

UGANDA / JUDGMENT

Mavunwa Edison and Another v Uganda Electricity Generation Company Limited (Civil Appeal No. 96 of 2004) [2008] UGCA 29 (1 January 2008)

[2008] UGCA 29

COURT

Court of Appeal of Uganda

BEFORE

Kitumba, JA, Twinomujuni, JA, Mukasa-Kikonyogo,
DCJ

CASE / FILE NUMBER

Civil Appeal No. 96 of 2004

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE L. E. M. MUKASA-KIKONYOGO, DCJ HON. JUSTICE A.
TWINOMUJUNI, JA HON. JUSTICE C. N. B. KITUMBA, JA

CIVIL APPEAL NO. 96 OF 2004

1. MAVUNWA EDISON) 2. AMITI TOM)..... For and on behalf of
194 others

VERSUS

UGANDA ELECTRICITY GENERATION COMPANY LIMITED RESPONDENT 20

[Appeal from the ruling of Hon. Bamwine, J dated 17/5/2004 in H. C. C. S No.353 of 2003]

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JUDGMENT OF TWINOMUJUNI, JA:

- This is an appeal from the ruling of the High Court of Uganda (Bamwine, 30 J) at Kampala in which his Lordship dismissed with costs a civil suit filed by the appellants against the respondent. The facts giving rise to this suit are not in dispute. All the 194 appellants worked in various departments of Uganda Electricity Board (UEB) in various capacities until July 2001
- when in accordance with section 128(2) of Electricity Act of 1999, they 35 agreed to transfer their services to Uganda Electricity Generation Company Ltd (UEGCL), a successor company to UEB.

The Electricity Act, 1999 dissolved UEB and created several successor companies and UEGCL was one of them. Section 123 and 124 of the Act provide that after a certain date set by the Minister after the coming into force of the Act, UEB will only continue to operate under a licence issued by the Minister for only purposes specified in the licence. Section 125 states:-

" 125 Successor Company.

The Minister shall, in accordance with the Public Enterprises Reform and Divestiture Act, cause to be incorporated under the Companies Act, a successor company or companies to assume all the duties, objectives and functions of the Uganda Electricity Board,, except those to be exercised by the authority under this Act, and to take over the property, rights and liabilities to which the Uganda Electricity Board is entitled or subject to."

Section 126 provides:

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"The vesting of property in Successor Company

- (1) The Minister may, by order published in the Gazette, appoint a transfer date and on that date, all property, rights and liabilities to which the Uganda Electricity Board was entitled or subject to immediately before that date shall become, by virtue of this section, the property, rights and liabilities of the successor company. 20 25
- (2)On the transfer date appointed under subsection (1), the Uganda Electricity Board shall cease to exist and shall be taken to be dissolved."

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Section 128 of that Act provides:-

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"(1) The successor company shall, on the transfer date, accept into its employment, every person who, immediately before the transfer date, is employed by the Uganda Electricity Board and who was given an option by the Uganda Electricity Board and has opted to serve as an employee of the successor company.

(2) A person who opts under subsection (1) to be an employee of the successor company shall be employed by that company on terms and conditions of service not less favourable than the terms and conditions of service to which he or she was entitled immediately before the transfer date."

Before this Act, there was in place, the Public Enterprises Reform and Divestiture Act (1997) (PEIDA) which provided in Section 29 that: it

> "On a date appointed by the responsible Minister by Statutory Instrument, the undertaking of the public enterprise named in the instrument shall, by virtue of this section, vest in the successor company of that public enterprise."

Section 31 of the PEIDA Act provided:-

"S.31 Protection of Employees' Contracts etc. Notwithstanding any other provision of this Act:-

(a) on the appointed day in relation to a public enterprise, each employee of the public enterprise shall become an employee of its successor company but, for the purposes of every enactment, law, determination, contract and agreement relating to the employment of each such employee, the it

contract of employment of that employee shall be deemed to have been unbroken and the period of service of that employee with the public enterprise, and every other period of service of that employee that is recognised as continuous service by the public enterprise, shall be deemed to have been a period of service with the company;

(b) the terms and conditions of employment of each such employee shall, until varied, be identical with the terms and conditions of the employee's employment with the public enterprise immediately before the appointed day and be capable of variation in the same manner;"

On 29 March 2001 UEB wrote to the appellants and stated in part

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"I acknowledge receipt of your letter dated 27th March, ²⁰⁰¹ that informed me of your consent to transfer your service to UEB Successor Companies pursuant to section 129 of the Electricity Act 1999,

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This is to inform you therefore that you will transfer your service to the Uganda Electricity Generation Company Ltd with effect from Monday 02 April, 2001. You are transferred on the same terms and conditions of service stipulated in UEB Standing Instructions in force. Your salary will also remain unchanged."

On the 11th April 2001 the respondent wrote to the 1st appellant stating in part:-

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.. SUBJECT: CONFIRMATION OF RANK OF SHIFTMAN AND REDESIGNATION.

At their meeting of 23 April 2001, the Directors of the Board of the Uganda Electricity Generation Company Limited (UEGC) Ltd. The board also adopted use of the UEB Salary Structure.

I am pleased, therefore to inform you that you are confirmed at the rank of Shiftman. You are redesignated Shiftman with effect from 02 April, 2001. You report to the Principal Engineer, Operations. A description of the position duties will be given to you in due course.

Your salary remains shs.451,024.17 per month on scale UECC 10 step point 5. You will continue to be entitled to benefits attached to scale UEGC 10.

Your other terms and conditions of service are also unchanged."

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At the appellants received similar letter affirming that their terms and conditions of service would remain unchanged.

After two years the UEGCL dismissed all the employees it had inherited from UEB and paid them pension for only two years covering the period they had worked with UEGCL. The employees insisted that they were entitled to full pension including that one earned when still working with UEB. The respondent resisted this claim whereupon the appellants filed HCCS No.353 of 2003 to recover their pension from the respondent. 15

At the hearing of the suit, counsel for the respondent raised a preliminary point of law and asked court to dismiss the suit for failure to disclose a cause of action. He argued that the appellants had sued a wrong party because UEB was still in existence and was the one, together with the Government of Uganda, which were liable to pay the pension. After listening to both sides, the learned trial judge upheld the objection and dismissed the suit, hence this appeal. There is only one ground of appeal, namely that:-

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"The learned trial judge erred in law and in fact when he found that the respondent is/was not liable for the appellants' pension claims."

Mr John Matovu appeared for the appellants and Mr. Nicholas Echimu represented the respondent. Mr. Matovu for the appellants submitted that the trial judge erred in law and in fact in ignoring clear provisions for the Electricity Act, 1999 and the PERD Act, which clearly made the respondent liable to pay all terminal benefits earned by the appellants as employees of UEB. He also criticised the trial judge for failing to take into account documentary evidence on record in which the respondent accepted and undertook to pay all terminal benefits accruing to the appellants, including pension earned when they were still working with UEB. He also relied on the authority of *Evident vs Guildford City Association Football Club Ltd* (1975) 3 ALL. ER 269, which he relied on as authority on all issues with the instant case.

Mr. Nicholas Echimu for the respondent did not agree. He submitted that the respondent did not at any time undertake to pay the pension earned

while the appellants were still employees of UEB. He contended that the respondent had undertaken to pay all other terms and conditions of service as were normally being paid by UEB except the pension. He submitted that their pensions were governed by Section 129 of the Electricity Act which made the Government of Uganda liable to pay the pensions of the UEB employees. The section provides:-

.. S. 129 PENSION FUND AND FORMER EMPLOYEES

- (1) All former employees of the Uganda Electricity Board who at the commencement of this Act are receiving retirement benefits and pensions from the Uganda Electricity Board shall continue to be paid by government on terms and conditions not less favourable than those to which they were entitled before the commencement of this Act.

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- (2) All employees of the Uganda Electricity Board who may be retrenched as a result of the implementation of this Act shall, on the date of retrenchment, be paid in full the calculated and ascertained retrenchment benefits and pensions.
- (3) There shall be established a Contributory Pension Fund initially funded by government for the benefit of those employees in the permanent employment of the Uganda Electricity Board immediately before the commencement of this Act who are transferred to the successor company. 1U
- (1) All employees of the Uganda Electricity Board who transfer their services to the successor company under section 128 shall have their terminal benefits and pension calculated and ascertained and transferred to the contributory pension fund. 15
- (5) Any employee who, at any time after the transfer of his or her services to the successor company, retires or is dismissed or whose services are terminated for whatever reason shall be paid his or her calculated and ascertained retirement benefits or pension from the Contributory Pension Fund,
- (6) The calculated and ascertained retirement benefits and pension entitlement of each employee of the Uganda Electricity Board shall be recorded in a pension certificate; and whenever that employee terminates his or her services with the successor company, the pension certificate shall be conclusive evidence of the employee's entitlements relating only to the period of employment for the employee in the Uganda Electricity Board."
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Mr. Echimu invited the court to hold that this section and especially subsections (3) and (4) specifically made provision for payment of pensions to the transferred former UEB employees and to order that the respondent was not liable to do so,

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This appeal arises from the decision of the trial judge that the appellants had sued the wrong party and in effect had no cause of action against the respondent. A careful perusal of the provisions of the PERD Act and the Electricity Act, 1999 set out above will reveal that LJEBS was dissolved and all its responsibilities, assets and liabilities would be the responsibility of a successor company to be floated under the Companies Act. This would take place on the date fixed and announced by the Minister referred to in the Electricity Act as the "transfer date". It is not very clear on the evidence on record whether the Minister announced a

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transfer date and which date it was. However, on 29th March, 2001 UEB wrote to the appellants informing them that their services would be transferred to LJEGL and that they would be transferred on the same terms and conditions of services stipulated in UEB Standing Instructions in force in line with the provisions of the Electricity Act, 1999. This would be with effect from 2nd April, 2001. On 11th July, 2001 the UEGCL, wrote to the appellants informing them that the company had with effect from 2nd April, 2001 accepted the appellants into their company on terms and conditions they enjoyed while serving under UEB.

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This offer by UEGCL was promptly accepted by the appellants who had continued working even before this date.

As far as the appellants were concerned, whether the Minister set the 5 qA-Ulfel-dg-lg in writing or not, was not material. Their acceptance of the contractual terms offered by the respondent constituted a contract of employment. However, the contract was unique in a sense that it had the backing of the Electricity Act, 1999, the PERD Act and the Employment Act which provides in Section 18 thereof as follows:-

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"S.18 Change of Employer

(1) A change of employer shall, notwithstanding anything to the contrary in any contract, be deemed to have taken place whenever a person other than the original employer acquires the whole or greater part of the property of the undertaking and continues substantially the same operations."

t) To me it seems to be clear that UEGCL accepted and took over the services of the appellants with effect from 2nd April 2001 on the terms and conditions they enjoyed under the service of UEB.

i UEB was bound by the employment laws of Uganda especially Section ^I8(1) and (2) of the Employment Act Cap 219 (supra). That law provides that when an entity other than the original employer

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- (a) acquires the whole or greater part of the property of the undertaking, and
- 10 (b) continues substantially same operative, then there is a change of employer and the new entity is bound by Section 18(2) of the employment Act:-

In my opinion. UEGCL cannot, in light of the above state of affairs, be heard to say that they only agreed to take over all other terms and conditions of service except the pensions of the appellants earned before they were transferred when those pensions constituted part of the terms and conditions of service of the appellants. 15

So, is it correct to find as the learned trial judge did, that UEB still existed in law and was the one liable to pay the pensions of the appellants? With respect, my answer is that with the enactment of the Electricity Act, 1999, UEB ceased to exist. it was dissolved. All its responsibilities assets and liabilities passed on to UEGCL. the respondent. UEGCL became the successor company. Section 26(2) of the Electricity Act 1999 is very precise on this point:- I (.) 15

> *126(2) (On transfer date appointed under subsection (1), the UEB shall cease to exist and shall be taken to be dissolved."

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Thereafter UEB could only exist in a very different form under a licence issued by the Minister on terms stipulated therein. It would no longer be a parastatal body set up by an Act of Parliament as was formerly the case and certainly it ceased to be the employer of the appellants.

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What then is the meaning of Section 129 of the Electricity Act, 1999 (supra)? Mr. Matovu argued that it did not create any liability on anyone to pay the pensions of the appellants or anyone else. All it did was to stipulate an administrative mechanism of how their pensions would be managed and administered. The liability to pay and transfer the pensions into the Pension Fund remained the responsibility of the new employer, the respondent company. On the other hand, Mr. Echimu for the respondent strongly argued that this section expressly removed the payment of pensions earned during service with UEB from the respondent and vested it into Uganda Government and UEB.

After a careful perusal of all the provisions of the Electricity Act and PERD Act. along with the provisions of Section 18 of the Employment Act, I have no doubt in my mind whatsoever that the responsibility to pay the appellants pensions earned under UEB service were transferred to the successor company. the respondent. 10

I agree with Mr. Matovu that Section 129 of the Electricity Act only sets out a mechanism for the management and administration of the pension funds due to the transferred employees. the appellants. Whether that mechanism was set up or not cannot relieve the respondent. the successor employer. the contractual duty to pay the pensions. I would hold that this appeal must be allowed and the preliminary objection of the respondent can not be sustained. 15

Beibre I leave this case, I wish to make an observation on a matter of procedure arising from this suit. In raising the preliminary objection, counsel for the respondent did not state whether it was an application under order VI rules 28 or 29 of the Civil Procedure rules or it was made under order VIII Rule 11 of the same rules.

In my view, counsel should have specified under which procedure he was proceeding. Though the learned trial judge mentioned that he rejected the plaint under order VIII Rule 11 (a) of the Civil Procedure Rules, yet in my opinion the plaint clearly disclosed a cause of actions. He could have handled the matter under Order VI rule 28 of the Civil Procedure Rules. His record clearly shows that he was considering a point of law that would substantially dispose of the whole suit. That is how the appellants seem to have understood his ruling, hence the only ground of appeal filed challenges his holding that the respondent was not liable for appellants

pensions, which was the main issue in the FICCS No.353 of 2003. In the result, allowing this appeal on the basis of the ground of appeal, which was agreed by both parties and court, would dispose of the suit in the High Court in respect of prayer (a) of the plaint in favour of the appellants. That prayer seeks the judgment against the respondent for:- 15 :0

> "(a) a declaration that they are entitled to pension, and or gratuity dues and any other retirement benefits."

I would order that the file be remitted to the trial court to dispose of prayers (b), (c), (d), (e) & (1) of the plaint.

These are in respect of: 1

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"(b) an order that they may be paid their pension and or gratuity dues and arrears since the month of termination of their services

(c) general damages for breach of contract

- (d) interest of 25% on (b) from the time of termination of services in March 2003 till payment in full and (c) and 20% interest on the aggregate sum
- (e) costs of the suit

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(f) any other relief that this honourable court deems fit."

In the result, I would allow this appeal setting aside the judgment of the High Court and allow the said prayer (a) of the prayers in the plaint dated 4th January 2003 with costs to the appellants. The record should be transmitted to the trial judge to dispose of prayers (b), (c), (d), (e) and (f) of the plaint.

Dated at Kampala this . J. J. M. day of ... Angus 1:2007. \$15\$ un Hon. Justice A. Twinomujuni
JUSTICE OF APPEAL 20

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE L. E. M. MUKASA-KIKONYOGO, DCJ. HON. JUSTICE A. TWINOMUJUNI, JA HON. JUSTICE C. N. B. KITUMBA, JA

CIVIL APPEAL NO. 96 OF 2006

MAVUNWA EDISON $\mathbf{\$1.}$ \$2.\$ AMITI TOM) ::::::::::: APPELLANTS For and on behalf of 194 others

VERSUS

UGANDA ELECTRICITY GENERATION COMPANY LIMITED::::::::::::::::::::::::::::::::

[Appeal from the ruling of Hon. Bamwine, J. dated 17/5/2004 in H. C. C. S. No. 353 of 20031

JUDGMENT OF THE HON. DEPUTY CHIEF JUSTICE L. E. M. MUKASA-KIKONYOGO

I have had the benefit of reading in draft the judgment prepared by A. Twinomujuni J. A. and I agree with it and the orders proposed.

Since Kitumba J. A also agrees, by a unanimous decision of this Court, this appeal is allowed. The judgment of the High Court is hereby set aside with the orders proposed in Hon. Justice Twinomujuni's judgment.

Dated at Kampala this 24th day of August 2007.

L. E. M. Mukasa-Kikonyogo HON. DEPUTY CHIEF JUSTICE

THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE L. E. M. MUKASA-KIKONYOGO, DCJ. V HON. JUSTICE A. TWINOMUJUNI, JA. HON. JUSTICE C. N. B. KITUMBA, JA.

CIVIL APPEAL NO. 96 OF 2004

1. MAVUNWA EDISON \$10\$) 2. AMITI TOM) For and on behalf
of 194 others

VERSUS

UGANDA ELECTRICITY GENERATION COMPANY LIMITED ::::::::::: RESPONDENT
\$15\$

[Appeal from the ruling of Hon. Bamwine, J. dated 17/5/2004 in H. C. C. S. No.353 of 2003/

JUDGEMENT OF KITUMBA, JA. 20

I have read in draft the judgement of Twinomujuni, JA. I entirely agree with it and the orders proposed therein and have nothing more useful to add.

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Dated at Kampala this

CHES CILLA C. N. B. Kitumba JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO.96 OF 2004 MAVUNWA EDISON & 195 OTHERS APPELLANTS
VERSUS UGANDA ELECTRICITY GENERATION COMPANY LIMITED RESPONDENT

RULING ON TAXATION

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The facts from which this taxation matter arises are well laid out in the lead judgement of Justice Twinomujuni, JA dated 24/08/2007' and I need not recapitulate them in the interest of time.

15 The most contentious bill item is that of the instruction fees. I gave parties time to reconsider their offers and counter offers. The respondent counsel offered a fee of 10m/: while the Appellant counsel insisted on a fee between 20m- 40rt/.

Given the nature of the appeal, and time the counsel for these various appellants has spent to process their cause back to the High Court, of over ³ years, all in line with the benchmarks laid out in Paragraph 9(2) of the third schedule to the Court of Appeal rules I do find it adequate instruction fee befitting a reputable counsel for this appeal. *Simpsons Motor Sales*

25 (London) Ltd v Hendon Corporation, [1964] 1 All E.R. 833, *Penny v LKJ*.

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The rest of the bill has been taxed as under the scale to the Rules.

All in all this bill has been finally taxed and awarded at Shs. 30,372,500/- only.

⁵ Dated at Kampala this day of 2008. f/-

ASSISTANT REGIS

G. K. N (---.

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COURT OF APPEALS,

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