IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 57 OF 1993

STEPHEN MBONDE ..... APPELLANT

versus

BURHANI CHARITABLE DISPENSARY..... RESPONDENT

J U D G M E N T

MACKANJA J:-

Stephen Mbonde, the appellant, was until the Ist day of October 1991 employed by the respondent. On that day his employment was determined. He successfully challenged the punitive action against him before the Conciliation board which ordered his re-instatement. As the law provides, the decision of the conciliation board, or that of the Minister responsible for Labour where there is a further reference, is final, conclusive and binding on the parties. This is what we get from section 27 of the Security of Employment Act, Cap 574 of our revised laws.

The effect of an order for re-instatement is to restore the employee to his former rank. So what the Minister decided in this matter was that the appellant was going back to work as a medical laboratory technician, the job he was doing immediately before his employment was terminated.

According to the ruling which is appealed against the respondent refused or neglected to comply with the order of the concilition board and that of the Minister for Labour. Obviously such conduct, if proved, constitutes a criminal offence under section 50 of the Security of Employment Act. Prosecution of criminal offenders is the duty of the state, the immediate concern for the appellant was to get his job back together with all that it entails. So, complying with the order for re-instatement the appellant reported for duty but the respondent refused to

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comply. Since the decision of the Minister or that of the conciliation board, where there is no further reference, is final, the effect of re-instatement amounts to treating the appellant as if there had been no stoppage in his employment. For purposes of the law the appellant is deemed to have been in continuous employment from October 1, 1991 todate and until the employer obeys the order for re-instatement. Hence he is entitled to all wages, plus statutory adjustments, he would have received throughout the period he has been out of employment. The appellant is also entitled to all proved claims of statutory allowances, in particular housing or rent allowance, medical allowance. The appellant is not entitled to transport allowance and leave allowance since all the time he has been out of employment, according to numerous decisions of the Industrial Court of Tanzania, is deemed to be or paid leave. He is therefore not justified in claiming transport allowance which is paid to assist him to go to and from his place of work. And he could not leave earned "paid leave" within that period for doing nothing which justifies a break from work.

The above are the rights to which the appellant is entitled on re-instatement. In an effort to get them the Labour Officer wrongly instituted fresh proceedings under section 132 of Employment Ordinance in which he claimed a total of shs.402,350/= as of October 1992 instead of instituting proceeding for executing the Minister's order. It would appear that according to that claim the respondent would have discharged his obligations under the order for re-instating the appellant. Mr.Kalunga, learned Counsel for the respondents, also thinks that that is so and has informed the Court that his clients have already deposited that sum of money with the court ready for collection by the appellant. If that claim were to be upheld, the whole purpose for an order of re-instatement would have been defeated.

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In my view the proper course in implementing the Minister's order was by way of a chamber application for the execution of that order which is deemed to be a decree. Mr. Murugaruga discovered the error and promptly lodged a chamber application in the appropriate form, that is by chamber summons supported by affidavit. The affidavit in support of the application remained unchallenged; a counter affidavit is equivalent to oral evidence on oath. The employer did not see it fit to file a counter affidavit. Instead Mr. Kalunga attached it from the bar. That was wrong and it did not assist his client. So that the application to execute the decree remains unopposed before the eyes of the law. It is in this respect that I am in total agreement with the first ground of appeal that the learned District Magistrate slipped in error when he failed to put weight on the chamber application which, in effect, substituted the letter which had instituted the proceedings. If the chamber application was incompetent he ought to have thrown it out. For all purposes it was properly before the court.

Indeed, and for the reasons I have given, the second ground of appeal is a very strong one. The learned District Magistrate's cursory treatment of the chamber application with a counter affidavit was unjustified. So also, the third ground succeeds because the sum of shs.404,350/= he awarded the appellant does not amount to executing an order for re-instatement.

In the result the appeal is allowed to the extentent indicated herein: that the employer shall re-instatement the employee otherwise he exposes himself to criminal prosecution under section 50 of the security of Employment. It matters not that he will comply with the alternative remedy to re-instatement.

In the alternative, if the employer/respondent ignores the order for re-instatement the appellant is awarded the following reliefs.

1. Salary or wages in the sum of shs.6,500/= per month from the date on which his employment was terminated;

2. (a) rent allowance as per Government Notice No.366 of 1990 of shs.300/= per month from 1st July 1990 to 31st December 1990.

   (b) rent allowance as per GN No.43 of 1992 at shs.400/= per month from 1st January 1992 to date of satisfying the decree;

   (c) in case there is any other statutory adjustment in the intervening period covered in paragraph (c), the rate of rent allowance shall also be payable.

   (d) (i) damages for wrongful dismissal which are a pleaded for in the chamber application at shs.739,200/=.

   (ii) statutory compensations for whole period until the date of this judgment

   (iii) Twelve months salaries amounting to shs.78,000/=.

   (iv) severance allowance for the whole period until the date of this judgment.

   (v) payment in lieu of notice of shs.6,5000/=.

   (e) Interest at 31% per cent per annum from Ist July 1991 to date of judgment and thereafter at the rate of 7% per annum; and

   (f) the appellant shall have the costs in this Court and in the Court below,

Delivered.

J. M. MACKANJA
JUDGE

Ist March 1994

Mr. Murugaruga (Senior Labour Officer): For Appellant

Mr. Kalunga, Advocate: For Respondent

Mr. Kalunga: This being a second appeal, according to section 5(I)(c) of the Appellate Jurisdiction Act, No.15 of 1979 and Rules 43(a) of Tanzania Court of Appeal Rules, I pray that I be granted leave to appeal before the Court of Appeal.

Mr. Murugaruga:

There is a number of authorities to the fact that applications like this one should be made formally. There is no reason why a formal application should not be made as it is the usual practice of this Court.

Order: Ruling reserved till 22/3/94.

J. M. MACKANJA
JUDGE
1/3/94

I certify that is a true copy of the original.

DEPUTY REGISTRAR-ZONE