

TANZANIA / JUDGMENT

remigious muganga vs barrick bulyanhulu gold mine 2018 tzca 220 3 october 2018

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IN THE COURT OF APPEAL OF TANZANIA AT MWANZA (CORAM: JUMA. CJ.. MWARIJA, 3.A. And NDIKA J.AT CIVIL APPEAL NO. 47 OF 2017 REMIGIOUS MUGANGA APPELLANT VERSUS BARRICK BULYANHULU GOLD M IN E..... RESPONDENT (Appeal from the Ruling and Order of the High Court of Tanzania (Labour Division) at Mwanza) (Nverere. JT dated the 24th day of July, 2015 in Reference No. 11 of 2015 REASONS FOR RULING MWARIJA. 3.A.: On the 26th day of September 2018, we heard a preliminary objection filed by the learned counsel for the respondent in this appeal. The respondent challenged the competence of the appeal by raising a preliminary objection which consisted of two grounds that: "(i) ... the appeal is incom petent as it was lodged without leave thus in contravention o f section 5(1) (c) o f the Appellate Jurisdiction Act, Cap. 141 R.E. 2002. i (ii) ... the appeal is not grounded on points o f law the same is (sic) incom petent and against the requirem ent o f section 57 o f the Labour Institutions Act, 2004." At the hearing of the preliminary objection on the said date, the appellant appeared in person, unrepresented while the respondent was represented by Mr. Silwani Galati Mwantembe, learned counsel. Having heard the submission made by Mr. Mwantembe in support of the preliminary objection and the appellant's reply submission, we overruled the objection and reserved the reasons for our decision, which we now give. As stated above, the objection was based on two grounds. Arguing in support of the first ground, the respondent's counsel submitted that the appeal is incompetent because it was filed without the leave of the High Court or of this Court. He relied on the provisions of S.5 (1) (c) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002] (the AJA). As regards the application of S. 57 of the Labour Institutions Act, Cap 300 (the LIA), which does not make leave to appeal a condition precedent for an appeal arising from a decision of the High Court 2 (Labour Division) (hereinafter "the Labour Court"), Mr. Mwantembe argued that, from the nature of the proceeding giving rise to the impugned decision, that section does not apply. He contended that, he is alive to the settled position of the law as laid down by the full bench of the Court in the case of Tanzania Teachers Union v. The Chief Secretary & 3 others, Civil Appeal No. 96 of 2012 (unreported); that an appeal arising from a decision of the Labour Court does not require leave. He submitted however that the position does not apply to the case at hand. The reason, he said, is

that the impugned ruling does not fall within the category of the decisions envisaged under S. 57 of the LIA. According to the learned counsel, this is because, the impugned ruling arose from an execution proceeding which was preferred under the Civil Procedure Code [Cap. 33 R.E. 2002]. Elaborating, Mr. Mwantembe submitted that the ruling arose from Application No. 1 of 2010 in which the appellant had applied for execution of the award issued by the Commission for Mediation and Arbitration (CMA) in Dispute No. CMA/SHY/26/2010. The appellant was aggrieved by the ruling of the Registrar of the Labour Court and therefore, unsuccessfully appealed to 3 the High Court hence the appeal to this Court, the subject matter of the preliminary objection. The argument by Mr. Mwantembe is that the ruling, which gave rise to the impugned decision of the Labour Court, arose from execution proceeding preferred under 0. XXI rr.9 and 10 of the CPC and thus a decision which is distinct from those which arise from other labour legislation, including the LIA. In the circumstances, he said, the applicable provision as regards the present appeal is S. 5(1) (c) of the AJA. Relying on the words "... except where any other written law for the time being in force provides otherwise..." of that section, the learned counsel argued that because S. 57 of the LIA does not exempt the decisions of the High Court, made under the CPC from the requirement of leave as stipulated under S.5 (1)

- (a) and (c) of the AJA, the appellant ought to have complied with that requirement. On the 2nd ground, which was argued in the alternative to the 1st ground, Mr. Mwantembe submitted that the grounds of appeal contained in the appellant's memorandum of appeal are not based on points of law as required by S. 57 of the LIA. He contended that, in his grounds of 4 appeal, the appellant challenges the decision of the High Court on matters of fact, mainly on whether or not the appellant was paid the correct amount of money as his terminal benefits. On his part, as he was unrepresented, the appellant did not have much to advance in his reply by way of legal arguments. Resisting the preliminary objection, he argued, on the first ground, that leave to appeal is not a requirement under S. 57 of the LIA and therefore his appeal was properly filed. To support his argument, he cited the decision of the Labour Court in the case of Elifazi Ntatega & 3 Others v. Caspian Mining Ltd, Miscellaneous Labour Application No. 34 of 2015 and the decision of this Court in the case of Chama Cha Walimu Tanzania v. The Attorney General, Civil Application No. 15 of 2008 (both unreported). On the second ground, although he did not expressly state so, the appellant agreed that grounds 1-4 of the appeal are based on matters of fact. He argued however, that notwithstanding that position, the Court should consider to exercise its revisional jurisdiction under S. 4(2) the 5 AJA to revise the decision of the Labour Court with a view of correcting the irregularities complained of in the appeal. We have duly considered the submission of the learned counsel for the respondent and the appellant's reply. With regard to the 1st ground, in determining whether or not the appellant required leave, we find it instructive to reproduce S. 5(1) (a) (b) and (c) of the ADA which states as follows: "5-(1) In Civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall be to the Court of Appeal

- (a) against every decree, including an ex parte or preliminary decree made by the High Court in a suit under the Civil Procedure Code, in the exercise of its original jurisdiction;
- (b) against the following orders of the High Court made under its original jurisdiction, that is to say-
 - (i) - (ix)N/A
- (c) with leave of the High Court or of the Court of Appeal, against every decree, order judgment or finding of the High Court." The crux of Mr. Mwantembe's argument in this ground is that, since the application leading to the impugned decision was taken under the CPC, the appeal process is governed by the AJA. It was the learned counsel's contention further that, since the ruling was not made by the High Court under its original jurisdiction, the appellant ought to have obtained leave under S.5 (1) (c) of the AJA before he instituted the appeal. It was on the basis of that submission that the respondent's counsel urged us to find that, under the circumstances of this case, S. 57 of the LIA is not applicable. It is common ground that appeals to this Court against the decisions of the Labour Court are governed by S. 57 of the LIA which provides as follows; "Any party to the proceedings in the Labour Court may appeal against the decision of that Court to the Court of Appeal of Tanzania on a point of law only." Having applied the ordinary and plain meaning principle of statutory interpretation to this provision, we are of the view that, although Mr. Mwantembe's arguments are impressive, we are unable to agree with him that the appellant was required to obtain leave before he lodged the appeal. The section, gives a party to "the proceedings in the Labour Court" unfettered right to appeal to this Court. The provision does not restrict that right to the decisions made under any specified laws. It allows a party to the proceedings conducted in the Labour Court to appeal regardless of the law under which those proceedings were based. The only restriction is that the appeal must be on a point of law only. The section is couched in a way that it accommodates any proceeding conducted in the Labour Court. It is for this reason that, in the case of Tanzania Teachers Union (supra), we stated as follows: "where there are provisions of written laws like the LIA which provide the right of appeal that is unfettered by the requirements of leave to appeal, the unfettered provisions should not be made subject of the requirement of leave under sections 5(1) (c) of the AJA." In that case, in which the conflicting decision on the requirement of leave for appeals originating from the Labour Court were considered and the position settled as pointed out above, the Court cited with approval the decision in the case of Bulyanhulu Gold Mines (T) Ltd v. Nichodemus Kajungu and 1151 Ors; Civil Application No. 37 of 2013 (unreported). The following passage from that decision was quoted: "we are constrained to emphasize at this stage that a statute should not in the absence of any express provision, be construed so that it deprives people of their accrued rights, and that in fact it is the duty of the court to give sensible meaning with a view of promoting the employment of such rights instead of narrowing them down. In other words, we are duty bound to interpret the law accommodatively with a view of expanding its frontiers rather than narrowing frontiers, the purpose being to see to it that the

procedure is reasonable, fair and just. That way, we think, we will have invested the provision with sound reasoning and content." On the basis of the considerations made above, it is our view that the section allows a party, who is aggrieved by any appealable decision arising from the proceedings of the Labour Court, to appeal without recourse to the provisions of S. 5 (1) (c) of the AJA, notwithstanding that the proceeding giving rise to that decision was taken under the CPC. 9 With regard to the second ground of the preliminary objection, which was argued in the alternative to the 1st ground, the same is based on the condition imposed by section 57 of the LIA that an appeal to this Court against a decision of the Labour Court must be on a point of law only. In his memorandum of appeal, the appellant has raised the following five grounds of appeal: " 1. That, the learned High Court Judge was wrong to hold that the Application for Execution No. 1 Of 2010, which was decided by Hon. Gwae, Registrar (as he then was) arose from Labour Dispute No. CMA/SHY/68/2010 and Revision No. 2 of 2010.

2. That, the learned High Court was wrong to hold that the current dispute involved only 5 employees in the CMA at Shinyanga.
3. That, the learned High Court Judge erred in law and in fact to hold that the respondent pair repatriation allowance and subsistence allowance to the appellant on time during the retrenchment exercise and that the appellant cannot claim that again.
4. That, the learned High Court Judge erred in law to confirm the decision of Hon. Gwae, Registrar (as he then was), that the appellant is entitled to Tshs. 6,953,55/= only.
5. That, the decision of the learned High Court Judge and that of the Registrar were procured by the respondent illegally, by fraud and by perjury as the respondent deliberately suppressed the true facts and manufactured fake ones." Indeed, grounds 1 - 4 are based on matters of fact. The appellant is challenging the statement of the factual background of the application for execution as stated by the learned High Court judge and the quantum of the award made on the appellant's claims. The appellant did not dispute that the four grounds are not based on points of law. He submitted however, that the same should be considered by the Court in the exercise its revisional powers. By that argument, the appellant wants these grounds to remain in the memorandum of appeal so that, in the course of hearing the appeal, the Court should invoke its revisional jurisdiction to consider them. In our considered view, that argument is not tenable. S. 57 of the LIA provides in mandatory terms that an appeal arising from a decision of the Labour Court must be based on a point of law only. ii Now therefore, since grounds 1 to 4 are based on matters of fact, the same offend that provision. The irregularity cannot be cured by turning them into grounds of revision. In the circumstances, despite disregarding the 1st- 4th grounds of appeal, the Memorandum of appeal survives because the 5th ground is based on a point of law. It was on the basis of the reasons stated above that, after having heard the parties, we overruled the preliminary objection for lack of merit. DATED at MWANZA this 3rd day of October, 2018. I. H. JUM A CHIEF JUSTICE A. G. MWARD A JUSTICE OF APPEAL G. A. M. NDIKA JUSTICE OF APPEAL I certify that this is a true copy of the original. A/V[Aaaau{ S. J. Kainda - DEPUTY REGISTRAR

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