H/C Iringa

IN THE HIGH COURT OF TANZANIA
AT SONGEA

DC. CIVIL APPEAL NO. 12 OF 2007

(From Resident Magistrate`s Court of Ruvuma Civil Case No. 19 of 2005)

OCTAVIAN MILLINGA

LILIAN HASSAN & 85 OTHERS-----------------APPELLANTS

VERSUS

SAMCU LTD.----------------------------RESPONDENT

Date of last Order – 28/8/2008
Date of Judgment – 21/10/2008.

JUDGMENT

L.M.K. Uzia, J.

The appellants, Octavian Millinga, Lilian Hassan and 85 others filed in the Resident Magistrate Court a Civil Case no. 19/2005 against the respondent, SAMCU LTD, of Songea. The appellant were demanding payments following redundancy exercise. The claim stood at shs 93, 030,946 being severance allowance which was to be paid at 35% of the annual rate of their wages.

The appellants were against payment of redundancy benefits of 5% of their salaries paid by their employer (Respondent). In their suit they alleged that there was an agreement between them and the employer to pay them 35% of their annual rate of their wages instead of 5%. They also produced

Exhibit P3, which showed that one of the workers, John Samla, was paid 35% annual wages upon retirement.

When the case was brought on appeal, SAMCU Ltd, represented by Mr. Waryuba, learned counsel, submitted that there was no voluntary agreement between the appellants and SAMCU Board of Directors. The Registrar of Cooperatives did not authorise any voluntary agreement. Mr. John Samla, was not declared redundant but was retired from service.

During trial, the Court, framed only two issues,

(1) whether the formular of 5% of their annual rate of wages in calculating the amount of severance allowance due to the plaintiff was lawful.

2) And what were the reliefs.

In deciding the case, the trial court was of the view that, the payment of 5% was derived from section 5(1)(2) of the severance allowance Act; Cap 386, the law which governs employer and employee on severance allowance. In subsection (2) the law provides

> **"The severance allowance payable to an employee by the employer shall be an amount equal to five <u>per centum</u> of the amount arrived at by multiplying the annual rate of wages to which the employee entitled immediately before the cessation of his employment by the total number of full years during which he was in the continuous of employment of the employer."**

On the basis of the provision of the law, the trial Court Magistrate dismissed the claims of the appellants who demanded 35% of their annual rate of wages to which they were entitled before the cessation of their employment.

The decision of the trial Court has been challenged by the appellant`s advocate, Mr. Mbogoro, learned Counsel, on two main grounds;

1) That the trial Court misdirected itself in law and in fact in not holding that as for employment matters are concerned cooperative unions have independent powers pararel to the severance allowance Act. vide sections 63, 65 and 126 (1) (g) and (h) of the Cooperative Societies Act of 1991 Cap 211 of the revised edition of 2002.

2) That the trial Court erred in law and in fact in disbelieving and without assigning reasons the testimony of Pw2, Pw3 and Pw4 who were neutral witnesses. They were also in the Cooperative union`s top management team at the material time.

Further to that, Mr. Mbogoro, learned Counsel argued that, under section 63(1) of the Cooperative Societies Act, it is provided that, the control of the affairs of a registered society shall be vested in the general meeting summoned in accordance with the by laws of the society and on other hand Section 65(1) of the Cooperative Societies Act, provides as follows;

" The committee shall exercise all powers necessary to ensure the full and proper adminstration of the society subject to by laws of the society, the rules and any resolutions passed at the general meeting."

The learned counsel cited to this court section 126 (1) of the same Act, which provides that "The Minister may, for any registered society or class of such societies, make rules to carry out the purposes of this Act. Section 126(2)(g) provide for the appointment, remuneration, suspension and removal of the member of the committee and other officers and for procedure at meetings of the committee and for the powers to be exercised and the duties to be performed by the committee and provide for the deleagation of powers of the committee."

So by virtue of the above cited provision of the law the Respondent`s Co-operative society had powers to fix a higher percentage than the one prescribed under the Severance Allowance Act;

And that there is no law which prohibits an employer to pay his employees severance allowance based on a higher percentage than 5%.

The appellants complaint before the trial Court was based on discrimination, that whereas all other employees whose employment was terminated they were paid severance allowance calculated on the basis of 35% of their annual rate of wages. The appellants have been wrongly paid severance allowance calculated on the basis of 5% of their annual rate of wages.

Further to that, Mr. Mbogoro argued that the trial Court had no right of disregarding the evidence of Pw2, Pw3 and Pw4.

On the other hand Mr. Waryuba, learned Counsel, based his argument on sections (1)(2) of the severance allowance Act, Cap 386. That the appellants were entitled to 5% (five per centum) not 35% per centum their annual rate of wages for the period of time they worked in t Cooperative Socity.

In this appeal, the only issue which I would like to resolve is whethe the appeallants were entitled to 35% of the annual rate of wages to which they were entitled before the cessation of their employment.

I have given careful consideration to the submissions from both counsels, to start with, there is no dispute on the issue of redundancy. The only dispute lies on 35% of the annual rate of wages. It is alleged that there was an agreement between the appellants and the respondent on the mode of payment of severance allowance after the appellants were declared redundant. Mr. Mbogoro submitted that, the appellant`s employer sent the proposed 35% to the Registrar of Cooperatives for approval, on that point, I had to ask Mr. Mbogoro the whereabouts of the documents evidencing the approval of the Registrar of Cooperatives. The counsel didn`t show me anything.

Having been satsified myself that there was no voluntary agreement concerning 35% and no approval from the Registrar of Co-operatives. I found that the appellants allegations were without substance.

It is my considered opinion that, the respondent paid severance allowance according to the law, under Section 5(1) (2) of Cap 386, which provides;

Section 5(1) " **subject to any reduction which may be made under this Act, the amount of the severance allowance which an employer is liable of an employee shall be calculated in accordance with the provisions of this section.**

Section 5(2) " **subject to the provisions of subsection (3) and (4) the severance Allowance payable to an employee by the employer shall be an amount equal to five per centum of the amount arrived at by multiplying the annual rate of wages to which the employee was entitled immediately before the cessation of his employment by the total number of full years during which he was in the continuous employment of the employer."**

That being the position of the law, the appellants arguments have no substance, they were paid according to law.

This appeal is dismissed, the Judgment of the lower Court is restored.

Due to the nature of the appeal, I order no costs.

L.M.K. UZIA

JUDGE

21/10/2008.

Right of Appeal explained

L.M.K. UZIA

JUDGE

21/10/2008.

MMS/