

- A So, the preliminary objection is upheld and this application is struck out as it is not properly before the court. Costs to follow the event. The applicants are free to exercise their right of reference if they so wish. Overruled by *East African Development Bank v. Blue Enterprises Ltd and another*, Court of Appeal of Tanzania at Dar es Salaam, Civil Reference Number 7 of 2004 (12 November 2004).

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**SAID A. MARINDA AND THIRTY OTHERS v.
MINISTER OF LABOUR AND YOUTH
DEVELOPMENT AND THE ATTORNEY GENERAL**

HIGH COURT OF TANZANIA
AT DAR ES SALAAM

(Mapigano, Mackanja and Kalegeya, JJ.)

MISCELLANEOUS CIVIL CAUSE No. 57 OF 1996

- F *Labour Law – Labour disputes resolution – Jurisdiction of the Minister in labour disputes – Whether the Minister has jurisdiction to adjudicate on disputes founded on redundancy – Sections 39(2) and 40A of the Security of Employment Act 1964.*
- G *Labour Law – Voluntary Agreement – Voluntary agreement signed by employer and employees' union but neither party takes steps to get it registered by the Industrial Court – Effect of the failure to register the agreement – Section 39(4) of the Industrial Court Act 1967.*
- H As part of an exercise to restructure its business the Bank of Tanzania, as employer, declared a number of its employees redundant and terminated their employment. Those terminated included the applicants who, being aggrieved by the termination, sought to challenge it through their trade union. The trade union reported the matter as a trade dispute to the Labour Commissioner who, with the consent of the Minister for Labour, the first respondent, referred it to the Industrial Court for inquiry in terms
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A of section 9B of the Industrial Court Act 1967. The Minister considered the dispute and decided to dismiss it; the decision, of the Minister, was registered as an award of the Industrial Court. Aggrieved, the applicants filed this application for *certiorari* on the grounds that the Minister had no jurisdiction over the dispute as it was founded on redundancy, that the Minister based his decision on terms of a voluntary agreement that was not registered as required by the law, and that the procedural requirements for redundancy were not followed in declaring the applicants redundant. B

Held: (i) Although the applicants were indeed employees in terms of the Security of Employment Act 1964, that fact did not entitle them to contest their redundancy under that law; sections 40A and 39 of the Security of Employment Act 1964 do not allow employees to contest termination of employment effected by way of a redundancy exercise and they did not contest their termination under that Act; C

(ii) As the voluntary agreement signed by the employer and the employees' union was not registered by the Industrial Court; the said agreement was, according to section 39(4) of the Industrial Court Act 1967, inoperative and not binding on the parties to it; D

(iii) As the applicants' employment was terminated by way of a redundancy exercise carried out on the basis of a voluntary agreement that was not registered; the redundancy exercise was invalid *ab initio*; E

(iv) As the dispute referred to the Minister arose from a redundancy exercise that was invalid *ab initio*, there was nothing before the Minister on which to make a decision and, accordingly, the Minister's decision was also invalid; F

(v) The employer's decision of terminating the applicants' employment by way of redundancy was also invalid for failure to consult with the field branch of the employees' trade union prior to the redundancy exercise as required under section 6(1)(g) of the Security of Employment Act 1964. G

Minister's decision and award of the Industrial Court quashed

Case referred to: H

- (1) *Njombe/Ludewa/Makete Cooperative Union Ltd v. Minister for Labour, Youth and Culture*, HC – Songea – Miscellaneous Civil Cause Number 8 of 1994 (unreported) I

A Statutory provisions referred to:

(1) Security of Employment Act 1964, sections 6(i)(g), 39(2) and 40A

(2) Industrial Court Act 1967, sections 39(4), 4(1) and 4(1A) and 9

B (3) Employment Ordinance, section 2

Mr Msemwa, for the Applicants

Mr Mwidunda, for the Respondents

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RULING

(Delivered 02 October 1998)

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MACKANJA, J.: The applicants were at one time employees of the Bank of Tanzania (the employer). It seems that it became necessary for the employer to restructure its business. We are not called upon to consider whether or not the exercise was necessary or expedient. Suffice it now to say that the reduction of employees became one of the ways of going about what had to be done. The applicants are among those who were retrenched. They were aggrieved, so they took steps to challenge the employer's decision. They commenced their search for justice with filing their complaint at their field branch. A field branch is, according to section 4 as read together with section 5 of the Security of Employment Act, Chapter 574, a branch of a trade union which must be established at the employer's place of business in which ten or more union members (being employees within the meaning of that Act) are employed. The matter was ultimately referred to the Secretary General of the trade union, the Organization of Tanzania Trade Unions – OTTU, because the field branch could not resolve the dispute. On his part, the Secretary General reported a trade dispute to the Commissioner for Labour who, with the consent of the Minister for Labour, referred the matter to the Industrial Court

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of Tanzania for inquiry in terms of section 9B of the Industrial Court Act 1967. The Minister considered the dispute and made a decision. In his decision, which was registered as an award by the Industrial Court, he dismissed the complaint. The applicants were aggrieved, hence this application.

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The purpose of this application is in the prayer that this court removes unto itself the decision of the Minister and issue an order of *certiorari* to quash the decision of the Minister for Labour and Youth Development. They have four grounds in the statement, namely:

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(1) that the Minister lacked jurisdiction to entertain the dispute against the applicants;

(2) that the Minister made his decision with regard to matters contained in the voluntary agreement which was not registered as required by law;

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(3) That the applicants were governed by the Security of Employment Act which ousts the jurisdiction of the Minister; and

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(4) That the applicants were not lawfully and justifiably made redundant because procedural requirements as laid down by law were not followed.

Mr Mwidunda, learned Senior State Attorney, appeared for the respondents while Mr Msemwa is advocating for the applicants. The respondents did not file any written arguments.

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Mr Msemwa, learned counsel for the applicants, did not see it necessary to argue seriatim the grounds on which the application is founded. According to his priorities the first ground is last but one. Ground four is the last one. Ground two comes ahead of the first ground. We will ignore that approach; instead we will consolidate the first and the third grounds, since they concern almost the same issue.

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Learned counsel contends that all the applicants are employees whose labour – management relations fall within the perview of the Security of Employment Act, 1964. According to him the Minister's

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- A jurisdiction in relation to the discipline of such employees is limited to summary dismissal and termination as provided by section 40A of the Security of Employment Act. He argues that there are no provisions that empower the Minister to adjudicate trade disputes founded on redundancy. He cites *Njombe/Ludewa/Makete Co-operative Union Ltd v. Minister for Labour, Youth and Culture* (1) Mwalusanya, J., as authority. He has on the authority of that case, urged us to undo the Minister's decision. The first issue we are called upon to decide, therefore, is whether the applicants are "employees" for purpose of the Security of Employment Act.

D Section 40A of the Security of Employment Act 1964 (Chapter 574) was enacted by way of an amendment to the above Act. It was one of the amendments that were enacted in Labour Laws (Miscellaneous Amendments) Act Number 1 of 1975 which Mr Msemwa erroneously cites as Act Number 150 of 1975. To the extent that it is relevant here section 40A provides thus:

- E 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 (conciliation) board and the board may, if it is satisfied:
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- G (a) that the termination was manifestly unreasonable and
- (b) that the circumstances in and on account of which the employment of the employee was terminated by the employer are not circumstances of the kind specified in subsection (2) of section 39; and
- H (c) that the employee did not consent to the termination or that the termination was not at the instance of the employee; and
- (d) that the employee has not accepted any statutory compensation to which he may be entitled under this Act; and
- I (e) that the employee has not taken up any other employment; and

- (f) that it will not be unreasonable or unjust to order the employee's re-instatement or the re-engagement by the employer, A

Order the employer to re-instate or re-engage the employee.

Whoever is aggrieved by the decision of the board has the right to appeal to the Minister for the time being responsible for labour matters. As it can be seen, section 40A and those preceding it and that which come after it have one legislative scheme. They contain provisions that deal with the discipline and tenure of office of an individual employee. The Security of Employment Act 1964, therefore, creates jurisdiction for the conciliation boards and for the Minister in relation to labour disputes involving a single employee. And, for the purposes of this Act the term 'employee' does not cover all salaried employees and wage earners. It has the meaning ascribed to it by section 2 of the Employment Ordinance Chapter 366; it: D

means any person who has entered into or works under a contract of service with an employer whether by way of manual labour, clerical work, or otherwise and whether the contract is expressed or implied or is oral or in writing. E

... been covered but are deliberately exempted. They include members of Military Forces; members of the Police Force; members of the Prisons Services; members of the National Service; members of the Unified Teaching Service; members of the East African Community; Civil Servants in the service of the United Republic other than members of the auxiliary grades; casual employees; apprentices and any employee who, in the opinion of the labour officer, is employed in the management of the business of his employer. So an "employee" who is covered by the provisions of the Security of Employment Act, 1964, is one who does not have any thing to do with the management of the employer's business and personnel. F G

There is no evidence in the instant case that any of the applicants is caught up by the exemptions. They are, therefore, held to be employees in respect of whom the Security of Employment Act applies. H

Granted that the applicants are employees within the meaning of that word as ascribed to it in the Security of Employment Act, I

A were they entitled to institute a collective dispute arising from a contentious redundancy exercise in terms of the Security of Employment Act?

B It seems to us to be the case that not every unacceptable termination would entitle an employee to lodge a complaint before the Conciliation Board. The board must be satisfied that the pre-condition that is provided for in section 40A(1)(b) of the Act has been met, namely, that the circumstances in and on account of which the employment was terminated by the employer are not circumstances of the kind specified in subsection (2) of section 39 of that Act. They are:

- D (a) the winding up or partial winding up of the business, work which the employee was employed to perform, or the removal of the business wholly or partly from Tanganyika; or
- (b) the total or partial suspension of the work for reasons outside the control of the employer; or
- E (c) the completion of seasonal or temporary work; or
- (d) the redundancy of the employee; or
- (e) the inefficiency of the employee or his inability to perform properly the work he was employed to do; or
- F (f) the failure or neglect of the employee, without any sufficient reason, to fulfil the duties incumbent upon him under the contract of employment or under the employer's works rules applicable to the place of employment; or
- G (g) the replacement of the employee for the purpose of improving efficiency and productivity; or
- H (h) the occurrence of any circumstances which, having regard to the nature of the work or the character of the business, render the employee unsuitable to continue to perform the work he was engaged to do; or
- I (i) the absence of the employee from work on account of illness beyond the time permitted by law or regulations or any collective agreement

or contract of service under which he is entitled to sickness benefits from his employer; or

- (j) the employee has reached the statutory and compulsory retirement age; or
- (k) the re-engagement or re-instatement of an employee in accordance with the decision of the board or the Minister into a position filled since such employee's termination or summary dismissal or suspension by the employer in question; or
- (l) the employment is terminated in circumstances which would have justified summary dismissal under section 20 of the Act; or
- (m) the employee has been engaged in undermining or attempting to undermine the authority of the employer or the Field Branch; or
- (n) the Minister has certified that, in the interests of good industrial relations or for the avoidance of dissension at the place of work, the employment may be terminated without the payment of the statutory compensation.

It follows that even though the applicants are employees under the Security of Employment Act, that fact alone cannot entitle them to seek redress against a contentious redundancy under procedure that are laid down therein. Contrary to what they would like to have, section 40A and 39 of the Security of Employment Act bar any employee from contesting a termination of employment that arises from a redundancy. This means, therefore, that the fact that they are employees under the Security of Employment Act the Minister for Labour does not have jurisdiction unless he exercises powers that are vested to him by other legislative enactments. And as it will be shown later the Minister made the impugned decisions exercising a jurisdiction conferred to him under the Industrial Court of Tanzania Act Number 41 of 1967.

In the matter before us the applicants, all of whom are employees under the Security of Employment Act, did not prosecute their dispute with their employer through the Conciliation Board. Evidence on record

A shows that they referred their dispute to their Field Branch from where the matter was referred to the Labour Commissioner. The Labour Commissioner referred it to the Minister for Labour and the latter ultimately referred it to the Industrial Court as a trade dispute for inquiry. The procedure that was followed, therefore, is one which is provided for under the Industrial Court of Tanzania Act Number 41 of 1967 as amended from time to time. There are three parallel procedures through which employees or employers may institute trade disputes at the Industrial Court. Two are created under section 4 and the third under section 9 of the Industrial Court of Tanzania Act 1967.

D The procedure under section 4 of the Industrial Court Act commences in one of two ways. Under subsection (1) of that section:

- (1) Subject to the other provisions of this section, any trade dispute... may, if not otherwise determined, be reported to the Labour Commissioner by notice in writing given either by or on behalf of the employer or on behalf of the employees, as the case may be, by the general secretary of a registered trade union of which the employees are members.

F For purpose of this Act the word "employee" is defined under section 3 to mean:

...any person who has entered into a contract of service with an employer whether by way of manual labour, clerical work or otherwise and whether the contract is expressed or implied or is oral or in writing.

G Read in isolation this definition is wider than that in the Security of Employment Act and the Employment Ordinance. It appears to suggest that it covers supervisory, managerial as well as ordinary employees.

H Subsection (1A) of section 4 of the Industrial Court of Tanzania Act introduces an entirely new dimension. The way it is framed, it overrides the provisions of subsection (1) of that section; it states:

I (A) Notwithstanding subsection (1), an employee who-

- (a) is not an employee within the meaning assigned to that term by the Security of Employment Act, 1964; or A
(b) is not a member of a registered trade union, or
(c) though a member of the registered trade union is not supported by the field branch in the dispute with his employer, shall be entitled to institute before the court a trade dispute between him and his employer, either in person or by advocate. B

As it is clear from the provisions of subsection (1) of section 4, the Industrial Court of Tanzania Act makes provision for the determination of collective as well as individual trade disputes in the spirit of the definition of the expression "trade dispute". The expression "trade dispute" is defined to mean: C

...any dispute between an employer and employees or an employee in the employment or non-employment or the terms of employment or with conditions of labour of any of those employees or such an employee. D

We have given careful consideration to the provisions of section 4(1) and 4(1A) of the Industrial Court of Tanzania Act. We are of the firm view, and we so hold, that section 4 of that Act makes provision for two parallel procedures. The first one is that for which subsection (1) makes provision. It lays down procedure for collective disputes for employees irrespective of whether they belong to managerial, supervisory or auxiliary grades. The second procedure is where individual employees lodge trade disputes directly to the Industrial Court in accordance with the provisions of subsection (1A) of section 4. Under this latter procedure, and in view of the overriding nature of that sub-section, individual disputes can be lodged only by an employee who does not fall within the ambit of the Security of Employment Act. E

A third procedure under which trade disputes may be determined is by way of an inquiry in accordance with the provisions of section 9 of the Industrial Court of Tanzania Act. It provides that: F

where any trade dispute exists or is apprehended, the Labour Commissioner may inquire into the causes and circumstances of the trade dispute and, G

- A with the consent of the Minister for the time being responsible for labour matters, refer any matter appearing to him to be connected or relevant to that trade dispute to the Industrial Court whether or not the matter or dispute is a trade dispute within the meaning assigned to that expression by section 3.

It will be the duty of the Industrial Court to inquire into those matters and to report on them to the Minister. The provisions of section 9 appear to be as wide as those of subsection (1) of section 4 of the Industrial Court of Tanzania Act. They also admit of a wider definition of the term "employee".

- The pleadings and the submissions of learned counsel for the applicants clearly show that the applicants prosecuted their dispute in accordance with the provisions of section 9 of the Industrial Court of Tanzania Act. Notwithstanding the fact that the applicants followed this procedure to the letter, they now swear that they have been advised by their advocate, Mr Msemwa, that the Minister lacked jurisdiction to entertain their trade dispute because it involves. "... redundancy matters originating under the Security of Employment Act." There is no doubt that the advice was wrong because as we have had occasion to say while considering the provisions of section 40A(1) and 39(2) of the Security of Employment Act, an employee for purposes of that Act, if his employment was terminated, redundancy is a circumstance in and on account of which an employee will not be entitled to refer a dispute to the Conciliation Board. Conversely, however, redundancy, being as it is connected to the existence or non-existence of employment, it can legitimately found a trade dispute before the Industrial Court for direct adjudication or by way of inquiry. The applicants' trade dispute was dealt with as an inquiry and that was in conformity with our laws. The contention to the contrary, therefore, is totally misconceived.

From the foregone considerations we hold the view that the first and third ground is wholly untenable; we would dismiss them.

- This brings us to the second ground. There is evidence to the effect that soon before the retrenchment exercise was undertaken

by the employer, the employer and the trade union, the Organisation of Tanzania Trade Union (OTTU) commenced collective bargaining. The only negotiable issue was, it seems, the restricting of the employer's business and the consequent redundancies. As a result of collective bargaining, a voluntary agreement was put in place. It was finally signed by the parties that were privy to its conclusion. And, as stipulated in the agreement, the employer enforced that agreement and applied it in reducing employees that were considered as surplus age. The applicants are among the employees who lost their jobs as a result.

The applicants have taken great exception to the implementation of that agreement. They contend in their affidavit evidence that there was no consultation with all the OTTU field branches prior to the implementation of the redundancy exercise. At best, the leadership of the field branches were made aware of the exercise at the time of signing the voluntary agreement and that at that time the employer had already made a decision to retrench employees contrary to law. We think that kind of evidence is hearsay.

There is further affidavit evidence to the effect that the voluntary agreement is unenforceable because it was not registered by the Industrial Court of Tanzania. Mr Msemwa has addressed us on this point; we think he is basically right although he erroneously refers to the voluntary agreement interchangeably with a negotiated agreement. The two types of agreements are different and distinguishable. They also concern different issues. He has also touched on section 6(i)(g) of the Security of Employment Act 1964, which makes a mandatory requirement to the employer to consult with the field branch at his place of work if redundancy of employees becomes inevitable. We will first of all deal with the modalities of registering a voluntary agreement and the effects of registration and non-registration.

It is now common ground that the applicants' employment was brought to an end in a redundancy exercise. The modalities of that exercise, as we have shown, were based on a voluntary agreement which set down the criteria that were to be followed. As a matter of law, a voluntary agreement will not be enforceable and be binding

A on the parties to it unless it is registered under section 39(4) of the Industrial Court of Tanzania Act 1967. In particular, the relevant part provides thus:

B (4) No voluntary agreement shall be operative or be binding on the parties thereto unless it is registered by the Industrial Court..

Provided that where the court does not register a voluntary agreement within three months the employer and the employees may commence implementing the voluntary agreement.

C So it is mandatory that in order to have an operative and enforceable voluntary agreement the parties to it must ensure that it is registered by the Industrial Court by taking all the necessary and appropriate steps that are laid down in the Act. The proviso to subsection (4) of section 39 applies only to a situation where having received the voluntary agreement the Industrial Court does not register it within three months of having received it. It seems to us, and we think it is borne out by the affidavit evidence, that the employer and the employees did not take any step with a view to registering their voluntary agreement. The complainants are now saying that the employer had no authority to carry out the retrenchment exercise that was based on the terms and conditions as laid down in the unregistered voluntary agreement.

F The clear provisions of subsection 4 of section 39 of the Industrial Court Act admits no intelligible controversy. As it says "No voluntary agreement shall be operative or be binding on the parties thereto unless it is registered by the Industrial Court." We hold, therefore, that the voluntary agreement was inoperative and was not binding on OTTU who signed it on behalf of the employees. It automatically does not bind the applicants. It follows that since it is inoperative it cannot be the basis for a retrenchment exercise. Accordingly that exercise was invalid *ab initio*. That being the case there was nothing before the Minister on which to make a decision. In that circumstance reason compels us to say that the Minister's decision has thereby been rendered invalid.

Another ground upon which the rendition of the invalidity to the employer's decision, and consequently to the award of the Industrial Court, is founded is the non-observance of the mandatory provisions of section 6(1)(g) of the Security of Employment Act, 1964. That law requires the employer and the field branch to consult with one another:

... concerning any impending redundancies and the application of any joint agreement on redundancies.

C Two things are required. First, to consult with one another; second the application of a joint agreement on redundancies if one has been reached. A purposeful interpretation of these provisions leads us to the conclusion that the consultations must produce a joint agreement on redundancies if one is not in place already. If the agreement is signed, then any action must be stayed until that agreement is registered by the Industrial Court. Alternatively, it may be implemented or, if after it is submitted to that court for registration and three months have elapsed before it is registered. In this case there was no operative joint agreement, otherwise termed a collective agreement, under which a redundancy exercise could be carried out. There was therefore nothing before the Minister to decide.

F It is upon the foregoing considerations that we now hold that the applicants have made out their case. Accordingly the prerogative order of *certiorari* would lie. In the final result the application is allowed with costs. Consequently the Minister's decision and the award of the Industrial Court are quashed.