GEORGE BARABARA AND 240 OTHERS *v.* MINISTER FOR LABOUR AND YOUTH DEVELOPMENT, INDUSTRIAL COURT OF TANZANIA AND THE ATTORNEY GENERAL

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

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

CIVIL APPEAL No. 27 OF 1998

(From the Ruling of the High Court of Tanzania at Dar es Salaam, Mapigano, Mkwawa and Bubeshi JJ., dated 24 October 1997, in Miscellaneous Civil Cause No. 30 of 1975)

Labour Law – Retrenchment of employees – Minister's decision to confirm retrenchment faulted by the High Court – Whether High Court automatically bound to issue the orders of mandamus and certiorari.

Prerogative Orders – Application for orders of certiorari and mandamus and certiorari – High Court finds that the Minister's decision is legally erroneous – Whether High Court has discretion not to grant the orders.

The appellants were former employees of Shirika la Usafiri Dar es Salaam (UDA). On 9 May 1992 the Management of UDA recommended to the Board of Directors a retrenchment of between 250 and 300 employees of the company on grounds of redundancy. The Board of Directors accepted and sanctioned the recommendation. A month later the Management held a joint meeting with the Field Branch of the trade union, OTTU, whereat the employees were informed of the Board's decision to retrench them. The decision was implemented after it was approved by the OTTU district authorities. The appellants were dissatisfied with the exercise alleging that the retrenchment was effected in contravention of section 6(1)(*g*) of the Security of Employment Act 1964. The matter was finally referred to the Minister who dismissed the appellants' complaint. The appellants took up the matter to the High Court which impeached the Minister's decision for being legally erroneous but refused to grant the orders of *certiorari* and *mandamus*. On appeal;

Held: (i) The decision of the Board was obviously illegal for contravening the provisions of section 6(1)(g) requiring the Management to consult with the Field Branch before taking the decision whether or not to reduce the workforce;

(ii) If the decision of the Board ran foul of section 6(1)(g) of the Security of Employment Act 1964 this means that in law the purported decision of the Board was no decision at all, a nullity, amounting to no decision having been taken to reduce the workforce;

(iii) The High Court rightly faulted the decision of the Minister which upheld the illegal decision of the Board of Directors;

(iv) It is not in every case that illegality will exclude the exercise of the court's discretion, but the decision will depend on the circumstances of each individual case; in some cases the court may exercise discretion to refuse granting relief even though the impugned decision or order is shown to be illegal or unlawful;

(v) In the circumstances, therefore, it would be idle to grant relief while it is clear that the end result will be the same (that is, even if consultation in the legal sense had taken place).

Appeal dismissed

Cases referred to:

1) *Hamisi Ruhondo and 115 others v. Tanzania Zambia Railway Authority,* Civil Appeal Number 107 of 1986 (unreported)

2) *Republic v. Monopolies and Mergers Commission and another* [1986] 2 All ER 257

Statutory provision referred to:

1. Section 6(1)(g) of the Security of Employment Act 1964

Mr Kashumbugu, for the Appellants

Mr Mallaba, for the Respondents

JUDGMENT

(Dated 6 October 2000)

Kisanga J.A.: This appeal arises from the decision of the Full Bench of the High Court (Mapigano, Mkwawa and Bubeshi, JJ.) refusing to issue the orders of *certiorari* and *mandamus*. The background to the matter may be stated very briefly as follows: The appellants are former employees of Shirika la Usafiri Dar es Salaam, a parastatal organization popularly known by its acronym UDA. On 9 May 1992 the Management of UDA addressed to the Board of Directors of UDA a recommendation to retrench between 250 and 300 employees of the company on the grounds of redundancy. The proposal or recommendation had issued in the wake of a circular letter from the Government (Treasury Department) requiring parastatal organizations to embark on a restructuring exercise or programme, including cutting down the workforce, aimed at making the organizations operate commercially. The Board of Directors accepted and sanctioned the recommendation. Then a month later, for example, on 9 June 1992 the Management held a joint meeting with the Field Branch of the trade union organization (OTTU) whereat the Management informed the Field Branch of the Board's decision to cut down the workforce. The joint meeting then went on to discuss the details of whom to retrench, and at the end of the exercise it came out with a list of 241 employees who were accordingly served with their respective letters of termination of employment with the company. The decision to retrench was implemented after it was approved by OTTU district authorities, and in the course of implementing it the appellants were also given their terminal dues. Dissatisfied with such termination, the employees took the necessary legal steps and had the dispute referred to the Industrial Court for inquiry. After making the inquiry the court duly submitted its report to the Minister for Labour (The first respondent). On the basis of such report the Minister found that the appellants' complaint had no merit and dismissed it. Accordingly

the dismissal was duly registered by the Industrial Court (The second respondent) as an award.

The gravamen of the appellants' complaint to the Minister was that the termination of their employment was effected in contravention of section 6(1)(*g*) of the Security of Employment Act 1964 Chapter 574 which says:

> 6(1) The functions of a Committee in, and in relation to, the business for which it is established are:
>
> (a) ...
>
> (b) ... to ... (f)
>
> (g) to consult with the employer concerning any impending redundancies and application of any joint agreement on redundancies

It was contended for the appellants that the decision to reduce the workforce was taken by the UDA Board of directors before there was any consultation between the Management and the Field Branch of the trade union (OTTU) as required by this sub-section. In support of this contention reference was made to the decision of this Court in the case of *Hamisi Ruhondo and others v. Tanzania Zambia Railway Authority* (1) which interpreted the above sub-section to mean, in effect, that upon the issue of impending redundancy arising, the management is to consult with the Field Branch of the trade union (in this case OTTU), and that such consultation must take place before the decision whether or not to retrench is taken. For the appellants, therefore, it was submitted that since in the instant case the decision to reduce the workforce was taken by the Board before holding any consultations between the Management and the Field Branch of OTTU in terms of the above quoted sub-section, then the said decision of the Board was void a*b initio*.

However, the Minister rejected the argument. He found that the consultations which were held between the Management and the Field Branch of OTTU one month after the Board's decision to sanction the retrenchment was sufficient for the purpose of section 6(1)(*g*). Referring to *Ruhondo's* case he brushed it aside simply by saying that it was distinguishable and that it had no application or relevance to this case. As stated earlier this was duly registered by the Industrial Court as an award. However the appellants were dissatisfied, and they applied to the High Court for the prerogative orders of *certiorari* and *mandamus*: An order of *certiorari* to remove into the High Court and quash the decision of the Minister registered by the Industrial Court as an award, and an order of *mandamus* to compel both the Minister and the Industrial Court to exercise their respective jurisdictions in accordance with the law.

The High Court had no difficulty at all in faulting the decision of the Minister. The court found that the Minister took a distorted view of section 6(1)(*g*) by putting on it an interpretation which was at variance with that put on it by this Court in *Ruhondo's* case which was indeed binding on the Minister. After exposing the flaw in the Minister's handling of the issue the court concluded:

> In the result, we find that the decision of the Minister was legally erroneous

However, despite such finding the court declined to issue *certiorari* and *mandamus* because in its view the circumstances of the case were such as did not warrant the exercise of its discretion in favour of granting the orders. As intimated earlier, it is from that decision that this appeal now arises.

In this appeal the appellants are represented by Mr D Kashumbugu, learned advocate while Mr Mallaba, Principal State Attorney, advocated for the respondents, the Minister for Labour, the Industrial Court and the Attorney General. Mr Kashumbugu filed and argued three grounds of appeal. His main ground of complaint, however, is to the effect that the High Court, having held that the Minister's decision was legally erroneous, wrongly declined to grant the orders of *certiorari* and *mandamus*, as prayed. In other words by faulting the Minister's decision, as it did, the High Court was, in effect, saying that the termination of the appellants' employment on the grounds of redundancy

was illegal as it contravened the provisions of section 6(1)(*g*) requiring the holding of consultations between the Management and the Field Branch of OTTU before the decision whether or not to retrench was taken. Thus, Mr Kashumbugu concluded, the High Court ought to have quashed the Minister's decision which purported to uphold such illegal termination of the appellants' employments.

Responding to these submissions Mr Mallaba readily agreed with the High Court in faulting the decision of the Minister as shown above. However, he contended that the High Court, having thus faulted the Minister's decision, had discretion whether or not to grant *certiorari* and *mandamus*, and that in this particular case that discretion was properly exercised to refuse granting those orders.

We have carefully considered the arguments adduced by counsel for both sides. It is fairly apparent that the question falling for consideration and determination in this appeal is a narrow one and it is this: What was the effect of the finding by the High Court that the decision of the Minister was legally erroneous? First of all we agree with counsel for both sides that the High Court rightly faulted the decision of the Minister which upheld the illegal decision of the Board of Directors. The decision of the Board was obviously illegal for contravening the provisions of section 6(1)(*g*) requiring the Management to consult with the Field Branch of OTTU before the decision whether or not to reduce the workforce was taken. If the decision of the Board ran foul of section 6(1)(*g*) this means that in law the purported decision of the Board was no decision at all. It was a nullity. It amounted to saying that in law no decision had been taken to reduce the workforce. In such circumstances then can the High Court be said to have discretion in the matter? That is, did it have the option whether or not to quash a purported decision which did not in law exist? Admittedly the question is not an easy one.

According to Mr Kashumbugu, the purported decision by the Board of Directors to reduce the workforce on grounds of redundancy was illegal for non-compliance with a statutory requirement. Such an illegal decision should not be allowed to stand. It should be set aside, with the result that in law no redundancy exercise has taken place and the appellants are still the employees of UDA. Learned counsel seems to take the view that once the court found that the Directors' decision was illegal then the question of discretion did not arise; the court had no option but to quash such decision. With due respect to the learned counsel we think this is not correct. In our view, it is not in every case that illegality will exclude the exercise of Court's discretion. The decision on that question will depend on the circumstances of each individual case. In some cases the court will exercise discretion to refuse granting relief even though the impugned decision or order is shown to be illegal or unlawful.

For instance, in the English case of *Republic v. Monopolies and Mergers Commission and another* (2), the chairman of a Commission took a decision alone on a certain matter contrary to a provision of the law which required such a decision to be taken by a group of members of that Commission. The Court of Appeal found that the chairman had no power under the relevant law to take the decision alone. In other words the chairman lacked jurisdiction and therefore he acted unlawfully. The court, however, exercising its discretion refused to grant review of the decision on the grounds, *inter alia*, that a group of members of the Commission considering the matter would have reached the same conclusion as did the chairman, and further that third parties had already acted in reliance on the Chairman's decision.

In the instant case, the Trial Court found, and this is fully supported by the evidence on record, that the fact of redundancy and the need to reduce the workforce of UDA was beyond controversy. It is equally true that the Board of Directors acted illegally or unlawfully in that it had no power under section 6(1)(*g*) of the Act to decide on retrenchment before the Management held consultations with OTTU Field Branch on the matter. That is to say the Board's decision was illegal or unlawful for non-compliance with section 6(1)(*g*) of the Act. But the pertinent question is whether the Board's decision would have been different

if it were taken after holding consultations between the Management and the OTTU Field Branch. There is nothing whatsoever in the record to suggest that the decision would have been different. For, it is inconceivable that prior consultations between the Management and OTTU Field Branch would have led to a different recommendation to the Board, having regard to the ailing economic condition of UDA. Indeed the fact that the OTTU District Authorities approved the retrenchment re-inforces the view that the Board's decision would have been the same even if it were taken after the consultations in question were held. In the circumstances, therefore, it would be idle to grant relief when it is clear that the end result will be the same.

Secondly, once it was accepted that the workforce of UDA must be reduced because the size of UDA's fleet of buses had diminished greatly, it would be of no practical value to grant relief because UDA will have no jobs for the appellants, and since there is no employment to generate services there can be no money to pay their salaries. The problem is aggravated by the time lapse involved. The retrenchment took place way back in 1992 and the appellants' ultimate relief sought is re-instatement from that date. Given the poor financial position of UDA as demonstrated by the evidence on record the relief sought, if granted, will be largely or wholly academic; the practicability of its enforcement is a matter for grave doubt. It would be imprudent for the court to grant relief the enforceability of which is so highly in doubt.

In the result we see no reason to interfere with the decision of the High Court. We are satisfied that the court had discretion in the matter and that discretion was properly exercised to refuse the reliefs sought. We accordingly dismiss the appeal with costs.