Accordingly, I will order that these proceedings be stayed pending the disposal of the intended appeal. I will however, make no order as to costs in the present matter.

GAUTAM JAYRAM CHAVDA *v.* COVELL MATTHEWS PARTNERSHIP LTD

IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Lubuva, Mroso and Nsekela, JJ.A.)

CIVIL APPEAL No. 106 OF 2002

(From the decision of the High Court of Tanzania at Dar es Salaam, Chipeta, J. dated 18 October 2001, in Miscellaneous Civil Appeal Number 62 of 2000)

Company Law – Winding Up – Company's inability to pay its debts – Repeated demands made in vain to the respondent to pay the appellant TZS. 240.5 million – Whether the respondent was unable to pay its debts – Section 167(e) of the Companies Ordinance Chapter 212.

Company Law – Winding Up – Petition for winding up – Appellant filed a verifying affidavit together with the petition on 29 March 2000 and the respondent filed an answer to the petition on 30 May 2000 – Whether the respondent legally filed a proper reply to the petition – Rule 35(1) of the Companies (Winding-up) Rules 1929.

Company Law – Winding Up – Petition for winding up – Locus standi of the petitioner – Petitioner not being a shareholder of the company – Whether may have locus standi to petition.

This is an appeal against the ruling of the High Court. The appellant petitioned for winding up of the respondent company. When the petition was called for hearing,

counsel for the respondent raised a preliminary objection that the petitioner, the appellant, had no *locus standi* to file the petition. Sustaining the preliminary objection, the learned judge struck out the petition on the ground that the appellant was neither a shareholder nor a creditor in terms of the provisions of section 167 of the Company's Ordinance *Chapter* 212. The appellant was aggrieved by the decision, hence, appealed to this Court.

Held: (i) Where it is shown that the respondent company was unable to pay its debts, then one of the circumstances warranting the winding up of the company would be available;

(ii) Once a petition for winding up of a company is filed, under the provisions of rule 35(1) of the Companies (Wind-up) Rules 1929 it is mandatory for the respondent to file an affidavit in opposition within seven days of filing the petition and the verifying affidavit;

(iii) Where the law clearly provides for an affidavit in opposition to be filed, a reply to the petition cannot be a substitute for the affidavit;

(iv) As in this case the issue raised in the petition for winding up has not been controverted in the pleadings because no affidavit in opposition was filed in terms of rule 35(1) of the Companies (Winding Up) Rules 1929, it follows that the appellant had *locus standi* to present the petition;

(v) If the debt had been disputed, the position would be different because a disputed debt cannot be used as a basis in a winding up proceedings.

Appeal allowed

Cases referred to:

(1) *Mann and another v. Goldstein and another* [1968] All ER 769

(2) *Re Tanganyika Produce Agency Limited* [1957] E.A. 241

(3) *Re Lympare Investments Ltd.* [1972] 2 All ER 385

Statutory Provisions referred to:

(1) Companies Ordinance Chapter 212 section 167(e)

(2) Companies (Winding-up) Rules 1929 rule 29 and 35(1)

Mr Marando for the Appellant

Miss Sheikh for the Respondent

JUDGMENT

(Dated 7 October 2003)

Lubuva, J.A.: This is an appeal against the ruling of the High Court (Chipeta, J.). The facts giving rise to this appeal are simple and short, they may be stated as follows: The appellant, Gautama Jayram Chavda petitioned for the winding up of the respondent company.

When the petition was called on for hearing, counsel for the respondent raised a preliminary objection that the petitioner, the appellant, had no *locus standi* to file the petition. Sustaining the preliminary objection, the learned judge struck out the petition on the ground that the appellant was neither a shareholder nor a creditor in terms of the provisions of section 167 of the Company's Ordinance Chapter 212 of the Laws. As already observed the appellant, aggrieved by the decision, has appealed to this Court.

The three grounds of appeal complained that:

(a) The learned judge erred in dismissing the appeal.

(b) The learned judge erred in considering and relying on annexure/ documents attached to the answer which was filed out of time.

(c) The learned judge erred in making findings of facts without evidence having been given.

Mr Marando, learned counsel for the appellant, faulted the learned trial judge for finding that the appellant was neither a share holder nor a creditor. He argued as his first ground that the trial judge did not set out fully the provisions of section 167 of the Companies Ordinance which relate to the circumstances in which a company may be would up by the Court. Paragraph (e) of section 167 which is relevant to the case was not reproduced.

Had the learned trial judge considered the provisions of this paragraph together with the fact that the petition revealed, among other things, that the appellant had a claim against the respondent and that the respondent was unable to pay its debts, he would have found that one of the circumstances for winding up of the respondent company under section 167 had been established. In support of this submission, Mr Marando called the attention of the Court to the book by the learned author, DJ Bakibinga **Company Law in Uganda,** pages 263 – 264. Once it is accepted and found that the circumstance under paragraph (e) of section 167 had been established in this case, it followed that grounds for winding up by the appellant had been established.

Responding to this submission, Miss Sheikh, learned counsel for the respondent, was firmly of the view that the provisions of paragraph (e) of section 167 of the Companies Ordinance was not in issue in this case. This is so, she said, because the appellant had not established his status as a creditor or as share holder. Not being a creditor, the appellant had no legal basis upon which to file the petition for winding up under the provisions of section 169 of the Companies Ordinance. Furthermore, she said that even if the trial judge had considered the provisions of paragraph (e) of section 167 of the Companies Ordinance as contended by the appellant, still it would not make any difference in the case. She contended that the learned trial judge would have come to the same decision because the respondent company was not unable to pay its debts. After all, she further stated, the appellant was claiming only 25% of the respondent's credit worth.

The issue is straightforward; namely whether the circumstance set out under paragraph (e) of section 167 of the Ordinance were considered. On this we need not be detained. From the ruling of the learned trial judge, it is clear that he did not consider the fact that the respondent was unable to pay its debts as alleged by the appellant. It was perhaps for this reason that in reproducing the provisions of section 167, paragraphs (e) was omitted. Paragraph (e) of section 167 provides:

(e) the company is unable to pay its debts.

So, the pertinent question is whether it had been established that the respondent was unable to pay its debts in terms of the provisions of paragraph (e).

It is common knowledge that where it is shown that the respondent company was unable to pay its debts, then one of the circumstances warranting the winding up of the company would be available. We are reinforced in this view by the learned author DJ Bakibinga in his views expressed in the book **Company Law in Uganda** at page 264. In part, it is stated that: "once the Court is satisfied that the company is insolvent, it would grant a winding up to a petitioner who is owed money by the apparent that repeated demands were made to the respondent to pay the appellant TZS. 240.5 million to no avail. The appellant alleges that the respondent was insolvent. It is important and relevant at this juncture to examine how the respondent addressed the allegation raised in the petition. To this, we will shortly advert to.

In that regard, Mr Marando took up the second limb of his ground of appeal. It was his contention that from the pleadings and the annexures thereto, the respondent did not have lawful pleadings in the Court record. In elaboration, he said in terms of rule 29 of the Companies (Winding-up) Rules 1929, the appellant as petitioner filed a verifying affidavit of the petition on 29 March 2000 together with the petition. This, Mr Marando urged, in terms of rule 29, was sufficient *prima facie* evidence of the statements in the petition. He went on to submit that under rule 35(1), the respondent did not file an affidavit in opposition to the petition within seven (7) days from 29 March 2000 when the petition and the verifying affidavit were filed.

Furthermore, Mr Marando submitted that according to this rule 35(1), a notice of the filing of the affidavit in opposition shall be served on the petitioner. In this case he maintained that neither the affidavit in opposition to the petition nor the notice were filed and served on the appellant. In the circumstances, because of failure on

the part of the respondent to comply with the mandatory requirement of rule 35(1) to file the affidavit in opposition and serve the notice of the filing on the appellant, the respondent did not have proper pleadings in the Court record.

According to Mr Marando, from the record, the respondent instead of filing an affidavit in opposition, filed an answer to the petition on 30 May 2000. This, he maintained, is not an affidavit in opposition in terms of rule 35(1), it should not therefore have been looked at or considered. On the other hand, he argued that even if it is taken that the answer to the petition was a substitute to the affidavit in opposition, it was not filled within seven days of the date when the affidavit verifying the petition was filed, namely 29 March 2000. This is so, Mr Marando emphasized, because the answer to the petition was filed on 30 May 2000 a period long after the statutory period of seven days.

In summary, Mr Marando submitted that in the absence of an affidavit in opposition to the petition, there was no credible evidence to controvert the appellant's statements in the affidavit in support of the petition. He added that in that situation there was sufficient material evidence on record to show that the appellant was a creditor of the respondent company which was unable to pay its debts. Had the learned judge addressed the matter in this light, he would have come to the conclusion that circumstances under section 167 of the Companies Ordinance had been established, Mr Marando contended. Consequently, Mr Marando concluded, the learned judge would have found that the appellant had *locus standi* in this matter.

With regard to the filing of affidavit in opposition to the petition, Miss Sheikh conceded that no such affidavit was filed. She said the circumstances of the case were such that there was no chance for filing the affidavit. However, even though the respondent did not have the chance of filing a proper affidavit in opposition, an answer to the petition was filed by the respondent on 30 May 2000. In spite of that however, Miss Sheikh claimed that there was sufficient material based on the pleadings upon which the learned trial judge correctly came to the conclusion that the appellant was neither a share holder nor a creditor and thus had no *locus standi* in the matter.

Earlier in this judgment, we had indicated that we shall advert to the response of the respondent to the petition filed by the appellant. There is no gainsaying that once a petition for winding up of a company is filed, under the provisions of rule 35(1) of the Companies (Winding-up) Rules, it is mandatory for the respondent to file an affidavit in opposition within seven days of filing the petition and the verifying affidavit. In this case, the petition was filed on 29 March 2000 and the record shows that no affidavit in opposition was filed.

On this, Miss Sheikh, learned counsel for the respondent concedes that in the circumstances of the case, the respondent had no chance of filing the affidavit. So, it is accepted that the mandatory requirement of rule 35(1) was not satisfied, for whatever reasons aforementioned by Miss Sheikh. What is the effect of failing to file the affidavit in opposition to the petition for winding up in the matter before us. In an attempt to respond to this question Miss Sheikh was quick to point out that an answer to the petition was filed on 30 May 2000. With respect, Miss Sheikh, is not correct on this point. Where the law clearly provides for an affidavit in opposition to be filed, a reply to the petition cannot in anyway be a substitute for the affidavit in opposition, it was filed long after the expiry of seven days from 30 March 2000 when it was filed. It should not be looked at and considered at all, as urged by Mr Marando. We are therefore in agreement with Mr Marando that no proper legal reply was furnished to the petition by the appellant. The averment in the pleadings by the appellant remained, as it were, uncontroverted.

As observed earlier, circumstance (e) of section 167 of the Ordinance had not been addressed by the learned trial judge. In this paragraph, the circumstance is that the respondent was indebted and unable to pay the appellant. Whether this was so or not, it was an aspect which could be explained or controverted by the respondent in the pleadings.

As happened in this case, the issue raised in the petition for winding up has not been controverted in the pleadings as no affidavit in opposition was filed in terms of rule 35(1). The answer in reply to the petition filed on 30 May 2000 does not satisfy the requirement of the law either. In the circumstances, the appellant's assertion in the petition that the respondent was indebted to him and that the respondent company was unable to pay the debt stands uncontroverted. In that case, the debt claimed by the appellant at least until the time the matter was before the trial judge, was not disputed in the pleadings. It is our view in that situation, unlike the case of in *Mann and another v. Goldstein and another* (1), where the winding up petition was based on a disputed debt, the existence of the debt has not legally been disputed. It follows therefore, that the appellant had *locus standi* to present the petition. If the debt had been disputed, the position would be different because it is trite principle that a disputed debt cannot be used in a winding up proceeding – see for instance, *Re Tanganyika Produce Agency Limited* (2) and *Re Lympare Investments Ltd.* (3).

In recapteritulation, having regard to the circumstances of the case, we are satisfied that the learned trial judge erred in not addressing and finding that the circumstance under paragraph (e) of section 167 of the Ordinance had been shown. Had the learned trial judge done so, we think he would have found that the appellant was a creditor. Furthermore, we are also of the settled view that had the trial judge properly directed himself to the facts and circumstances of the case as well as the applicable law, he would have found that the appellant's petition had not been replied by way of an affidavit in opposition. For these reasons, the learned trial judge should have come to the conclusion that the appellant had *locus standi* to present the petition of winding up of the respondent company. It was an error to hold otherwise.

In the upshot, we allow the appeal and set aside the order of the High Court of 18 October 2002 sustaining the preliminary objection. It is further ordered that the case is to be remitted to the High Court with direction to proceed with the hearing on merit before another judge from the stage reached before the preliminary objection was raised. Costs to the appellant.

PAUL SOLOMON MWAIPYANA *v.* NBC HOLDING CORPORATION

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Ramadhani, Lubuva and Nsekela, JJ.A.)

CIVIL APPEAL No. 68 OF 2001

(From the decision of the Resident Magistrate's Court of Dar es Salaam, at Kisutu, Luguru, PRM, Extended Jurisdiction, dated 3 February 2000 in Civil Appeal Number 72 of 1999)

Labour Law – Summary dismissal – Labour Conciliation Board orders reinstatement of dismissed employee – Whether employer has option to pay statutory compensation or other benefit in lieu of reinstatement – Sections 24(1)(b) and 25(1)(a) of the Security of Employment Act 1964.

Labour Law – Summary dismissal — Order of the Labour Conciliation Board reinstating employee pursuant to section 24(1)(b)of the Security of Employment Act 1964 – Board's decision brought to Court for enforcement – Whether the Court may review the decision – Section 25(1)(a) of the Security of Employment Act 1964.

Finding that the respondent was not justified to summarily dismiss its employee, the appellant, the Conciliation Board ordered his reinstatement pursuant to section 24(1)(b) of the Security of Employment Act 1964, and no appeal was preferred against the decision. Instead of complying with the order, however, the respondent terminated the appellant's service on payment of statutory compensation. The appellant then made an application to the District Court seeking enforcement of the Board's decision.

Rather than implementing the decision, the District Court substituted payment of terminal benefits for reinstatement. In the High Court, on appeal, the respondent challenged the decision of the District Court successfully, the judge holding, in effect, that where the Board has ordered reinstatement pursuant to section 24(1)(b), the employer can opt to terminate the employee's service on payment of statutory compensation. The appellant was dissatisfied, hence this further appeal.

Held: (i) Where a decision of the Conciliation Board is made pursuant to section 24(1)(b) Security of Employment Act 1964 the decision can only be enforced in the manner laid down in section 25(1)(a) of the Act;

(ii) section 25(1)(a) of the Security of Employment Act 1964 affords the employer no option to pay statutory compensation or other benefit in lieu of reinstatement;

(iii) Where the Board's decision pursuant to section 24(1)(b) of the Act is referred to Court for enforcement the Court has no power to revien. the decision

Appeal allowed

Cases referred to:

(1) *SM Msisi v. Tanzania Railways Corporation,* CAT – Civil Appeal Number 39 of 1995 (unreported)

(2) *D.A.N. Kavishe v. Arusha International Conference Centre,* CAT – Civil Application Number 1 of 1987 (unreported)

(3) *Mwanza Textile Ltd v. A. Masatu,* CAT – Civil Appeal Number 8 of 1998 (unreported)

Statutory provisions referred to:

(1) The Employment Act Chapter 366, section 132

(2) The Security of Employment Act Chapter 386 RE 2002, sections 5A(5), 24(a) and (b), 25(a) and 40A (5)(a) and (b)

Mr Ndolezi, for the Appellant

Mrs Kashonda, for the Respondent

JUDGEMENT

(Dated 7 October 2003)

Lubuva, J.A.: The appellant, Paul Solomon Mwaipyana, was dissatisfied with the decision of Principal Resident Magistrate (Luguru, PRM) exercising extended jurisdiction, hence, this appeal has been preferred.

For an ease appreciation of the sequence of events giving rise to the appeal, we think it is desirable to preface the judgment with a brief outline of the background. The appellant was an employee of then National Bank of Commerce (NBC) from 13 August 1981 as a clerk. It is however, to be observed that with the dissolution of the NBC on 30 September 1997, the respondent, NBC, Holding Corporation, was joined as a party to the proceedings. On 28 May 1996, the appellant was summarily dismissed. He took up the matter with the Dar es Salaam Regional Conciliation Board. Acting under the provisions of section 24(1)(b) of the Security of Employment Act 1964, (hereinafter referred to as the Act) on 20 August 1997 the Board ordered the appellant to be reinstated. However, under the provisions of section 40A(5) of the Act, the respondent opted to pay the appellant statutory compensation amounting to a total of TZS. 61 240. The appellant was dissatisfied, so, after unsuccessful negotiations for a settlement out of Court, the matter was referred to the District Court under section 132 of the Employment Ordinance Chapter 366 seeking the enforcement of the decision of the Conciliation Board as a decree. The application was granted on 23 October 1998.

On the other hand, the respondent, was still not prepared to implement the decision of the Conciliation Board as ordered by the District Court. An appeal was preferred against the decision of the District Court. The Principal Resident Magistrate (PRM Ext. Jurisdiction) allowed the appeal, and set aside the decision of the District Court with the result that the decision of the Conciliation Board was restored. The learned Principal Resident Magistrate further held that the appellant

was not entitled to any other payments claimed in addition to what the respondent had already paid. This appeal is against this decision.

Mr Ndolezi, learned counsel, advocated for the appellant and the respondent was represented by Mrs Kashonda, learned counsel. A three point-memorandum of appeal was filed. In essence, these grounds are to the following effect: that the Principal Resident Magistrate Extended Jurisdiction, erred first, in reviewing the decision of the Conciliation Board. Second, that the Principal Resident Magistrate (Ext. Jurisdiction) erred in holding that the appellant had been paid all his claims and third, that the Principal Resident Magistrate (Ext Jurisdiction) erred in not holding that as a matter of law, as long as the Conciliation Board had not been challenged, the respondent was bound to implement the decision as ordered by the Board.

Mr Ndolezi, forcefully argued these grounds. He submitted that it was erroneous on the part of the Principal Resident Magistrate, Extended Jurisdiction, to interpret and give effect to the decision of the Conciliation Board contrary to the law. According to him, after the decision of the Conciliation Board ordering the reinstatement of the respondent in terms of the provisions of section 24(1)(b) of the Act, the matter was proceeded under an inapplicable provision of the law. He maintained that instead of reinstating the appellant as ordered by the Conciliation Board, the respondent opted to terminate the service of the appellant with payment of terminal benefits. This, Mr Ndolezi insisted, was contrary to the law. He said once the Conciliation Board had ordered the reinstatement of the appellant and no appeal had been preffered to the Minister, there was no option for the appellant but to implement the decision of the Board.

Furthermore, Mr Ndolezi said that the decision of the Board to reinstate the appellant had to be implemented by invoking the provisions of section 25 of the Act and not section 40A(5) as happened in this case. He also contended that the Conciliation Board's decision having been dealt with in the District Court and on appeal before the Principal Resident Magistrate Extended Jurisdiction by invoking an inapplicable provision of the law was improper. Worse still, he went on, the Principal Resident Magistrate purported to review the decision of the Conciliation Board contrary to the law as well. In view of what he referred to as inconsistent decisions in the High Court and this Court regarding the application of sections 40A(5) and 24(1)(b) of the Act, he urged the Court to clarify the position regarding the import and application of these sections. He prayed for the reinstatement of the appellant as ordered by the Conciliation Board or payment of the appellant's dues in view of the dissolution of the National Bank of Commerce.

Mrs Kashonda, learned counsel, for the respondent responded to these submissions: First, that the appellant had absented himself from his employment for about seven years after taking leave without payment. For this reason the appellant was not entitled to any payment for the period he was away from his work. Second, the Principal Resident Magistrate, (Ext Jurisdiction) was entitled to interpret the decision of the Conciliation Board in order to satisfy himself that the decision was properly implemented. Third, in lieu of reinstatement, the appellant had been fully paid his dues in accordance with the provisions of section 5A(5) of the Act. In support of this submission, she referred the Court to its decisions *SM Msisi v. Tanzania Railways Corporation,* (1) and *DAN Kavishe v. Arusha International Conference Centre,* (2).

We think the determination of this appeal hinges on the interpretation and application of sections 40A(5), 24 and 25 of the Act. From the submissions by counsel for both parties, it is apparent that the application of these provisions of the law have at times not been free from difficulty. It seems to us therefore that there is merit in the submission of Mr Ndolezi, that the import of section 40A(5) of the Act is perceived differently. This is evident from some of the decisions of the High Court to which our attention was called by learned counsel.

In this case, it is to be observed at once that the Conciliation Board's order for the reinstatement of the appellant made pursuant to the provisions of section 24(1)(b) of the Act, was not appealed against to the Minister. In that situation, we agree with Mr Ndolezi that its implementation is provided for under section 25(1)(a) and not section 40A(5) of the

Act as happened in this case. Section 25(1)(a) provides for the implementation of the orders of the Board. It provides that:

> 25. Where, in the exercise of its powers under this Part, a Board orders:
>
> (a) the re-engagement or re-instatement of an employee, *the employer shall* (unless such employee refuses to be re-engaged or re-instated, as the case may be) *re-engage or re-instate the employee in his former employment, from the date of the employee's summary dismissal* ... [emphasis supplied]

From the provisions of this section, we think it is unambiguously clear, that the order of the Conciliation Board had to be implemented by the respondent. There is no option for payment of statutory compensation or other benefit provided in lieu of reinstatement. In this case, instead of implementing the Board's decision by invoking the provisions of section 25(1)(a) of the Act, section 40A(5) was instead applied.

When the matter was referred to the District Court and then on appeal, both the District Magistrate and the Principal Resident Magistrate (Ext Jurisdiction) did not address this issue. Worse still, both the Courts below, in their endeavour to interpret the Board's decision, unfortunately went beyond the scope and purview of the decision of the Conciliation Board. For instance, in the District Court where, all that was sought was the enforcement of the Conciliation Board as a decree, the magistrate awarded claims pertaining to terminal benefits and the Principal Resident Magistrate (Ext Jurisdiction) also fell into the same error of reviewing the Conciliation Board's decision.

In fine, we agree with Mr Ndolezi, that in the circumstances of the case, in the absence of an appeal to the Minister, in terms of the provisions of section 25(1)(a) of the Act, nothing less than the reinstatement of the appellant as ordered by the Board was required. To deal with the matter under section 40A(5) of the Act as the Courts below did, was clearly improper. The facts that the respondent was paid statutory compensation as urged by Mrs Kashonda, did not cure the impropriety.

On the other hand, as a result of the amendment to the Act, brought about by the Labour Laws (Miscellaneous Amendments) Act Number 1 of 1975, the Conciliation Board may also order the reinstatement of an employee under section 40A(5) of the Act, which, in part, provides that:

> 40A (1) Notwithstanding any other provision of this Act or of any other written law, where an employer terminates the employment of any employee or summarily dismisses any employee and the employee is aggrieved by such termination or dismissal, the employee may at any time before the expiration of fourteen days from the date on which such termination or dismissal takes effect, refer such termination or dismissal to the Board and the Board may, if it is satisfied:
>
> 1.- (f)————
>
> (5) Where a re-instatement or re-engagement has been ordered under this section and the employer refuses or fails to comply with the order:
>
> a. in the case of an order made by a Board against which no reference has been made to the Minister, within twenty-eight days of the order being made; or
>
> b. in the case of an order made by the Minister on further reference to him, within fourteen days of the order being made by the Minister.
>
> The employer shall be liable to pay the employee compensation of an amount equal to the aggregate of:
>
> 1. the statutory compensation computed in accordance with section 35; and
>
> 2. a sum equal to twelve months' wages at the rate of wages to which the employee was entitled immediately before the termination of his employment or, as the case may be, his dismissal,
>
> order the employer to re-instate or re-engage the employee.

Upon a close reading of this section, it is plain that under the provisions of sub section (5)(a) and (b) where the employer refuses or fails to comply with the decision of the Board against which no reference has been made to the Minister or where, reference has been made, the order of the Minister, he shall be liable to pay statutory compensation and twelve months' wages. So, the import and effect of the two sections are distinctly different. That is, in applying section 24(1)(b) of the Act, the employer who terminates the services of an employee has no option but to implement the Board's decision to reinstate the employee. On the other hand if section 40A(5) is applied, the employer who refuses to comply with the order would be held liable to pay statutory compensation and twelve months' wages. This, it is to be observed, is described in general terms as an alternative or option to reinstatement, an aspect which is not available under section 24(1)(b). In the instant case, had the matter been dealt with properly by invoking section 25(1)(a) of the Act, the question of paying the statutory compensation as an alternative would not arise, it was not available.

Finally, we wish to observe briefly on Mr Ndolezi's claim that there is need for clarifying the import and application of section 40A(5) of the Act in order to avoid conflicting and inconsistent decisions by the Courts. From the foregoing analysis of sections 24(1)(b), 25(1)(a) and 40A(5), we can see no reason for conflict or inconsistency. On a proper construction and application of these sections, the legal position is crystal clear. That is, as observed earlier, 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. On the other hand if the reinstatement is ordered under section 40A(5) the employer who refuses to comply with the order, is liable to pay statutory compensation and twelve months' salaries as set out under paragraph (b)(i) and of section 40A(5). This is as it were, the alternative open for the employer if he fails to effect the order for reinstatement. The Court reiterated this legal position in *DAN Kavishe v. Arusha International Conference Centre, (2)*. With respect to counsel, the other cases cited, namely, *Mwanza Textile Ltd. v. A.*

Masatu (3) and *SM Msisi v. Tanzania Railways Corporation* (1) do not deal specifically with the import of section 40A (5). Rather, they deal first with the fact that section 28 of the Act, ousts the jurisdiction of the Court and second, the issue whether the Minister can qualify the order for reinstatement.

For the foregoing reasons, we are satisfied that the decision of the Conciliation Board was proceeded in the District Court and on appeal before the Principal Resident Magistrate (Ext Jurisdiction) on the basis of an inapplicable section of the law. The proceedings in the Courts below were therefore improper. Accordingly, the appeal is allowed, the decision of the Principal Resident Magistrate (Ext Jurisdiction) and the District Court is set aside.

Consequent upon this decision, there remains the decision of the Conciliation Board to reinstate the appellant to be implemented. However, we are aware of the fact that with the dissolution of the National Bank of Commerce Limited with effect 30 September 1997, it is not feasible to effect physical reinstatement of the appellant at this time. It would be a futile exercise to make an order to that effect. In the event, it is ordered that the appellant is to be paid his entitlements applicable under the terms of employment from 28 May 1996, when he was dismissed, to 30 September 1997, when the National Bank of Commerce Limited was dissolved. It is so ordered. Costs to the appellant.

EDWIN ISDORI ELIAS *v.* SERIKALI YA MAPINDUZI ZANZIBAR

COURT OF APPEAL OF TANZANIA AT ZANZIBAR

(Mroso, Munuo and Nsekela, JJ.A.)

CRIMINAL APPEAL No. 145 OF 2002

(From the Judgment of the High Court of Zanzibar at Vuga, Dourado, J. dated 29 May 2000 in Criminal Appeal Number 9 of 2000)

Criminal Practice and Procedure – Appeals – Second appeal – Duty of an appellate Court on a second appeal – Section 276(1) of the Criminal Procedure Decree of Zanzibar.

Evidence – Misdirection or non-direction on the evidence – Duty of appellate Court when there have been mis-directions or non-directions by the Court(s) below.

Criminal Practice and Procedure – Judgment – What a judgment should contain – Section 276(1) of the Criminal Procedure Decree Zanzibar.

Appellant was convicted of robbery with violence and was sentenced to three years' imprisonment by the Regional Magistrate's Court. His appeal against conviction was dismissed by the High Court and the sentence was enhanced to ten years' imprisonment. In his judgment, the High Court judge did not analyse or evaluate the evidence, stating simply that the trial court's finding was on adequate facts. On the enhancement of sentence, the judge said that the Court had to take judicial notice of the prevalence of the offence in Zanzibar and that such bandits like the appellant "turn tourists away". There was no evidence on the record to that effect.

Held: (i) The judgment of the High Court contained no point or points for determination, and no reasons for the decision itself; it did not constitute a judgment under the provisions of section 276(1) of the Criminal Procedure Decree (of Zanzibar) as it simply supported the judgment of the Trial Court without analysing and evaluating the evidence adduced at the trial;

(ii) On a second appeal, the Court is only supposed to deal with questions of law, where the findings of fact are based on a correct appreciation of the evidence; if both Courts below completely misapprehend the substance, nature and quality of the evidence, resulting in an unfair trial, the Court must, in the interests of justice, intervene.

(iii) The principle that the Court on a second appeal is only concerned with points of law presupposes that there are no misdirections or non-directions on the evidence; where there are such misdirections or non-directions on the evidence, the Court is entitled to look at the relevant evidence and make its own findings of fact;

(iv) The general description of the suspects as given by the two eye-witnesses as being tall, fat , black or short and slim could fit many young boys and did not establish the identity of the appellant without doubt, considering that the golden chain robbed was snatched when the complainant was busy taking pictures;

(v) Judicial notice is the notice and acceptance by a Court, for the purpose of a case, of the truth of certain notorious facts without requiring proof; in this case there was nothing on the record to indicate that the offence of robbery with violence was rampant or interfered with tourism in Zanzibar, and the learned High Court judge wrongly took judicial notice of an alleged prevalence of the offence.

Appeal allowed

Cases referred to:

(1) *Salum Mhando v. R.* [1993] T.L.R. 170

(2) *Hassan Mzee Mfaume v. Republic* [1981] T.L.R. 167

(3) *DPP v. Jaffari Mfaume Kawawa* [1981] T.L.R. 148

Mr Mbwezeleni for the Appellant

Mr Abdulhakim Ameir State Attorney for the Respondent

JUDGMENT

(Dated 31 October 2003)

Munuo, J.A.: In Criminal Case Number 212 of 1998 in the Regional Court at Vuga within Zanzibar, the present appellant, Edwin Isidor Elias, was charged with the offence of robbery with violence contrary

to sections 258 and 259(1) of the Penal Decree of Zanzibar Chapter 13 as amended by section 2 Schedules 1 and 2 of Act Number 2 of 1991. It was alleged that on the 11 August, 1998 at about 12:10pm at Kilimani area in Urban District within Zanzibar, the appellant, Edwin Isidor Elias, threatened one Arafe Saleh Hemed with a knife thereby seizing her gold necklace valued at TZS. 100 000. He was convicted and sentenced to three years imprisonment.

Subsequently the appellant unsuccessfully lodged Criminal Appeal Number 9 of 2000 in the High Court of Zanzibar, before Dourado, J. who enhanced the three years imprisonment sentence to ten years imprisonment giving rise to this second appeal against the conviction and sentence.

The complainant, Arafa saleh Hemed, testified as PW1. She stated that on the material afternoon she took her six visitors from Arabia to the Kizingo beach at Kilimani area for recreation. Her sister in law, PW2 Zena Salum Jaffar, accompanied the visitors. While taking pictures, two suspects stormed into the group. The appellant allegedly threatened PW1 with a knife whereupon he seized a golden chain from the neck of the complainant and ran away with it. PW2 Zena Salum Jaffar, deposed that she could not hear the words the appellant uttered to PW1 but she saw him snatch the necklace and speedly esChaptere with it. Both eye witnesses visually identified the appellant because they used to see him around the area. After the robbery, PW1 reported the matter at Madema Police Station. With the assistance of PW3 Mbarak Salum, PW1 was able to trace and arrest the appellant whereafter he was charged with the offence of robbery with violence.

In this appeal, Mr Mbwezeleni, learned advocate, represented the appellant. The respondent, the Revolution Government of Zanzibar, was represented by Mr Abdulhakim Ameir, learned State Attorney. The learned advocate for the appellant filed four grounds of appeal namely that:

i. The learned judge erred in law in deciding the appeal without making his own evaluation of the facts of the case against the grounds raised in the appeal before him.

ii. The learned judge erred in law in determining the appeal based on the findings of the RM's Court while the same was reached on contradictory and weak evidence on the part of the prosecution witnesses.

iii. The learned judge erred in law in dismissing the appeal basing on the RM's findings while the same was reached contrary to the normal procedure as the RM's findings were reached without analyzing the so called evidence before the Court.

iv. That the learned judge erred in law in enhancing the punishment on the appellant without a proper legal base for the same.

Mr Mbwezeleni faulted the judgment of the learned judge in that it does not qualify to be called a judgment because it lacks analysis and evaluation of the evidence adduced at the trial which evidence was also not analyzed or evaluated by the learned trial Regional Magistrate. The learned judge failed to comply with the provisions of section 276(1) of the Criminal Procedure Decree of Zanzibar, the learned advocate for the appellant contended, because the said judgment does not contain a point or points for determination, reasons for the decision and the decision itself. He criticized the learned judge and the trial magistrate for failing to address and resolve contradictions relating the time, the date of the commission of the robbery and the date of the arrest of the appellant which were inconsistently deposed upon by the two eye witnesses namely PW1 Arafa Salehe Hemed and PW2 Zena Salum Jaffar. Mr Mbwezeleni further contended that the identification of the suspect who seized the complainant's necklace was doubtful for want of specification. He cited the case of *Salum Mhando v. Republic* (1) and *Hassan Mzee Mfaume v. Republic* (2) in which the Court upset convictions because the identification of the suspects was weak coupled with the fact that the Trial Court and the appellate Judge had neither evaluated the evidence nor resolved contradiction in the prosecution evidence.

On the propriety of the sentence, the learned advocate for the appellant criticized the learned judge for unilaterally enhancing the

three year sentence imposed on the appellant by the Trial Court to ten years on the wrong premise of taking judicial notice of the prevalence of the crime of robbery with violence, which, Mr Mbwezeleni asserted, is rarely committed in Zanzibar.

The learned State Attorney, Mr Abdulhakim Ameir, supported the conviction but not the enhancement of the sentence. He conceded that the judgment of the learned judge contravened the provisions of section 276 (1) of the Criminal Procedure Decree which is why this Court has to step into the shoes of the Courts below, evaluate the evidence and determine the case on merit. The learned State Attorney dismissed the minor discrepancies relating to time and dates because they do not go to the root of the case and are thence not of any materiality. He pointed out that in his sworn defence, the appellant admitted that he was at the Kizingo beach around 1:00pm which means that he had the opportunity to commit the robbery and did indeed rob the complaint's golden chain as alleged by the two eye witnesses, PW1 Arafa Saleh Hemed and PW2 Zena Salum Jaffar. As for the sentence, the learned State Attorney found no aggravating factors or justification for enhancing the sentence to ten years imprisonment considering the low rate of robbery with violence in Zanzibar.

Tackling grounds 1, 2 and 3 together, we are in agreement with both learned counsel that the judgment of the learned judge contravened the provisions of section 276(1) of the Criminal Procedure Decree Chapter 14 which states.

> 276(1) Every such judgment shall, except as otherwise expressly provided by this Decree, be written by the presiding officer of the Court in the language of the Court, and shall contain the point or points for determination, the reasons for the decision, and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it.

In the present case, the learned judge determined the appeal vaguely and generally as follows:

JUDGMENT

> The learned RM based his finding on adequate facts. I am not prepared to upset his finding. The conviction will stand. As regard sentence, the Court must take judicial notice of prevalence of such offences.
>
> Zanzibar relies on tourism and bandits like Edwin Isidore turn tourists away. The Court will not allow this. I am therefore increasing *(sic)* from three years to a sentence to one of 10 years.
>
> Let this be a lesson to others who may be tempted to enrich themselves.
>
> Dated this 29 August 2000.
>
> W. Dourado, J.

As illustrated by the above general judgment, the same contains, as submitted by the appellant's advocate, no point or points for determination, the reasons for decision and the decision itself. In other words the above sentences do not constitute a judgment under the provisions of section 276(1) of the Criminal Procedure Decree of Zanzibar, Chapter 14 for it simply supported the judgment of the Trial Court instead of analyzing and evaluating the evidence adduced at the trial.

Faced with a similar situation, the Court, in the case of *Salum Mhando v.* R (1) at page 174 interfered with the findings of the Trial Court and observed:

> ... As it will be noticed, we have taken the unusual step in this appeal of interfering with the concurrent findings of fact made by the two Courts below. On a second appeal to this Court, we are only supposed to deal with questions of law. But this approach rests on the premise that the findings of fact are based on a correct appreciation of the evidence. If as in this case both Courts completely misapprehend the substance, nature and quality of the evidence, resulting in an unfair conviction this Court must in the interest of justice intervene. In the High Court the learned judge approached the case globally forgetting that the appellant was charged with two counts which had to be considered separately. The consequence of this approach was that the learned judge failed to analyze the evidence touching on each count; this led him to make general statements which cannot be supported by the evidence in support of each count. In a case in which a similar problem arose, *DPP v. Jaffari Mfaume Kawawa* (3) this Court held at page 153:
>
> The next important point for consideration and decision in this case is whether it is proper for the Court to evaluate the evidence afresh and come to its own conclusion in matters of fact. This is a second appeal brought under the provisions of section 5(7) of the Appellate Jurisdiction Act 1979. The appeal therefore lies in this Court only on a point or points of law. Obviously this position applies only where there are no misdirections or non-directions on the evidence, a Court of second appeal is entitled to look at the relevant evidence and make its own findings of fact.

Like in *Salum Mhando's* case, in this case the Courts below did not analyze or evaluate the evidence which is why we have to interfere with findings of the Trial Court. We think the learned State Attorney rightly submitted that the minor inconsistencies relating to dates and time of the commission of the robbery and the arrest of the appellant are not of any substance because the complainant's golden necklace was snatched by a suspect at the Kizingo beach at Kilimani area on the 11 August 1998 in the afternoon which incident the complainant reported at Madema Police Station on the same day.

The issue for determination in this appeal is whether the two eye witnesses, PW1 and PW2, properly identified the appellant as the person who committed the suspected robbery.

We are of the view that the identification of the appellant was doubtful. One, when the complainant testified on the aspect of identification she stated:

> ... we were invaded by some young persons. These people were not new to us as sometimes I was seeing them. I know them by their face, and in this Court there is only one who is in the dock.

A Then in cross-examination by the appellant, PW1 stated:

> I know you just on the street, —— it is you who took my neck chain.

During re-examination, PW1 stated:

B
> —— I was living at Kilimani and I was seeing the accused person.

On her part, PW2 Zena Salum Jaffar had the following to say on the identification of the suspect who robbed the golden necklace of the complainant:

C
> ... Later came two young boys, who passed through *(sic)* us three times, later those people came and grabbed the neck chain of my sister in-law when she was taking pictures, then these people went in speed, ... we shouted and then we returned home and my sister in-law went to the police station. I know those boys one is fat, tall and black, and one was short and slim. Among the two, one is present, he is in the dock...

D

When cross-examined by the appellant PW2 stated:

E
> I do see you on several parts around the Urban town. I do not know where you are living. I have no special job in town ... I was not very near but I managed to see what you were doing. We were six.

F From the above extracts from the testimonies of the two eye witnesses, we are of the settled view that the general description of the suspects being tall, fat and black or short and slim, could fit many other young boys. We observed the appellant at the hearing and found it difficult to fit him in the category of tall, fat and black or short and slim,
G could fit many other young boys. We observed the appellant at the hearing and found it difficult to fit him in the category of tall, fat and black or short and slim persons. In that regard, we find that the evidence of the two eye witnesses did not establish the identity of
H the appellant without doubt considering that the golden necklace was snatched when the complainant was busy taking pictures and as PW2 Zena Salum Jaffar, the other eye witness stated, she was not within a close range:

I

> —— I was not very near but I managed to see what you were doing- A

In the light of the above, we allow grounds 1, 2 and 3 of the appeal.

With regard to ground four of the appeal, there is no material on the record to indicate that the offence of robbery with violence is B
rampant or that it has interfered with tourism in Zanzibar. On the contrary, the learned State Attorney conceded to the contention of the learned advocate for the appellant, that the learned judge wrongly took judicial notice of an alleged prevalence of the crime of robbery C
with violence because such offences are rarely committed on this Island. On judicial notice, we find it pertinent to refer to **Law Lexicon, The Encyclopedia Law Dictionary**, 1997 Edition at page 1015 which defines: D

> Judicial notice is the notice which a judge will take of a fact without proof. Acceptance by Court for the purpose of a case, of the truth of certain notorious facts without requiring proof.

The record shows that the prosecutor indicated that the appellant E
was a first offender and prayed that the appellant be given a sentence:

> Which will deter and reform the accused not to repeat the same.

The learned trial magistrate sentenced the appellant; F

> — to go into an Education Centre for a period of three years without corporal punishment.

As it is, the prosecutor wanted the appellant to get a punishment G
which would facilitate his reform. As the learned State Attorney conceded that the offence of robbery with violence is rarely committed, the learned judge's reliance on judicial notice based on the prevalence of the said crime, was, to put it mildly, a false alarm at the moment. H
We have no facts to enable us to take judicial notice of the prevalence of the crime of robbery with violence in Zanzibar. Nor do we have facts to enable us to say that the said crime has interfered with tourism. Hence we allow ground four of the appeal.

I

For the reasons stated above, we quash the conviction and set aside the sentence. The appellant should be released forthwith unless detained for lawful cause. We accordingly allow the appeal.

JUMA ALI ABDALLA AND OTHERS *v.* SERIKALI YA MAPINDUZI ZANZIBAR (SMZ)

COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(Mroso, Munuo and Nsekela, JJ.A.)

CRIMINAL APPEAL No. 45 OF 2003

(From the judgment of the High Court of Zanzibar at Chakechake, Dahoma, J. dated 27 December 2002)

Administrative Law – Delegation of Powers – Power to issue clove export permit – Power vested in a Sheha – Whether that power may be exercised by a shehia councillor – Regional Administration Authority Act Number 1 of 1998, Interpretation of Laws and General Provisions Act 1984, and the Cloves Act 1985.

The appellants were convicted of exporting dry cloves without a permit under the Cloves Act 1985. They were each sentenced to 12 years in the Education Centre and ordered to plant 200 seedlings of clove trees each. Their appeal to the High Court against conviction and sentence was dismissed hence this appeal to the Court of Appeal. Their central contention was that they had an export permit issued by a *Shehia* councillor.

Held: Under section 18 of the Regional Administration Authority Act 1998, the functions of the *Shehia* Advisory Council are purely advisory in nature and not executive or administrative which are vested in the Sheha under section 17(1) of the Act

Appeal dismissed

Mr Ussi K. Haji, for the Appellants

Mr Hassani, for the Respondent (SMZ)

JUDGMENT

(Dated 31 October 2003)

Nsekela, J.A.: The appellants, Juma Ali Abadalla, Juma Suleiman Ali, Issa Massoud Abdalla, Haji Makame, Ali Adam Hamza, Said Ali Khamis, Suleiman Habib Suleiman, Waziri Mwalimu Shinondo, Salum Mohamed Seif and Omari Issa Nassor were convicted of the offence of exporting dry cloves without a permit contrary to section 3(1), (2) and (3) of the Cloves Act 1985 (Act Number 11 of 1985). The learned trial Regional Magistrate (Abraham, MRM 11) sentenced each of the appellants to a custodial sentence of twelve (12) years in the Educational Centre and that each appellant would plant two hundred seedlings of clove trees on an area to be specified by the Minister. Furthermore, the Court ordered that TZS. 4 924 800 being proceeds from the cloves in question and the dhow with Reg. Number WMKP 491 "Ngangari Kinomanoma" Exhibit P2 be confiscated and forfeited to the Government. They appealed to the High Court against both conviction and sentence but the appellate judge (Dahoma, J.) dismissed the appeal, hence this appeal to the Court.

The background to the case may be briefly stated as follows: On the 22 August 2001 at about 7:00pm, officers belonging to Kikosi Maalum cha Kuzuia Magendo (KMKM) went out to the ocean on their normal patrol duties. While on patrol, these officers, PW1 Lieutenant Iddi Juma Haji; PW2 Amme Mohamed Ussi; and PW3 Johari Mmanga Khamis encountered the appellants who were in a dhow and arrested them. The dhow had a cargo of cloves. When searched in the morning, the appellants were found with thirty three bags of dry cloves and seven "*vipeto*", the subject matter of this appeal.