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IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 115 OF 2002

TANZANIA HARBOURS AUTHORITY.....APPLICANT

VERSUS

1. THE MINISTER FOR LABOUR
2. THE ATTORNEY GENERAL
3. WILLIAM MAJIYAPWANI } **.....RESPONDENTS**

Date of Last Order 9/8/20006
Date of Ruling 26/10/2006

RULING

ORIYO, J

Perhaps it will serve the purpose if the decision is prefaced with the historical background of its delay. On 6/4/2006, long past the deadline for filing rejoinder submissions; there was no copy of the rejoinder on court record. The applicant and counsel were both absent and there was no explanation available for their default. The court was of the view that beside the missing copy of rejoinder; there were also certain aspects of the applicant's written submissions in chief, which required some clarifications from the applicant's counsel. Despite notice counsel did not appear to supply the

clarification sought until the time of writing this ruling. However, a copy of the rejoinder filed on the scheduled date had, meanwhile, been placed on record.

In this application, the applicant was represented by M/S Mbunna & /Co Advocates, learned counsel; the first and second respondents were represented by the learned State Attorney while the third respondent was not represented but appeared in person.

The applicant, Tanzania Harbours Authority, was aggrieved by the decision of the Minister for Labour dated 23/10/2001 which confirmed decision of the Conciliation Board of Temeke District, Dar es Salaam dated 18/8/1999, to reinstate the third respondent. The Board had ordered the applicant to reinstate into the former position, an ex employee, William Majiyapwani. The applicant sought from the Court an order of CERTIORARI to quash those decisions.

The facts were set out in the affidavit of Claudio Michael Mbenna, a Principal officer of the applicant, made on 23/9/2005. It was stated that on 30/1/95, the third respondent was summarily dismissed for being involved in a theft. The third respondent

successfully referred the matter to the Conciliation Board of Temeke District, which ordered his reinstatement on 14/8/97; pursuant to the provisions of SECTION 24 (b) of the SECURITY OF EMPLOYMENT ACT CAP 387 R.E. 2002. The applicant was apparently satisfied with the decision of the Board and set out to implement it.

By its letter dated 29/12/97, the applicant purported to reinstate the third respondent with all his dues as ordered by the Board. On the next day, 30/12/97, by another letter, the applicant purported to terminate the services of the third respondent for the reason that the former position was no longer available having been filled in the interim period of dismissal 1994-1997. The third respondent was to be paid all terminal dues as listed in the letter. The applicant this time purported to terminate the third respondent under section 39(2)(K) OF THE SECURITY OF Employment Act.

The third respondent made another reference to the Conciliation Board of Temeke against the second termination. The Board delivered its decision on 18/8/99 that the respondent was to be reinstated and all his dues paid. The decision of the Board as contained in Form No. 5 stated in Kiswahili as hereunder:-

"Kwa mujibu wa Kifungu cha 40(1) cha Sheria ya Usalama Kazini Na 62/64 kama kilivyoongezwa na Kifungu cha 18 cha Sheria Na. 1 ya Mwaka 1975 kuachishwa kazi Ndugu William Majiyapwani sio sawa na halali hivyo Baraza linaagiza Ndugu William Majiyapwani arudishwe kazini kwa sababu mwajiri ameshindwa kulithibitishia kweli nafasi yake ilijazwa. Pia kifungu cha 39(2)(k) cha Sheria ya Usalama Kazini alichotumia mwajiri kumwachisha kazi hakumpi nguvu mwajiri kumwachisha kazi mrufani baada ya kurudishwa kazini na Baraza au Waziri wa Kazi."

The applicant was dissatisfied with the Board decision above and preferred an appeal to the Minister who confirmed the Board's decision on 23/10/2001. The Minister's decision was in the following terms in Kiswahili:-

" Kwamba kwa Mujibu wa Kifungu 40A (3) cha Sheria ya Usalama Kazini Sura 574 kama ilivyorekebishwa na Sheria Na. 1 ya 1975 nathibitisha uamuzi wa Baraza la Usuluhishi mfanyakazi arudishwe kazini kwa sababu imebainika kwamba mwajiri hakuwa na sababu ya kumwachisha kazi mfanyakazi".

It was this decision of the Minister which the applicant complained against and sought the order of Certiorari to quash it.

The applicant advanced three major reasons in its statement. One was that the Board lacked jurisdiction because the reference was made outside the 14 days statutory limit. Two was that no reasons were advanced for both the Ministers and the Board decisions. Third reason was that the decision was unreasonable. It was the applicant's contention that the order of reinstatement contravened the provisions of SECTION 40 (A) (1)(b) and 40A (1)(d) as amended by Act No. 1 of 1975. The applicant argued that the Board/Minister are prohibited by law from ordering reinstatement after affected

employee had admitted to have been adequately remunerated by the employer. Further argument was that the Board was not allowed to order reinstatement in circumstances where employer terminated services under Section 39(1) and 2(K) of Cap 387 R.E. 2002.

Now for the merits of the application. It is noteworthy that the duty of this court is to determine only whether the Minister's decision and/ or the Conciliation Board of Temeke contravened the law or not; (See ASSOCIATED PROVINCIAL PICTURE HOUSES LTD VS WEDNESBURY CORP. [1947]2 ALL E.R. 680). However, the court's duty here is different from that of an appellate Court. There are six grounds upon which this court can issue the order of Certiorari. They are set out in the Court of Appeal decision in the case of SANAI MIRUMBE & ANOTHER VS. MUHERE CHACHA (1990) 54 at 56. Of relevance here are three. Those are:-

a) N/A

b) N/A

c) Lack or Excess of Jurisdiction

d) Conclusion arrived at is so unreasonable that no reasonable authority could ever come to it

e) N/A

f) Illegality of procedure or decision.

The first ground was on lack of jurisdiction by the Board to deal with the reference made by the third respondent for being time barred. This ground can easily be dealt with. According to Annexture "A" to the third respondent's counter affidavit the termination letter dated 30/12/97 was received by the third respondent on 8/1/1998; the applicant failed to controvert this vital piece of evidence. Pursuant to the provisions of the Law of Limitation Act; 14 days started to run against the third respondent on the date he received the knowledge of the termination. Therefore 14 days statutory period ended on 22/1/98. The reference was made on 19/1/98 well within time. Therefore the Board had jurisdiction to deal with the reference as it did. This ground lacks merit.

The second ground on failure to give reasons for their respective decisions is also easy to deal with. The decisions complained of dated 23/10/2001 by the Minister and that of

18/8/99 by the Board have been reproduced above and both have reasons for the decisions. Therefore this ground also lacks merit.

The third ground was that the decision reached in the circumstances was unreasonable and illegal. There is no dispute that the decision of the Board on the first reference to reinstate the third respondent was made under the provisions of SECTION 24(1)(b) of Cap 387, R.E. 2002. It was correctly argued by the respondents that on the authority of the Court of Appeal decision in the case of PAUL SOLOMON MWAIPYANA VS. NBC HOLDING CORPORATION, DSM, C/A NO. 68/01 (unreported).

> "..... Once section 24(1)(b) is invoked, there is no option available to the employer except to reinstate the employee as ordered by the Conciliation Board."

I would go further to state that if the applicant had any reservations on the Boards decision because the vacancy was no longer available or otherwise, the option for appeal to the Minister was available. But having opted not to appeal the applicant's subsequent action

rendered the Boards decision superfluous and of no effect. Here it was the applicant who was in contravention of the law and not the respondents. The third ground also lacks merit.

I have demonstrated above that all grounds advanced by the applicant lack merit; and there has been no single instance of contravention of the law established by the Minister or the Board. Therefore the Minister's decision of 23/10/2001 was legally issued and valid.

In the event Certiorari is not granted as there are no grounds upon which the order can issue. Application for Certiorari is dismissed.

Let me briefly delve into the consequences of this decision. Having held that neither the Minister nor the Board decisions contravened the law; there remains two options to the applicant. One option is to try luck and prefer an appeal to the Court of Appeal against this decision. Two is to implement the decision to reinstate the third respondent. On the option of reinstatement; I have stated elsewhere that it is undesirable to order unwilling parties to work together (see M.C Application 96/03 CRDB Vs. Minister for Labour

Ors; DSM Registry, unreported). I repeat the same here that it is wrong and impractical to order unwilling parties to work together. It is noted that the order of reinstatement in the CRDB case as well as in this case was ordered under SECTION 40A of Cap 387 R.E. 2002, as amended. SECTION 40A (5)(b) requires that reinstatement be made within 14 days of the order. After the expiration of 14 days, the employer becomes automatically liable to pay compensation as stipulated under SECTON 40A (5)(b)(i) and (ii). In the CRDB case (Supra) the employer was ordered to pay the employee pursuant to the provisions of Section 40A (5)(b)(i) and (ii). It was an order made by consent of parties. There is no such consent here; but with lapse of over 10 years since 1994 when the third respondent was summarily dismissed; the changes that may have taken place within the applicant authority itself, etc; even with good intentions it may not be practical to reinstate the third respondent. In the absence of an appeal, the applicant may have to pay the third respondent his entitlements under the law; as ordered by the Minister.

On the costs of the suit, the respondents to have the costs thereof.

Accordingly ordered.

K.K. Oriyo

JUDGE

26/10/2006

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