Revision No. 17/99 of the Industrial Court of Tanzania namely:-

1. Whether there were consultations held between the workers committees and the 2nd Respondent, prior to the retrenchment of the applicants/complainants.
2. Whether the Industrial Court permitted the 2nd Respondent to produce additional evidence during hearing of consolidated Revision No. 17/99 of the Industrial Court.
3. Whether the principles of natural justice were contravened by allowing E. Abdrahman to execute the joint agreements on behalf of the 2nd Respondent.

She has submitted as far as the first issue is concerned that much as the Applicants have argued that, there were no Consultations held between the workers committees and the Second Respondent, prior to the retrenchment of the Applicants, as required by Section 6 (1) (g) of the Security of Employment Act of 1964, the evidence which is on record indicates that, prior to the retrenchment of the Applicants, the 2nd Respondent and the workers committees in the 2nd Respondent's corporation met in Morogoro on the 22nd and 23nd of December, 1992 to deliberite on the retrenchment of employees. She submitted that Minute No. 5 of Annexture "A" to Counter Affidavit indicates that during the meeting which was held in Morogoro the workers committees were informed by the Second Respondent that the 2nd Respondent was forced to retrench 859 employees due to changes which had taken place in the 2nd Respondents establishement, the said minutes indicates that not only did the workers committees consent to the retrenchment of 859 employees but they also proceeded into setting the criterias to be applicable in the retrenchment exercise and that apart

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from the workers committees consenting to the retrenchment of the 859 employees further evidence on record shows that, even after the meeting in Morogoro, the workers committees and the 2nd Respondent held further meetings to deliberateon the retrenchment which ended with the workers committees executing joint agreements with the 2nd Respondent to retrench the 859 employees as evidenced by Annex "D" to Counter - Affidavit.

The said learned counsel continued in her submission that since the workers committees and the Second Respondent had met more than once to deliberate on the retrenchment of 859 employees prior to effecting the retrenchment, therefore, the minutes of the meeting and the joint agreements executed between the workers committees and the Second Respondent are sufficient evidence to prove compliance of Section 6 (1) (g) of the Security of Employment Act, 1964 by the Second Respondent.

On the second issue, the said learned counsel for the Respondents submitted that the Applicant's argument that there were irregularities in hearing and determining Consolidated Revision No. 17/99 by the Industrial Court because the said court had permitted the Second Respondent to produce additional evidence during hearing of the review application has been fabricated to defect the ends of justice as the evidence on record reveals clearly what transpired during hearing of the Consolidated Revision No. 17/99, the Applicant had advanced a new argument, that the court of 1st instance had erred in law to consider that, the 197 applicants were all derived from the 2nd Respondent's Offices in Dar es Salaam, while the 197 employees were derived from, the Second Respondent's Offices throughout the country and that on the basis of the said argument, the Applicant had requested the court to produce additional evidence to support their claim. She continued to submit that the Second Respondent opposed the said argument and requested the said court to also be allowed to produce the joint agreements which were executed by the Second Respondent and all the workers committees in the Second Respondent's corperation in the court and the said court allowed both parties to tender additional evidence to support their arguments. She submitted further that, however, in its decision, the said court rejected the additional evidence which was tendered by both partes and it outlined its reasons for rejecting the said additional evidence as is clearly shown in pages 2 to 7 of the Ruling of the Industrial Court of Tanzania on consolidated Revision Application No. 17 of 1999 appended as Annex "A" to the Applicant's Affidavit

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and since the said additional evidence was summarily rejected and not used by the said court the argument of the Applicant that there were irregularities in hearing and determining Consolidated Revision No. 17/99 or error on the face of the record is devoid of merit.

On the third issue, on whether there was violation of principles of natural justice, the said learned counsel for the Respondent submitted that the Applicant had argued that the principles of natural justice were violated in the retrenchment of the employees as the Second Respondent had appointed one Mr. H. Abdrahman to execute the joint agreements on behalf of the Second Respondent while the said person was the secretary of the workers committee in the 2nd Respondent's Offices in Dar es Salaam as evidenced by the minutes of the meeting which was held in Morogoro on the 22nd and 23nd December, 2002. She further submitted that in scrutirising the evidence which is on record, it can be noted that this issue was not raised in the court of first instance, therefore, she prayed that the issue should not be entertained by this court as it will render the proceedings of this court a nullity on grounds of irregularities. She continued to submit that, in the alternative and without prejudice, the Second Respondent had appointed Mr. H. Abdrarhamn to execute the joint agreements on behalf of the Second Respondent because the said official was the one who carried out the changes in the 2nd Respondent's establishment hence executed most conversant with the retrenchment exercise since he the agreements after the Second Respondent and the Workers Committees had held consultations to retrench the 859 employees, the execution of the joint agreement by the said official on behalf of the Second Respondent does not render the retrenchment a nullity, because an employer, is empowered to assign any officer of the business of the employer to carryout any obligations on behalf of the employer as was the situation in the present case. The said learned counsel for the Respondent finally submitted that on the basis of her submission demonstrated above, it goes without saying that there were absolutely no irregularities in hearing and determining Consolidated Revision No. 17/99 and on the basis of the aforesaid submissions she prayed for the total dismissal of the Applicant's application with costs.

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In a very short reply submission, Mr. Mwakajinga, the learned counsel for the Applicant reiterated that the Central Joint Industrial Council was merely a policy maker organ of the Second Respondent and it deliberated on redundancy on 22nd and 23nd December, 1992 in Morogoro in that capacity and it cannot be substituted for a meeting between the employer and a branch of the workers organisations of the employer as required by Section 6 (1) (g) of the Security of Employment Act, 1964, therefore, he maintained his submission that the Second Respondent did not consult the branches of the workers organisation of the Applicant in retrenching the Applicants. Further, he appreciated that the learned counsel for the Respondents had aknowledged that one H. Abdrahaman had acted for both the Applicant and the Second Respondent as shown in her submission. He again prayed for the application to be granted with costs.

Having studied the affidavit of the Applicant, the Counter Affidavit of the Respondents and the reply to Counter Affidavit as well as the submissions of each party, I will proceed to consider and determine the issues before me and I have adopted for consideration the three issues framed by Ms. Rwechungura, the learned Advocate for the Respondents in her submission namely:-

1. Whether there were Consultations held between the workers committees and the Second Respondent prior to the retrenchment of the Applicants/complainants.

2. Whether the Industrial Court permitted the Second Respondent to produce additional evidence during hearing of Consolidated Revision No. 17/99 of the Industrial Court.

3. Whether the principles of natural justice were contravened by allowing H. Abdraham to execute the joint agreements on behalf of the Second Respondent.

The first issue, on whether there were consultations held between committees of the workers and the Second Respondent prior to the retrenchment of the Applicants, the Industrial Court of Tanzania sitting in its original jurisdiction had held that no consultations were made but quashed and set aside the said position on revision basically on the ground that the Applicant had failed to prove the said matter. Now,

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I have read the affidavit of Gregory Makula in support of this application he alleges that the 197 employees of the Second Respondent alleged to have been retrenched came from 35 different branches of the Second Respondent in Tanzania but the Respondent had consultation with only two workers branches in Dar es Salaam namely Karakana Branch and Makao Makuu branch on the retrenchment. Therefore, I sincerly construe him to mean that 33 union branches outside Dar es Salaam were not consulted on the retrenchment. However, just as the said court found on revision, the two witnesses of the Applicant who adduced evidence namely Saleha Juma Kaguso (PW1) and Juma Shamte (PW2) before the said court did not show in their evidence which union branches all over the country outside Dar es Salaam there were referring to and which of said union branches outside Dar es Salaam did each of the alleged 197 retrenched employees came from, to me, it is as if the two witnesses from the two Dar es Salaam based union branches were trying to act for the other employees from the other union branches outside Dar es Salaam. In actual fact, PW1 and PW2 in their evidence had only alleged that their Union branches at their place of work were not consulted but the two witnesses were all from the two union branches in Dar es Salaam and it is the averrement of Gregory Makula in his Affidavit in support of this application before this court that the two Dar es Salaam based union branches were consulted on the retrenchment exercise by the Second Respondent. It is a settled principle of law of evidence that whoever alleges a certain fact must prove it. None of the union branches officials or members outside Dar es Salaam or even any of the alleged 197 retrenched employees from branches outside Dar es Salaam testified in the Industrial Court in support of the allegations that those union branches outside Dar es Salaam were not consulted on the issue of retrenchment.

Much as Mr. Mwakajinga, the learned counsel for the Applicant has tried to persuade this court that the Control Joint Industrial council meeting between the Applicant, and the Respondent held in Morogoro on 22nd and 23nd December, 1992 was not consultation in terms of Section 6 (1) (g) of the Security of Employment Act, 1964 and that the Industrial Court of Tanzania acted on irrelevant material to believe that it was proper consultation and that it confused the minutes of the said meeting to be an agreement betwen the Applicant and the Respondent on the retrenchment matter, has not convinced this court to disturb the decision of the Industrial Court on revision.

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learned counsel for the Respondents that the additional evidence was rejected by the said court. Therefore, the argument of the learned counsel for the Applicant that the Second Respondent was allowed to tender forms which led thesaid court to rule in their favour has no merit at all because the said court did reject all the additional evidence from both parties including the alleged tendered forms, This finding disposes the other argument of the learned counsel for the Applicant related to thesaid forms allegedly signed by one H. Abdurhaman who is accused to have acted for the management while he was at the same time a union branch secretary. Indeed, according to the minutes of the Central Joint Industrial Council held on 22nd and 23nd December, 1992, Mr. Abdrahaman was from Makao Makuu Union Branch Dar es Salaam but the affidavit of Gregory Makula in support of this application shows that this was one of the two branches in Dar es Salaam which had consulted the Second Respondent on the retrenchment exercise. The said affidavit shows that the issue of consultation not being made is for the other union branches or workers committees outside Dar es Salaam in the Second Respondent's organization. However, it was not shown in the evidence of PW1 and PW2 before the Industrial Court that the said person had also acted for the other union branches or workers committees in work places outside Dar es Salaam which it is alleged that there were no consultations.

On the third issue, as regards whether the principles of natural justice were contravened by allowing H. Abdrahaman to execute the joint agreements on behalf of the Second Respondent, the learned counsel for the Applicant had maintained that there was a violation of natural justice because the said person acted for both for the Applicant as a union branch secretary at Makao Makuu branch and for the Respondent's management in signing the redundancy forms. However the learned counsel for the Respondent has urged this court not to entertain this point because as for the record is concerned it is not raised in the court of first instance, it is being raised for the first time in this court. Alternatively, the learned counsel for the Respondent has argued that the said officer was the one who carried out the changes, therefore, the most conversant person with the said exercise of retrenchment for the Second Respondent and the latter as an employer is empowered to assign officer of the business to cary out any obligation

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on behalf of the employer as was the case here. I have carefully perused the record available in the file, I am satisfied that this issue had not been argued in the Industrial Court either on original jurisdiction or on revisional jurisdiction. Further, as I have already said the said officer as far as the minutes of the Central Joint Industrial Council meeting of 22nd and 23nd December, 1993 is concened he was from Makao Mokuu Union branch in Dar es Salaam. He was not a member, or secretary of theother union branches outside Dar es Salaam. He could not have acted for these branches. Therefore, as far as these branches are concerned no violation of natural justice could have been made. As far as the said issue is concerned, I find no merit in the argument of the learned counsel for the Applicant to disturb the decision of the Industrial Court on revision.

Having disposed thesbove issues, I still have to resolve other points raised by the Applicant in his submission. The learned counsel for the Applicant has submitted that the Industrial Court took into consideration irrelevant material when it said that the financial position of the Second Respondent is not good without any evidence before it thereby ordering employees to be paid twelve months salary instead of being reinstated. This issue need not detain me because the Industrial Court of Tanzania in its revisional jursdiction had given its reasons as to why it was ordering payment of twelve months salaries instead of reinstatement. Again the said court when sitting in its revesional jurisdiction had fully considered this matter including the issue of poor financial status as can be seen on page 8 to 9 of the ruling of the Industrial Court of Tanzania on Consolideted Revision No. 17/99. Therefore, the argument of the learned counsel for Applicant that the said court took into consideration irrelevant material when it said that the financial position of the Second Respondent is not good without any evidence before it has no merit at all.

Another point taken up by the learned counsel for the Applicant in his submission is that the Industrial Court took into consideration irrelevent material that the Central Joint Industrial Council meeting between the Applicant and the Second Respondent was consultation as per Section 6 (1) (g) of the Security of Employment Act, 1964. He argued that the said meeting cannot be substituted for a meeting between the employer and a branch of the workers organization of the

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employees of the employer as required by Section 6 (1) (g) of the Security of Employment Act, 1964. I have already said that as far as the affidavit of Gregory Makula is concerned in support of this application, it is categorically clear that there was consultation between the Applicant and the Respondent in respect of Makao Makuu and Karakana branches in Dar es Salaam on the retrenchment issue. As for the remaining union branches outside Dar es Salaam I have already said that the Applicant hand led no evidence at the Industrial Court to establish the alleged branches as well as evidence to establish which branch, each of the alleged 197 retrenched employees belonged to in respect of the union branches outside Dar es Salaam.

Therefore, even if for the sake of argument one was to say that the alleged meeting held in Morogoro is not a substitute for the union branches meetings under Section 6 (1) (g) of the Security employment Act, 1964, the point remains that the Applicant did not led evidence at the Industrial Court of Tanzania vide PW1 and PW2 to establish the other alleged union branches apart from Makao Makuu and Karakana branches in Dar es Salaam.

In the final result, the application for orders of certiorari and mandamus filed by the Applicant is hereby dismissed with costs. It is so ordered.

F. A. R. Jundu
JUDGE
20/05/2004

R/A Explained.

F. A. R. Jundu
JUDGE
20/05/2004

Delivered in the presence of Mr. Mwakajinga, learned counsel for the Applicant and Mr. Mwakajinga holding brief for Mrs. Rwechungura for the Respondents.

F. A. R. Jundu
JUDGE
20/05/2004