

**A LABOUR COMMISSIONER FOR YUNUS ABDALLAH
AND 38 OTHERS v. MANAGING DIRECTOR - KOKO
BEACH RESORT LTD.**

**B HIGH COURT OF ZANZIBAR
AT VUGA
(Garba Tumaka, DC.J.)**

C CIVIL CASE No. 36 OF 1998

*Labour Law – Leave without pay – Employer sending employee on leave without
pay – Procedural pre-requisite – Permission of Labour Commissioner is a
D pre-requisite – Section 72(2) of the Labour Act 1997 (Zanzibar).*

E The defendant company was a hotelier. Faced with a low season it sent its employees on leave without pay. A couple of months later it terminated their services. A suit against it was filed in the High Court by the Labour Commissioner on behalf of the employees. The court considered whether sending the employees on leave without pay was lawful.

F Held: The mandatory provisions of section 72(2) of the Labour Act 1997, requiring the Labour Commissioner's permission for an employer to send his employees on leave without pay, were contravened.

Claims allowed

Statutory provisions referred to:

- G** (1) Labour Act 1997 (Zanzibar), section 72(2)
- (2) Civil Procedure Decree Chapter 8, Order 18, rule 3 and Order IX, rule 1
- H** (3) Labour Decree, Chapter 61, section 71(1)
- (4) Labour Act Number 3 of 1997, sections 13(4), 72(2) and (3)

Mr Saleh, for the Plaintiff

I *Mr Nassor, for the Respondent*

JUDGMENT

(Dated 14 March 2000)

Garba Tumaka, DC.J.: This is a civil suit brought by the Labour Commissioner representing 39 former employees of the defendant's company. It was contended that, between January and April 1998, the defendant unlawfully gave leave without pay, despite directives of the Labour Commissioner to the contrary.

The defendant then went further in July 1998, to terminate the plaintiff's employment unlawfully and consequently upon this, they were entitled to accumulated salaries, three months salaries *in lieu* of notice, gratuities and disturbance allowances totaling TZS. 18 834 250, in addition to 36% per annum interest until payment of same.

Thereafter, the defendant applied and was granted leave to file "a third party notice" on ZIPA (Zanzibar Investment Promotion Agency), under Order 18, rule 3 and Order IX, rule 1 of the Civil Procedure Decree, Chapter 8. On the ground that ZIPA's suspension and termination of its operations forced it to terminate the plaintiffs' Contract of Employment. It therefore sought to claim, contribution or indemnity against the plaintiff's claims, from ZIPA.

In the course of the proceedings, the defendant and ZIPA had a meeting with a view to resolving some of the issues and reported back to the court that they had reached an agreement on most of the issues. They had agreed that paragraphs B and D should be deleted from the plaint, which relate to the three months salary *in lieu* of notice to the sum of TZS. 4 311 000 million and disturbance allowance in the sum of TZS. 2 340 million. They had agreed that Paragraph 7C, relating to gratuity should without doubt remain but were yet to agree on quantum but were optimistic that they would. They were however not in agreement on paragraph 7(A), which was about accumulated salaries for the duration of the unlawful leave without pay, and decided to revert to the court for a resolution of the issue.

A The defendants then produced some documents under Order 15, rule I of the Civil Procedure Decree Chapter 8, which included annexure D1, letter to the Labour Commissioner from Koko Beach; annexure D2, letter from the Labour Commissioner to Tamarind Beach Hotel; B annexure D3, letter to the Labour Commissioner from Koko Beach and annexure D4, which was a letter to the employees of Tamarind Beach Hotel from Koko Beach Ltd.

C Mr Said Saleh for the plaintiff's submitted that the leave without pay which the defendant gave the plaintiff's was contrary to section 27 of the Employment (Private Enterprises) Regulations 1990, made under section 71(1) of the Labour Decree, Chapter 61 and section 72(2) and (3) of the Labour Act 1977 (Number 3). He said, in spite D of directives of the Labour Commissioner to the contrary, the defendant not only persisted in this illegality but went ahead on or about the first of July 1998 to unlawfully terminate their employment.

E He submitted that for the first period of January to March 1998, the procedure to be followed is provided by section 27 of Employment Regulations 1990 whilst that of the second period of April to June 1998 is governed by section 72 of the Labour Act 1997 and required the seeking of the Labour Commissioners permission and this was F not done in this case.

G Mr Nassor agreed that the two aforementioned enactments govern the issue in question. He said Mr Said Saleh submitted only on sub(2) which talks of the approval of the Director of Labour without making H reference to sub(1) which specifies the conditions under which the permission can be granted; 1(a) where there is redundancy of workers occasioned by either lack of raw materials; breakdown of the plant; destruction of the plant by fire or any other inherent or natural hazards, I (b) where it is likely that the enterprise will by reason of circumstances prescribed under (a) herein or by any good reason, collapse if it continues with existing workmen. Specific mention is not made of hoteliers by the Regulations whilst section 72(2) specifically makes I provision for Hotels.

A It is therefore the more appropriate provision as it talks of "low season" being a good ground or reason for the Labour Commissioner's permission to be sought to grant leave without pay for a period of no more than 6 months.

B I have gone through the provisions of both legislations Employment (Private Enterprises) Regulations 1990, made under section 71(a) Labour Decree Chapter 61, Laws of Zanzibar, and the Labour Act 1997. I am in agreement with Khamis Nassor that the Labour Act 1997 is much more opposite in relationship with this case as it makes C reference to hotel business.

Section 72(2) Labour Act 1997 is very explicit:

D when an enterprise ceases to operate following shortage of raw materials, low season in respect of Hotel or any other reason thereof, the employer may, with permission from the Commissioner grant one or more employees with leave without pay for a period not exceeding six months.

E Doubtlessly therefore, the defendant was entitled by this provision to grant leave without pay to its workers if it was faced with a "low season" situation, provided it sought and got the permission of the Labour Commissioner.

F It is however not mandatory that the Commissioner must grant his permission as section 72(4) states that the Commissioner has the power to refuse approval of such leave if he is not satisfied with any reason referred to in sub-section (2).

G In order not to make the Commissioner totalitarian, the Act in section 72(5) entitles the employer to a right of appeal to the Minister, against the Commissioner's decision, in exercise of subsection (2). I think Mr Nassor himself is guilty of what he earlier accused Mr H Saleh of as he did not for apparent reasons, refer the court to section 72(8) which I believe resolves the issue very succinctly, and it states:

I Every employer shall observe the following procedures in granting leave without pay in accordance with subsection (2) of this section;

- A (a) the employer shall communicate in writing with the branch leadership level of the Trade Union concerned, stating reasons for the intended leave, in a period of not less than three months before the intended date of granting such leave;
- B (b) the employer shall, in a period of three months before the intended date of granting leave without pay, submit an application in writing to the commissioner stating reasons for the intended leave and the written comment of the trade union branch leadership on such leave;
- C (c) the trade union branch leadership shall in a period not exceeding one month from the date of receiving the communication, submit its reply to the employer giving their comments on granting such leave. A copy of the said reply shall be sent to the Commissioner;
- D (d) the Commissioner shall consider the application, and in a period of one month from the date he received that application, shall give or withhold his approval after considering the reasons adduced by the employer and the trade union, provided that the copy of the decision of the Commissioner shall be delivered to the employer and trade union branch leadership;
- E (e) within thirty days of delivery of Commissioner's decision, any party aggrieved by such decision may appeal to the Minister who shall hear and determine the appeal within 30 days from the date on which the appeal was submitted to the Minister;
- F (f) in the event one month elapses from the date the Commissioner received an application from the employer to grant leave without pay without giving reply, the employer shall have the right to grant the said leave without pay;
- G (g) In the event one month elapses from the date the Minister received an appeal from the aggrieved party against the decision of the Commissioner without giving his decision, the decision of the Commissioner shall be binding on both parties.

I The employer, to take benefit of "low season" shall, i.e. mandatory, follow this procedure. Clearly, the defendant was in breach and cannot

therefore avail itself of the provisions of section 72(2).

I have gone through annexures D1 to D4 produced by Mr Nassor to show that the labour department contributed to the situation that led to his clients taking the "complained actions". I can only come to the conclusion from the date of that letter and the opening sentence; "We would like to inform you that we have sent (*sic*) several staff of the Tamarind Beach Hotel on unpaid leave for not more than three months ...", that the defendant merely presented the Labour Commissioner with action already taken the taking of which action was *ab initio* not in compliance with the law and hence illegal. Consequent upon the foregoing, it is ordered:

1. That the accumulated salaries for the period of the unlawful leave without pay as appropriately calculated in the sum of TZS. 4 230 000, be paid to the plaintiffs and that no court fees be paid, in compliance with the provisions of section 13(4) of the Labour Act Number 3 of 1997.
2. That interest at the rate of 36% per annum be paid by the defendant until the payment of the aforesaid sum.