of the said Act in this matter. John Ntungwa stood trial at Meatu District Court for the offence of being in unlawful possession of arms contrary to sections 13 and 31 of the Arms and Ammunition Ordinance in that on 3 June 1998 at Paji Village, Meatu District, he was found in possession of one loading muzzle gun (*gobore*) without a licence. John Ntungwa was convicted as charged and sentenced to seven years imprisonment.

In terms of paragraph 21 of the First Schedule to the Economic and Organised Crime Control Act 1984, as amended by Act Number 10 of 1989 a person found in unauthorised possession of arms and ammunition contrary to the provisions of the Arms and Ammunition Ordinance Chapter 322 is guilty of an offence under the Economic and Organised Crime Control Act 1984. Offence under the Economic and Organised Crime Control Act are triable by the High Court sitting as an Economic Crimes court; See section 3 of the Economic and Organised Crime Control Act. The Director of Public Prosecutions or any state attorney authorised by him may, by a certificate under his hand, order that any case involving an offence triable by the Economic Crimes court be tried by such court subordinate to the High Court as he may direct: See section 12 of the said Act as amended by Act Number 12 of 1987. By virtue of section 26 of the Economic and Organised Crime Control Act 1984, no trial of an economic offence may be commenced save with the consent of the Director of Public Prosecutions.

On perusal of the record, there does not appear to be a certificate of the D.P.P or any state attorney ordering the trial magistrate in this case to try the offence charged. Nor is there consent by the D.P.P. to commence trial of the offence charged. Hence the trial magistrate had no jurisdiction to try this case. The proceedings are, therefore, null and void. The conviction is quashed and the sentence set aside. John Ntungwa is to be released unless otherwise lawfully detained.

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# J S MUTUNGI *v.* UNIVERSITY OF DAR ES SALAAM

## HIGH COURT OF TANZANIA AT DAR ES SALAAM

(Kalegeya, J.)

## MISCELLANEOUS CIVIL APPLICATION No. 17 OF 1994

*Labour Law – Minister's order of reinstatement – Whether employer can pay statutory compensation and a sum equal to 12 months' salary in lieu of reinstatement – Sections 27 and 40A(5) Security of Employment Act 1964.*

On 17 November 1981 the applicant's employment with the respondent was terminated allegedly because of the former's negligence leading to theft of a cheque worth USD 52 260 issued as a grant and later found to have been cashed in Geneva. He challenged the termination before the Conciliation Board which upheld his complaint, and ordered his reinstatement. The Conciliation Board's decision was upheld by the Minister, to whom the respondent had appealed. Instead of reinstatement, the respondent paid him terminal benefits and an amount equal to 12 months' salaries. Amongst his prayers now before the court was that the respondent should comply with the Minister's order of reinstatement.

**Held:** The respondent was under no obligation to reinstate the applicant and properly exercised its right under section 40A(5) of the Security of Employment Act by opting to pay statutory compensation and twelve months' salary.

***Order accordingly***

Cases referred to:

(1) *Stephen Nyigango v. Tanzania Electric Supply Company Ltd*, HC – DSM – Miscellaneous Civil Cause Number 15 of 1986 (unreported)

(2) *Juma Ally Kaziyabure v. Tanzania Posts and Telecommunications* [1994] T.L.R. 1

(3) *Augustine Masatu v. Mwanza Textiles Ltd.*, HC – MZA – Civil Case Number 3 of 1986 (unreported)

(4) *General Marketing Company Ltd v. AA Sharif* [1980]TLR 61

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

(6) *Timothy Kaare v. Mara Cooperative Union*, CAT – MZA – [1998] T.L.R. 77

(7) *Zuberi Augustino v. Anicet Mugabe*, CAT – Civil Appeal Number 10 of 1992 (unreported)

(8) *Kihamira Kalunge Kibaya v. United Africa Company*, CAT – DSM – Civil Appeal Number 36 of 1987 (unreported)

(9) *I.M. Mahona v. University of Dar es Salaam*, Civil Case Number 83 of 1977 HC - DSM [1981] T.L.R. 55

(10) *Re: Industrial Court Uganda Union and Clerical, Commercial Technical Employers'* [1967] ALR 119

(11) *Republic v. Oscar Mwabola* [1967] H.CD. n. 441

Statutory provisions referred to:

(1) Security of Employment Act sections 40A(5), 27, 41 and 50

(2) Constitution vide Act Number 15 of 1984

(3) Criminal Procedure Code, Order 21, rule 30(2)

## RULING

(Dated 15 February 2000)

**Kalegeya, J.:** The applicant, JS Mutungi, is before this court armed with a chamber application which contains a number of prayers. In order to grasp the substance contained therein I find it necessary that the prayers should be quoted in full as hereunder:



1. That Professor D.J. Mkude the Chief Administrative Officer and Hashim Hamza Mtanga, the Principal Officers of the University of Dar es Salaam, Judgment Debtor, be called upon to show cause why they should not be detained as civil prisoners for refusing to comply with the decision of the Minister for Labour dated 5 May 1993.
2. That in addition, or in the alternative the applicant be awarded damages for failure of the Judgment Debtor to carry out the Minister's decision dated 5 May 1995 and
3. That the applicant be paid TZS. 2 524 275 the aggregate of statutory compensation computed in accordance with section 35 and a sum equal to twelve months wages amounting to TZS. 2 019 420 in terms of section 40A(5) of the Security of Employment Act leave pay of TZS. 929 871. Senior Staff Superannuation TZS. 1 097 076. Transport of personal effects TZS. 339 300, transport of family TZS. 213 955. Housing allowance of TZS. 1005 720, (apart from the damages).
4. That upon failure to show cause the two said officers, Professor D.J. Mkude and Hashim Hamza Mtanga be detained as civil prisoners.
5. That the first respondent/judgment debtor, be prosecuted of the offence prescribed under section 50 of the Security Employment Act.
6. That the costs of this application be paid by the respondents to the applicant.
7. That interest be ordered on each payment requested above.
8. Any other relief be granted in favour of the applicant as may to the court appear just and equitable.

The background to this application is as follows. On 17 November 1981, the applicants' employment with respondent was terminated by the latter allegedly because the former's negligence had led to theft of a cheque worth USD 52 260 issued as a grant and later found to have been cashed in Geneva. The applicant had been employed as an accounts clerk on 27 February 1970 and by the time of his termination he had been promoted to an accountant grade 1. He challenged the termination before the Conciliation Board which upheld his complaint. The Conciliation Board decision was upheld by the Minister responsible for labour matters to whom the respondent had appealed. The Minister ordered the applicant's reinstatement. Instead of reinstating him, the respondent paid him terminal benefits amounting to TZS. 1 183 320-35. That, sum was made up of 12 months' salary (November 1981 – October 1993) TZS. 1 043 517-05; TZS. 97 500 being travelling/baggage allowance and TZS. 70 864-85 leave allowance for 330 days less TZS. 28 561-55 being deduction for a loan and imprest.

According to the supporting affidavit and submissions the applicant citing a number of decided cases, insists that the Minister's decision is a decree which should be enforced by the court (sections 27 and 41 of the Security of Employment Act) and that reinstatement is not a matter of discretion (cited *Stephen Nyigongo v. Tanzania Electric Supply Company Ltd* (1), *Kyando J Juma Ally Kaziyabure v. Tanzania Posts and Telecommunications Corp.* (2), Msumi J., as he then was; *Augustine Masatu v. Mwanza Textiles Ltd* (3), Mwalusanya, J., and *General Marketing Company Ltd v. AA Sharif* (4).

In his written submission, the applicant argues and claims payment of an amount somehow different from the one contained in paragraph 3 of his chamber summons. While the amounts claimed in the said paragraph (already quoted above) total to TZS. 8 129 617, in the submission he claims a total of TZS. 19 269 398 made up of 1981–1995 salary arrears pegged on USD rate, baggage, and transport allowance for himself and his family less TZS. 1 183 320 which was paid to him. Not only that, he also claims TZS. 50 000 000 as general damages for his wrongful termination. Insisting on the entitlement to TZS. 18 086 078, the applicant argued that he should be taken to have been in continuous employment as his termination was found to have been wrongfully made; no fare was paid for his five children, and that he was denied full benefits payable under superannuation scheme as he was paid just a surrender value which is one third of the full value.



As to the imprisonment of the Principal Officers of the respondent, he argued that they are liable to imprisonment as civil prisoners under Order 21, rule 30(2) of the Criminal Procedure Code because they have refused to obey the order - his reinstatement. On prosecution under section 50 of the Security of Employment Act the applicant states that he will not insist for its taking place if other prayers are honoured and so also is his reinstatement.

In response, the respondent brushed aside all the applications as being legally untenable. To start with, citing *D.A.N. Kavishe v. Arusha International Conference Centre* (5), and (CAT) *Timothy Kaare v. Cooperative Union* (6) the respondent vehemently argued that under section 40A(5) of the Security of Employment Act the Employer is not bound to reinstate employee as there is an option of paying a statutory compensation instead. Regarding pegging the salary on hard currency, the respondent argued that applicant had all along been receiving his salaries in local currency, and thus failed to see the basis of this change into foreign currency. As to damages, the respondent argued that that cannot be awarded as there is no court order which has declared that applicant's endowment was unlawfully terminated and that no order so far has been made for implantation of the Ministers' decision. The cases cited were attacked as being distinguished and more specifically that the *Masatu* case was overruled by the *Kavishe* case.

In a bold reply, the applicant reiterated the substance of Order 21, rule 30 CPC adding that his application is clear: that the respondent's principal officers should be imprisoned if they fail to show cause for their failure to comply with Minister's order that pegging the computation on a dollar aims at cushioning the inflationary rate of the shilling which factor is approved by courts as was done in (CAT) Civil Case Number 10 of 1992. *Zuberi Augustino v. Anicet Mugabe* (7) where "50% rate" of devaluation was found "reasonable"; that until the Minister's order of reinstatement is complied with an employee is taken to be in continuous employment of the employer – cited (CAT) Civil Appeal Number 36 of 1987, *Kihamira Kulunge Kibaya* *v. United African Company of Tanzania* (8). Finally, as to damages, he argued that general damages need not be proved, and as for his being entitled to the same, let his own words paint the picture: "Every body has been looking down upon me as a person who was dismissed from employment. I have been unable to feed or educate my children. My family has been condemned to live as destitute".

Now, to the analysis of the arguments and the law. The main issue which controls this controversy is whether the respondent was mandatorily required to reinstate the applicant into employment. In order to have full appreciation of the matter, the two controlling provisions of the law, sections 27 and 40A(5) of the Security of Employment Act should be quoted in full. They provide as under.

> Section 27 – (1) The decision of the Minister on a reference to him under section 26 and subject to any decision on a reference to the Minister therefrom the decision of a board on a reference to it under this part:
>
> (a) shall be final and conclusive; and
>
> (b) shall be binding on the parties to the reference, and the relationship between the parties in consequence of the matters in respect of which the reference was made shall be determined accordingly; and
>
> (c) may be enforced in any court of competent jurisdiction as if it were a decree.
>
> (2) In addition to its powers to execute any decision which requires the refund of any wages deducted or, expressly or by implication, the payment of any sum to an employee where a dismissal is ordered to take effect as the termination of employment, a court in which it is sought to enforce a decision of the Minister or a Board may make and enforce such orders as are necessary for the specific performance of any decision for the re-instatement of any employee (notwith standing that the court would not have power apart from this subsection to make or enforce such orders) and may award damages for the failure of the employer to carry out any such decision as if he had dismissed the employee concerned wrongfully (and if Part IV of this Act is in operation in relation to the employee concerned, such damages shall include the statutory compensation provided for in that part).



While section 50A(5) states:

> (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 a further reference to him, within fourteen days of the order being made by the Minister,
>
> (c) the employer shall be liable to pay the employee compensation of an amount equal to the aggregate of:
>
> (i) the statutory compensation computed in accordance with section 35; and
>
> (ii) 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.
>
> and such compensation shall be recoverable in the same manner as statutory compensation the payment of which has been ordered under section 39".

As was clearly pointed out by the parties in their submissions, we have conflicting decisions on the matter. In *kaziyabure* case (2) Msumi, J. (as he then was) held that deciding on whether to be reinstated or be paid statutory compensation was at the discretion of the employee and not employer. Even at the danger of making this ruling unnecessarily long let an excerpt from the judgment speak for itself:

> The learned counsel for respondent is of the view that an employer can legitimately ignore the order of the Minister of Board for re-instatement or re-engagement provided he pays the aggrieved employee statutory compensation plus twelve month's salary. With respect, I can find no legal backing for such argument. My understanding of section 27 and 40A(5) of the Act is that where the Minister of Board has ordered for reinstatement or re-engagement, the complainant employee may opt for one of the two alternatives. He may either apply to the court under section 27(1) of the Act to have the Order executed as if it was a decree, or he can claim for payment of statutory compensation and twelve months salary as provided under section 40A(5) of the Act. Either of these alternatives can only be initiated at the instance of the aggrieved employee and not the offending employer. An employer who refuses to reinstate his employee in contravention of the decision of the Minister or Board, he does so at the risk of having such decision executed against him by way of specific performance with or without payment of damages: or on the application the aggrieved employee, he may be ordered to pay the employee statutory compensation plus twelve months' salary. An employer cannot, at his own initiative, choose to pay his aggrieved employee statutory compensation and twelve months' salary as alternative to complying with the Minister's or Board's decision of reinstatement.

This decision was in direct conflict with the decision handed down by Kisanga, J. (as he then was) some years back in *IM Mahona v. University of Dar es Salaam* (9).

A year later (1987), Mwalusanya, J. cited the *Kaziyabure* case with approval in a well researched decision regarding a worker's plight on "a Right to work" principle in *Masatu* case (3). Again, let Mwalusanya, J.'s very wording, *in extenso*, take up the floor:

> Now what about on the question of an order of reinstatement by the Minister for Labour? Is the employer free to refuse to obey it? The High Court of Tanzania is divided on this issue as there are two schools of thought.
>
> One school of thought maintains that there is no right to work in Tanzania as it has been taken away by section 40A(5) of the Security of Employment Act as amended by Act Number 1 of 1975. That section states that where a reinstatement has been ordered by the Minister for Labour and the employer refuses to comply with the order, the said employer may terminate the services of his employee by payment of a statutory compensation as well as a sum equal to 12 months wages so that view holds that an employer has got the right to terminate the services of his employee. That is what transpired here. The employer purported to terminate the services of his employee the present plaintiff by using that section. The plaintiff has filed this case arguing that the purported termination is null and void. And counsel for the employer Mr Rugarabamu referred to the case of *IM Mahona v. University of Dar es Salaam* (9) where Kisanga, J. (as he then was) held that an employer has a right to refuse to reinstate an employee and instead terminate his service with full terminal benefits.



However the other school of thought, to which I subscribe, holds that the employer has no right to terminate the services of an employee under section 40A(5) of the Security of Employment Act (as amended) when where there is an order of reinstatement. The plaintiff referred me to the case of *Juma Ally Kaziyabure v. Tanzania Post and Tel. Corporation* (2). Accordingly, in that case an order of specific performance was granted i.e. the employee was re-engaged. That view also finds support in the decision of Biron, J. in the case of *General Marketing Company Ltd v. AA Shariff* (4) where he held that when the Minister for Labour has ordered a reinstatement, then the same has to be effected and not terminating the employee or re-employing him as if he was a fresh employee.

The second school of thought is to be preferred for a number of grounds. First it should be borne in mind that it is a basic rule of statutory interpretation that all sections of a statute must be given meaning. To do otherwise is to engaged in the untenable assumption that the legislature did a meaningless act by the insertion of a superfluous section in the statute see Mustafa J. (as he then was) in *R v. Oscar Mwambola* (1967) HCD n. 441 (11). So it is a rule that a construction must be made upon the entire instrument and not merely disjointed parts of it (*ex antecedentibuset ... consequent bus fit optima* interpretation).

Now section 27 of the Act compels the courts to make sure that an order of reinstatement by the Minister is implemented; while section 40A(5) states that the employer may refuse to reinstate the employee and instead terminate him. Now in the case at hand it would appear the first school of thought interpret section 40A(5) of the Act in isolation and/or oblivious to the existence of section 27 of the same Act. If we interpret that section 27 of the same Act and interpret that section 40A(5) of the Act entitles the employer to terminate an employee at will then section 27 is rendered superfluous. So the interpretation by the second school of thought which takes both sections into account is to be preferred.

Second, the cardinal precept of statutory interpretation is to search for the intention of the legislature. To be sure, the best place to look for that intention is in the words used in Act but the courts have time and again reiterated the principle:

> ... that the expression of the will of the legislature must be considered not only by it self, but with the natural consequences flowing from it.

For that view see Professor Allen in his book **'Law in the Making'** (1927) Clarendon Press, Oxford at page 491. In the case at hand it will be recalled, the intention of the Security of Employment Act was to create job security for employee and therefore it is very unlikely that the same legislature decided to take away that tenet of job security by section 40A(5) of the Act.

Thirdly, I entirely agree that any interpretation ought not to induce the court to do violence to well settled rules of construction, but it may properly lead to the selection of one rather than the other of two reasonable interpretations. Whenever the language of the legislature admits of two constructions (as in here) and if construed in one way would lead to obvious injustice, the courts act upon the view that such a result could not have been intended, unless the intention had been manifested in express words. In other words, the most favourable construction is to be placed on doubtful expressions. And so in here, the most favourable construction in favour of the doctrine of right



to work for an individual is to be preferred to that canvassed by the employer.

And finally, I have mentioned previously the introduction of the fundamental right of right to work in our Constitution vide Act Number 15 of 1984. The rules of construction hold that statutes which encroach on the ordinary rights of the subject should be interpreted if possible so as to respect such rights. The language of the statute shall be so construed that it will preserve the subject's rights unless express words or clear implication require the opposite result. The law regards with care the right of individuals and unless a statute restricts those rights by language beyond any reasonable doubt, they should be left untouched by the court. In the case at hand, the Security of Employment Act has not in a clear language conferred upon an employer the right to terminate the services of an employee in the face of an order of reinstatement. There is section 27 of the Act which is a cog in the wheel held by the employer".

The court, in that case did also consider the common law stand that specific performance in personal services contract cannot be ordered by courts. It stated:

> Then the ... counsel argued that it is the law that specific performance cannot be ordered in the case of personal services contracts. The common law holds that the court will not grant specific performance of a contract of personal services because this would entail forcing an unwilling person to continue a person's employment against the employer's wishes-see the case of *In Re Industrial Court Uganda Union and Clerical, Commercial Technical Employers* (10) (African Law Reports, Commercial Service). However I find that the defendant's contention cannot succeed. This is because the common law doctrine that specific performance cannot be granted for contracts of personal services has been superseded by legislation i.e. section 27 of the Security of Employment Act. The section clearly compels the court to implement specific performance and that is the law. The remedy of reinstatement was adopted apparently because it was recognized that financial compensation alone might not be adequate for a dismissed worker. Professor W. Szubert speaking of a similar Polish legislation which introduced the remedy of

reinstatement in Poland in 1956 in his work, "**Contract of Employment in Polish Labour Law**" (1962) 25 **Modern Law Review** 36 at page 43 state that:

> An employee may have a particular interest in keeping his former job on account of training facilities, opportunities for promotion, housing amenities or many other important reasons ... security of employment in the same undertaking is also in principle, generally speaking, preferable to a change of a job, which contributes to increased labour turnover.

The same applies to an employee of this country. Therefore there is a good case for remedy of reinstatement rather that of financial compensation.

I have quoted the court's observation at length in order to lay bare the basis behind the stand of the other school of thought.

Again, a year later (1988) Kyando. J., in *Nyigongo* case, held the same: That once ordered by Minister, reinstatement should be complied with by Employer.

However, unknown to the court then, (Mwalusanya, J. 10 July 1987, and Kyando, J. September 1988) earlier on, in the *Kavishe case (*citation already provided) the Court of Appeal (Omar, J.A.) had on 9 April 1987, found as follows:

> Looking at Labour Laws (Miscellaneous Amendments) Act 1 of 1975 which amends Employment Ordinance Chapter 366, there is section 40A which says that where a reinstatement or re-engagement has been ordered under the section and employer refuses or fails to comply with the order, the employer shall be liable to pay the employee compensation as contained in section 40A(5). So according to this section, the employer is not bound to receive the applicant back, even if the Permanent Labour Tribunal or Minister orders his reinstatement.

Of course reference was not made to section 27 as well hence we do not know what the court (Court of Appeal) would have said if it had so acted. Likewise we do not know what Mwalusanya, J. and Kyando, J., would have said if they had come across *Kavishe's* case.



Indeed, as pointed out by Mwalusanya, J., all the above point to the obvious: that there are two schools of thought on the matter. In my considered opinion, apart from the court of appeal decision, by which I am bound, I subscribe to the school of thought which holds that section 40A(5) removes the otherwise mandatory element contained in section 27 of the Security of Employment Act. I fully associated myself with the considerations analyzed by Justice Mwalusanya, J., regarding the **plight of a worker** but, with respect, my reading of sections 27 and 40A(5) convinces me that the legislature did not intend to make reinstatement mandatory. We can rightly challenge that the framers of section 40A(5) ought to have formulated it better, especially regard being had to the provisions of section 27 of the same Act was mainly to protect the workers against the notorious wrath of their employers. But this does not mean that the Employer's interests were not considered at all. I would think that the legislature, noting that section 27 was leaning unjustly on one side by not providing any breathing valve to an employer, decided to balance the interests of both employer and employee by giving the former an option **but in a punitive way**. I do appreciate that the statutory compensation and twelve month's salary prescribed , by all standards, is not enough, and more specifically, at this point in time, when it is not easy to get an employment nor to have any mark able utility for ones sustenance with a twelve month's salary. Neither can it act as a sufficient control on ruthless and uncompromising employers imbued in "fire and hire" doctrine, for, they would obviously go for statutory compensation and 12 month's salary. Also, as rightly argued by Mwalusanya, J., an employee may have other important considerations for keeping his job instead of monetary compensation.

All the above said however, with all respect to the other school of thought, I find nothing in the wordings of sections 27 and 40A(5) which support the view that reinstatement or statutory compensation is in the option of the Employee only. I gather support of my views from the opening words to section 40A(5), which run as follows:

> "Where a reinstatement or re-engagement has been ordered under this section and employer refuses or fails to comply with the order"

This words clearly show that the framer of this subsequent section (inserted into the Act vide a 1975 Amendment) was fully aware and conscious of section 27. The words "refuses" or "fails" clearly show that there are no mandatory elements implanted. What section 40A(5) simply says is that in the event of the employer "refusing" or "failing" to reinstate or re-engage he would be liable to pay statutory compensation and twelve months salary.

Further, my views are reinforced by yet another factor. I looked at the objects and reasons advanced in the Bill which inserted section 40A(5) in the Security of Employment Act but could find no support to the interpretation fronted by the other school of thought. The Bill gives object and reason for the amendment [The Labour Laws (Miscellaneous Amendments) Act 1975 – Act Number 1 of 1975) including insertion of section 40A(5). It states,

> The new section 40A gives the Conciliation Board power to order re-instatement or re-employment of an employee whose employment has been terminated on an unreasonable ground. If the employer refuses or fails to re-instate the employee, the employee will be entitled to an additional statutory compensation of an amount equal to twelve months' wages. A decision on reference under the proposed new section 40A may be appealed against to the Minister in the same manner as other decisions of a Conciliation Board.

I find no suggestion in the quoted words, that the legislature intended to prove what the other school of thought advances as being the true interpretation of section 40A(5). Apart from the above stand on the interpretation of the relevant section I have the following observations to make. While aware of the precarious position held by employees when dealing with the employers who obviously are of unequal muscle; and being appreciative of an individual's right to work, and the need to have a water-tight system in place to protect the weaker (employee), in my view, here, we should tread carefully and deal with the all round picture of the problem lest we



set into motion elements that will bring the system unto a knot and for no one's benefit including those who are supposedly intended to be served by the same.

Would the law make sense, for example, by mandatory ordering reinstatement, in a firm or corporation where the existing establishment no longer has a vacancy originally occupied by the litigating employee, good examples being where restructuring including redundancy, has taken place between the dismissal and Minister's order for reinstatement?

In my view, in its wisdom, the legislature, envisaging such and the like situations, where reinstatement would be meaningless not only to the employer but in some situations to the employee as well, in order to rhyme with common sense and avoid absurdity, inserted into the Security of Employment Act section 40A(5), to give an employer an option of paying the statutory compensation and twelve months salary as opposed to reinstatement.

The only quarrel one can justifiably launch against this provision is the inadequacy of the compensation. Twenty four months salaries instead of 12 would have been reasonable as this would enable a litigating employee enough financial cushioning while he is adjusting himself to new environment seeking an alternative life sustenance activity. With those observations, I hold that the respondent, the University of Dar es Salaam, was under no obligation to reinstate applicant, Mutungi. The respondent properly exercised its right under section 40A(5) of the Security of Employment Act by opting to pay just a statutory compensation and twelve months salary, although, I will shortly after, make further observation regarding the manner and style employed by respondent in meeting that obligation.

The above finding knocks off forthwith grounds 1, 2, 4 and 5 of the prayers contained in the chamber summons quoted in full at the beginning of this ruling.

Next we turn to prayer 3. I have already indicated that the prayer in this paragraph and the main submissions contradict each other. The figures indicated in paragraph 3 total up to TZS. 8 129 617 while the main submission shows TZS. 19 269 398 less TZS. 1 183 320 already paid.

I agree to say that, it would seem, the applicant's subsequent act of dropping the services of a counsel has led to his failure to prosecute properly his grievances as portrayed by the jumbled up chamber application and submissions. Clearly, the applicant has mixed and confused up what he believes he is entitled to. He mixes up what he believes he is entitled to as a compensation under section 40A(5) and what he believes he should be paid as arrears of his salary for the period between 1981, when he was dismissed, and when the employer decided not to honour the Minister's order. At the same time the respondent also mixed up the issue. It mixed up salary arrears and the compensation under section 40A(5). On page 2 of the respondent's submission we find the following:

"...the applicant was paid his terminal benefits as follow:

| | | |
|---|---|---|
| 1. | Net salary from November 1981 – October 1993 | 1 043 517-05 |
| 2. | Add Travelling Allowance, must Baggage – | 97 500-00 |
| 3. | Add 330 days leave | 70 864-85 |
| 4. | LESS special loan (code A. 1912) TZS. 22 961-55 minus | 28 516-50 |
| | Imprest (1166/034) | <u>TZS. 5 600-00</u> |
| | | TZS. 28 561-55 |
| | <u>NET PAY</u> | <u>TZS. 1 183 320-35</u> |

What do we gather from the above? The respondent paid salary arrears but did not pay the 12 months salary as per provisions of section 40A(5). The 12 months' salary under that provision is not for any particular period. The period indicated above (November 1981 – October 1993) is part of the period when applicant's services were



terminated and when he was still challenging the action at various levels and not the 12 months salary prescribed under section 40A(5). The Minister gave his decision on 5 May 1993. The respondent officially declared that it was not reinstating the applicant but would instead pay him the compensation, on 6 August 1993, vide its letter Ref. CP.ADM/2/95 whose part of the contents run as under:

> KUH: Karatasi ya 8 ya uamuzi wa waziri wa kazi katika shauri lako.
>
> Tafadhali rejea mazungumzo yetu Mkude/Mutungi ya tarehe 6 August 1993 kuhusu suala la uamuzi wa Waziri wa Kazi.
>
> Napenda kuthibitisha na kukuarifu kuwa hutarudishwa kazini na badala yake utalipwa mshahara wako kwa muda wote uliokuwa nje ya kazi yaani kuanzia tarehe 17 November 1981 hadi 9 October 1992 siku ambayo uamuzi wa kukurudisha kazini ulitolewa na mshahara wa mwaka mmoja kuanzia tarehe 10 October 1992 mpaka tarehe 10 October 1993, pamoja na marupurupu mengine unayostahili kwa mujibu wa masharti ya ajira.
>
> Sgd
>
> Professor DJ Mkude
>
> Afisa Mkuu Tawala

The letter points out three salient features: first, the applicant would not be reinstated; second, he would be paid his salary arrears since termination, and thirdly, he would be paid twelve months salary including other terminal benefits.

It is obvious that although the letter does not say so in so many words, the third feature falls under the compensation prescribed under section 40A(5) of the Security of Employment Act. Again, it is clear however that indicating that the twelve months' salary was for the period "10 October 1992 to 10 October 1993" is a misnomer, for as indicated earlier on, the twelve months' salary under section 40A(5) is pegged to no particular period. It is just a penalty to an employer for refusing to reinstate an employee. Again, the letter contains another error. The decision to have applicant reinstated was finally made by the Minister on 5 May 1993 and not 9 October 1992.

The latter date is when the Conciliation Board made the decision which was finally approved by the Minister. The controlling date therefore is the one when the controversy was finally decided and this was sealed off by the Minister's decision and not before. Again, it is obvious that an employee would still be counted to be in employer's employment for all the period since he was terminated till reinstatement on Minister's order or when the employer decides to exercise the option under section 40A(5). On the facts of this case therefore, the applicant would still be counted as respondent's employee till 6 August 1993 when it (respondent) officially informed him that he would be treated under the said section 40A(5) instead of reinstatement.

Now, if the applicant had been properly advised, instead of the jumbled up chamber summons and submission he should have launched his prayers by zeroing on the prayer to be paid, the statutory compensation and twelve months salary as provided under section 40A(5) and possibly, interest. He could not be heard to claim for salary arrears for which he concedes to have been paid as vividly proved unless he quarreled with the computation. He has not raised anything on that. He has not complained that the salaries for November 1981 to October 1993 did not total up to the figure stated. He only prayed to peg it to a US dollar. This however, is untenable because, he has already been paid. Allowing parties to file ancillary actions regarding claims they pocketed years back would be opening up the pandora's box from where all types of creatures, tempests and unquantifiable characteristics would creep and suffocate to death the fountains of justice. In any case, though included in the submission it does not form part of the prayers as per the chamber summons. On the facts of this case, what the applicant is justifiably entitled to is statutory compensation and twelve months salary as provided under section 40A(5) read together with section 35 of the Act. Section 35 provides:

> 35. The statutory compensation shall be:
>
> (a) such sum of money as shall be equal to the severance allowance due and payable to the employee on the termination of his employment; or



> (b) the sum of five hundred shillings, whichever is the greater:
>
> Provided that where, by reason of the provisions of subsection (2) of section 4, section 6 or section 7 of the Severance Allowance Act 1962, the employer is exempt from liability to pay severance allowance or the amount of severance allowance is reduced, there shall be substituted for the sum prescribed in paragraph (a) of this section such sum as shall be equal to the severance allowance that, but for the provisions of those sections or any of them, would have been payable to the employee on the termination of his employment.

(I should however observe that this law, as is the case with most of our laws, is very far behind times and needs to be rectified soonest. To what marketable use can TZS. 5 000 be put in modern times?)

What the parties are required to do it to look at the said provisions of the law, ascertain what guidelines are used in the computation thereunder, gauge the same to the amount which was paid to the applicant apart from the salary arrears and come up with a sum to which the applicant is now entitled. I shall also be categorical that the argument of pegging whatever sum that would be arrived at to the USD is again unsupportable because the cited provisions of the law do not make an allowance for such consideration.

I do appreciate that the statutory compensation and the twelve months salary under section 40A(5) was supposed to be paid to the applicant in a lumpsum in 1993. It was not paid in full. In fact, if anything, just very little sum was paid leaving out the major component; the twelve months' salary. While the respondent remained with that sum and obviously put it at its full utility, the applicant has missed enjoying his entitlement for years. This factor leans in favour of the applicant regarding his prayer for interest on the sum still due.

In conclusion, therefore, for reasons discussed, I find as under. The respondent was not obliged to reinstate the applicant. It rightly exercised the option provided under section 40A(5) of the Security of Employments Act by deciding to pay the compensation instead. The prayer for payment of salary arrears and pegged on US dollar fronted in the main submission did not from part of the prayers in the chamber application, hence can not be decided upon by this court. However, in passing as already indicated, I should observe that the said salary arrears was fully paid by the respondent as per its main submission and as conceded to by the applicant himself. At the same time, though opting to pay the same in compliance with section 40A(5), read together with section 35 the respondent did not pay in full the compensation to which applicant was entitled. Flowing from the latter, it is ordered that computation of the balance (which obviously include the twelve months salary) of the applicant's entitlement be made by the respondent in conjunction with the applicant, and the same be paid forthwith. As the respondent unjustifiably sat on applicant's entitlement for years it is condemned to pay interest on the unpaid sum at the rate of 10% per annum since 1993 till final payment. For the same reason, and also because the applicant has substantially succeeded in his prayers the respondent is condemned in costs. Application succeeds to the extent indicated

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# MOSOUD MOH'D MASOUD *v.* HASHIM AYOUB JAKU, EXECUTIVE SECRETARY COMMISSION FOR LAND AND ENVIRONMENT AND DIRECTOR GENERAL STONE TOWN CONSERVATION AND DEVELOPMENT AUTHORITY

HIGH COURT OF ZANZIBAR
AT ZANZIBAR

(Hamid M. Hamid, C.J.)

CIVIL APPEAL No. 22 OF 1999

(From the Regional Magistrate's Court, in Original Decree in Case No. 34 of 1995)

*Civil Practice and Procedure – Judgment – Default judgment in a suit with several defendants – One defendant fails to file defence and trial court pronounces judgment in favour of plaintiff – Then court proceeds to hear suit against the other defendant – Whether the proper procedure is complied with – Order XI, rule 12 Civil Procedure Decree Chapter 8.*

*Civil Practice and Procedure – Judgment – Same court pronounces two judgments in the same case –Whether trial was regular and valid.*

This appeal comes from the decision of the Regional Magistrate's Court which was in favour of the first respondent, Hashim Ayoub Jaku, who had sued the second and third respondents disputing the reallocation of a piece of land to the appellant. The second respondent appeared in the trial court but failed to file a written statement of defence and the court pronounced judgment in favour of the first respondent who was then the plaintiff. Thereafter the suit proceeded against the third respondent who was then the second defendant. Before the hearing proceeded the appellant, Masoud Moh'd Masoud, applied to the same court to be joined as the third defendant since he had interest in the land in dispute. His application was granted and he filed a cross suit asking the court to pronounce him the legal owner of the land in dispute. The appellant's claims were rejected and the Lower court went on to confirm the first respondent as the lawful owner of the disputed land, hence, this appeal.