

A and that the Uhuru newspaper is widely read in the country, if not also outside the country.

B The plaintiff complained that he had found difficulty to obtain employment after he was wrongfully terminated despite his senior status. He also complained that his own school going children were getting derisive queries from their friends because of the defamatory publications. But there was no proof that his failure to get a suitable job was directly attributable to the newspaper publications.

C All considered I think the plaintiff should be awarded a fair amount of damages, which I assess at TZS. ten million. He will also get his costs and the arrears of salary as well as the damages awarded to earn interest at the court rate until full payment.

D

E **GENERAL TYRE (E.A.) LIMITED v. PATRON SIAME
AND ANOTHER**

F **HIGH COURT OF TANZANIA
AT ARUSHA
(Mkwawa, J.)**

CIVIL APPEAL No. 29 OF 1997

G (From the Court of the Resident Magistrate of Arusha, in Employment Cause No. 10 of 1997)

H *Labour Law – Security of Employment Act – Order to reinstate an employee given by a competent authority – Whether the employer has option not to reinstate – Options available to the employee – Sections 27(1) and 40A(5)(b) of the Security of Employment Act.*

I After the Minister's order that the appellant employer should reinstate the respondent employees the employer decided to pay them statutory compensation. The employees referred the matter to court in order to enforce the Minister's decision. The trial court magistrate ordered the employer to pay the statutory compensation and salaries

A and allowances that were in arrears. The employer appealed to the High Court challenging the jurisdiction of the trial court. The High Court considered whether or not after a reinstatement order by a competent authority the employer may opt to pay statutory compensation; it also considered the options open to an employee after an order of reinstatement. B

Held: (i) An employer cannot, at his own initiative, choose to pay his aggrieved employee statutory compensation and twelve months salary as an alternative to complying with the Minister's or the Board's decision and order of reinstatement; C

(ii) Where the Minister or the Board has ordered 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 Security of Employment Act to have the order executed as if it was a decree, or he can claim statutory compensation and twelve months salary as provided under section 40A(5) of the Act; D

(iii) Where an employee opts for payment of statutory compensation and twelve months' salary he does not become entitled to allowances and/or other benefits.

Orders accordingly E

Editorial Note: With the coming into force of the Employment and Labour Relations Act 2004, Act Number 6 of 2004, an employer has a right to opt to pay statutory compensation and twelve months' salary *in lieu* of reinstating or re-engaging an employee; and an employee is entitled, in addition to statutory compensation and twelve months' salary, to wages due and other benefits from the date of the unfair termination to the date of final payment [section 40(3) of the Labour Relations Act 2004] F G

Cases referred to:

- (1) *Mahona v. University of Dar es Salaam* [1981] T.L.R. 55
- (2) *Juma Ally Kaziyaure v. Tanzania Posts and Telecommunications Corporation* [1994] T.L.R. 1 H
- (3) *Obadiah Salehe v. Dodoma Wine Company Ltd*, HC – DOM Civil Case Number 53 of 1990 (unreported) I

A Statutory provisions referred to:

- (1) of the Security of Employment Act, sections 27(1), 40A(5) and 40A(5)(b)
 (2) Labour Relations Act 2004, section 40(3)

B *Mr Ngalo*, for the Appellant

Mr Makange, for the Respondent

C JUDGMENT

(Delivered 19 June 1998)

D **MKWAWA, J.:** This appeal is against the decision of the Court of the Resident Magistrate of Arusha in Employment Cause Number 10 of 1997. The facts of the case may be briefly stated as the questions to be decided are purely legal and in my view require very careful treatment.

E It is common ground that Patron Siame and Kaanarl William, hereinafter to be referred as the respondents, were employed by
 F General Tyre E.A. Limited (the appellant). According to the version of the respondents it has been established that they were terminated
 G from employment in July 1994. The respondents being aggrieved by the termination they challenged it through the Labour Conciliation Board which ordered their reinstatement. Being aggrieved by the decision of the Labour Conciliation Board the instant appellant preferred an appeal to the Minister for Labour – who rejected the appeal.

H It is not in dispute between the parties that instead of the appellant reinstating them he decided to pay them statutory compensation. The respondents rejected this and decided to refer the matter to the trial court in order to enforce the decision of the minister. This they did in the aforesaid Employment Cause Number 10 of 1997.

I It is the respondents' case, if I may put it in a nutshell, that the appellant who was the employer has no option to refuse to reinstate

A the respondents/employees under the provisions of section 40A of the Security of Employment Act (Chapter 574). It is also the respondents' case that the decision of reinstatement of the Minister shall be final and conclusive and shall be binding on the parties.

B The trial magistrate in his decision had, *inter alia*, ordered the employer/appellant to pay the respondents/employees "3 months' notice and 12 months' salaries as statutory compensation." He further held that in computing statutory compensation the salary ought to be the employee's present salary and not the one which he was receiving immediately before termination. He did not end up there as he awarded salary and allowances that were in arrears.

D The appellant on the other hand impugns the aforesaid decision and in essence argues that the Court of the Resident Magistrate had no jurisdiction to hear and determine a matter which had been heard and finally concluded by a competent tribunal vested with the powers to deal with the matter. It is also the appellant's case that the respondents' entitlements were only those provided under the provisions of section 40A(5) of the said Act, namely statutory compensation and 12 months' salary.

F The case for the appellant before me was advocated upon by Mr Ngalo whereas that of the respondents by Mr Makange. The learned counsel, with the leave of the court, pursued their appeal by way of written submissions. It is not irrelevant to mention that going by the submissions both learned counsel had only canvassed the issue of jurisdiction, namely whether the trial court had jurisdiction to entertain the matter brought under Employment Cause Number 10 of 1997.

H The learned counsel for the appellant in essence contends that as the decision of the Minister was final the matter should not have been entertained by the trial court.

I It is also the argument of Mr Ngalo that the trial court in considering and determining the matter raised before it by the respondents failed to invoke the provisions of section 40A of the Security of Employment Act.

A In rebuttal Mr Makange, learned advocate for the respondents, counter-submitted to the effect that as the appellant had not complied with the reinstatement order of the Minister the matter had to be referred to the court for adjudication.

B As neither side had in their submissions addressed themselves to the pertinent legal issues arising from the provisions of section 40A(5) of the said Act (Chapter 574), namely whether under the said provisions of the law an employer has an option to refuse to reinstate an employee, C I feel it appropriate to do so for the interests of justice. In my view, with respect to the counsel, the foregoing and not what has been raised by them was the central issue in this matter.

D It is not without significance to mention that there are two schools of thought propounded by the High Court on the aforementioned. The first school of thought is that advocated by Kisanga, J. (as he then was) in *Mahona v. University of Dar es Salaam* (1), which holds that the employer has the right to refuse to reinstate the employee E so long as he pays the statutory compensation plus twelve months' wages.

F The second school of thought holds that the employer has no right to refuse to reinstate an employee when there is an order of reinstatement (See: *Juma Ally Kazyabure v. Tanzania Posts and Telecommunication Limited* (2) per Msumi, J. as he then was, and *Obadiah Salehe v. Dodoma Wine Company Limited (Dodoma)* (3) Mwalusanya, J.

G The exponents of the second school of thought are of the view that: "where the Minister or 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) H 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 I not the offending employer. An employer cannot at his own initiative

A choose to pay his aggrieved employee, statutory compensation and 12 months salary as an alternative to complying with the Minister's or boards' decision of reinstatement".

B On my part I subscribe to the second school of thought because, as also subscribed by Mwalusanya J., it does interpret the said Act (Chapter 574) as a whole (combining sections 27 and 40A(5) unlike the decision in *Mahona* (1) which interprets section 40A (5) in isolation.

C In the instant case the respondents went to the trial court but they did not do so to have the order of the Minister executed, as if it were a decree, under the provisions of section 27(1) of the said Act. Unfortunately, the trial court instead of proceeding under section 27(1) of the said Act purported to proceed the *Mahona's* way (1). D But again, it exceeded the perimeters of the *Mahona's* case by awarding salary arrears and various allowances to the respondents.

E For the foregoing reasons I am unable to sustain the decision of the trial court as the provisions of section 40A(5) (b) of the Security of Employment Act (as amended by Act Number 1 of 1975) provides that the aggrieved employee is entitled, from the offending employer, F to statutory compensation and twelve (12) months' salary only.

G The said law had impliedly and in fact deliberately excluded payment of allowances and/or other benefits. In other words allowances are not encompassed in the Act. But, that does not mean that the employee is not entitled to damages if he is not reinstated. (See: *Dodoma Wine Company Limited's* (3) case per Mwalusanya, J).

H In the event, the award of allowances and other benefits to the respondents, being illegal, is hereby set aside. For the avoidance of doubt the computation of salary should be based on the salary that the respondents were receiving at the time the Minister ordered reinstatement.

I The appeal is thus allowed to the aforesaid extent only but fails in other respects. In the peculiar circumstances of this case, I consider

A it proper to make no order as to costs. But should either party wish to press for costs, I am quite prepared to hear him in such respect.

B

**NATIONAL INSURANCE CORPORATION v.
KWEYAMBAH QUAKER**

C

**COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(Lubuva, Samatta and Lugakingira, JJ.A.)

D

CIVIL REFERENCE No. 25 OF 1997

(From the Ruling of a single judge of the Court of Appeal of Tanzania, Kisanga, J.A., dated 6 November 1997, in Civil Application No. 59 of 1997)

E

Appeal – Appeal to the Court of Appeal – Notice of Appeal and Jurisdiction of the High Court – Effect of lodging a Notice of Appeal on the jurisdiction of the High Court – Whether the High Court still has jurisdiction over a matter after Notice of Appeal to the Court of Appeal is lodged in respect of the same – Rule 76(1) of the Tanzania Court of Appeal Rules 1979.

F

Appeal – Notice of Appeal – Notice of Appeal to the Court of Appeal – Withdrawal of Notice of Appeal – Statutory provisions for withdrawing Notice of Appeal.

G

Appeal – Notice of Appeal – Notice of Appeal to the Court of Appeal – Withdrawal of Notice of Appeal – Whether Notice of Appeal is withdrawn by intimating to the High Court that appellant is withdrawing the notice.

H

Appeal – Appeal to the Court of Appeal – Institution of appeal – Whether an appeal to the Court of Appeal is instituted by Notice of Appeal – Appeal and Notice of Appeal distinguished – Rules 2(1), 76 and 83(1) of the Tanzania Court of Appeal Rules 1979.

I

Two applications by the applicant, one to set aside an *ex-parte* judgment and the other to stay execution of that judgment, were dismissed by the High Court. Then, on 4 June

1997, the applicant filed an application for extension of time to file a fresh application to set aside the *ex-parte* judgment, and also filed a fresh application for stay of execution. But a week later, on 11 June 1997, he lodged a Notice of Appeal against the *ex-parte* judgment. And then on 4 July 1997, he filed a Certificate of Urgency in the High Court for urgent disposal of the applications filed on 4 June 1997, and indicating that he was withdrawing the Notice of Appeal. The respondent's view was that the Notice of Appeal had not been withdrawn and, because 60 days had passed since it was lodged and the applicant had not taken steps to proceed with the appeal, he lodged a Notice of Motion to strike out the Notice of Appeal; a single judge of the Court of Appeal granted the Motion. The applicant then brought this reference to the full court. Among the issues considered on reference were whether the High Court still had jurisdiction to proceed with the applications filed on 4 June 1997 after the Notice of Appeal had been lodged on 11 June 1997, and whether the Notice of Appeal was effectively withdrawn by the applicant's intimation to that effect made to the High Court on 4 July 1997.

Held:(i) A Notice of Appeal is addressed to the Court of Appeal and the provision in rule 76(1) of the Tanzania Court of Appeal Rules 1979 for lodging the notice "with" the Registry of the High Court does not mean that the notice is lodged in the High Court; the High Court Registry is merely a transmitting agent for the Court of Appeal;

(ii) Once a Notice of Appeal has been lodged, any dealing with or in connection to it can only be transacted in the Court of Appeal; as the intimation to withdraw the Notice of Appeal in this case was directed to the High Court, it was ineffectual and the notice subsisted;

(iii) A Notice of Appeal removes a case from the High Court to the Court of Appeal and rule 76(4) of the Tanzania Court of Appeal Rules 1979 under which the High Court exercises jurisdiction to grant leave to appeal even after a Notice of Appeal has been lodged does not serve to bring back to the High Court a matter already before the Court of Appeal;

(iv) By lodging a Notice of Appeal the applicant thereby abandoned the applications lodged in the High Court for the ultimate setting aside of the *ex-parte* judgment and for staying its execution, and resolved instead to appeal against the merit of that judgment; in the absence of an effective withdrawal of the notice, the applicant could not go back to those applications;