

UGANDA / JUDGMENT

National Union of Clerical Commercial Professional and Technical Employees (Civil Appeal 42 of 99) [2000] UGCA 35 (31 March 2000)

[2000] UGCA 35

COURT

Court of Appeal of Uganda

BEFORE

Mayindo, DCJ, Berko, JA, Engwau, JA

CASE / FILE NUMBER

Civil Appeal 42 of 99

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 42/99

HON. MR. JUSTICE S. T. MANYINDO, DCJ. CORAM: HON. MR. JUSTICE J. P. BERKO, JA. HON. MR. JUSTICE S. G. ENGWAU, JA.

NATIONAL UNION OF CLERICAL) COMMERCIAL PROFESSIONAL)..... AND
TECHNICAL EMPLOYEES)

VERSUS

BARCLAYS BANK OF UGANDA LTD.....

JUDGMENT OF J. P. BERKO, JA.

This is an appeal against the decision of the Hon. The Principal Judge in a Misc. Cause No. 314 of 1997 given on 16th July 1998 in which he granted orders of Certiorari calling for and quashing the interpretative decision of the Industrial Court delivered on 11th February, 1997 in Trade Dispute No. 2 of 1993 and prohibition preventing the award made by the Industrial Court from taking effect and restraining the Industrial Court, either by itself, or by its Chairman or deputy Chairman or anybody else on its behalf, from causing the award to be published in the Gazette or the respondents or any person or persons from enforcing the award. The application was made under section 38 of the Judicature Statute 1996 and rule 5(1) of the Law Reform (Miscellaneous Provision) (Rules of Court) Rules S. 1 - 74 - 1\$.

The facts that gave rise to the application are comparatively simple. The applicant, who is the respondent in the appeal, is the Barclays Bank of Uganda Ltd, while the appellant who was respondent, is the National Union of Clerical, Commercial, Professional Employees. For easiness of reference we shall refer to the respondent simply as the Bank and the appellant as the Union.

The Bank is a member of the Association of Uganda Bankers and 40 together with other Banks, was a party to a collective agreement which was concluded with the Union under the Trade Disputes (Arbitration and Settlements) Act. Cap. 200 of the Laws of Uganda, as amended by the Trade Disputes (Arbitration and Settlements) (Amendment) Decree, 1974 - on 24th August, 1984 following a recognition agreement which was made on 22nd June 1984.

The collective agreement governed the terms and conditions of service of the unionised employees of the Bank. That collective agreement is of two parts. The first part regulates the conduct of industrial relations between the parties. That covers, among others, the scope of the agreement, conditions of the agreement, negotiating committees and grievance procedures.

The second part of the agreement, known as Appendix B, concerns remunerative items supposed to accrue to the unionised employees. These include rent, basic salary, cost of living allowances, cashiers allowances, leave allowances e.t.c. Through established practice Appendix B is revised annually.

A dispute arose between the parties when they failed to revise Appendix B for the year 1992 as regards the remunerative items for 1st January to 31st December 1993. The matter was referred to the Minister of Labour and Social Welfare who in turn referred it to the Industrial Court for arbitration and settlement. The industrial court heard the dispute and made an award on 18/4/1995.

Following disagreement between the Union and the Banks, namely The Tropical Africa Bank Ltd., Stanbic Bank Uganda Ltd and Barclays Bank of Uganda Ltd, the Union requested the Industrial Court to interpret the award. \$20\$

The issues for determination by the Industrial Court were:-

- the effective date of the award. \$(i)\$
- whether the Union possessed representative capacity to act on \$(ii)\$ behalf of dead or dismissed workers.
- the effect of irrevocable letters of retirement on a collective (iii) agreement or award and
- \$(iv)\$ whether any rights accruing from a collective action in the Industrial Court should be forfeited by an individual who had filed a Civil Suit in the High Court.

The case of the Union was firstly, that the effective date of the award was 1st January, 1993, secondly, that the award should benefit all the Union members who had rendered service for whatever length during the period of 1993 as the award was retrospective and in respect of a collective agreement that should have operated in 1993.

The Banks, on the other hand, asserted that the award applied only to workers who were in active service when the award was made. Secondly, 40 that workers who had been issued with irrevocable letters of termination received their packages in accordance with the 1991 scheme for early retirement and were therefore not entitled to benefit under the Industrial Court Award; thirdly, those workers who had been dismissed before the announcement of the award were not entitled to benefit and the contract between them and the Bank came to an end, when they were dismissed; fourthly, neither the Union nor the estate of deceased former employees who died before the commencement of the proceedings that resulted in the award could maintain an action against the Bank to claim benefit under the award.

The Industrial Court delivered its interpretative decision on 11th February 1997 and held that:

- the effective date of the award was settled at 1st January 1993. (i)
- the award covered all workers of the Bank who were in the (ii) employment of the Bank in the year 1993 for whatever period they worked;
- (iii) that so long as the dispute remained undetermined there was no current agreement in existence.
- the Union continued to represent the former workers of the Bank (iv) for as long as those former workers had any residual right or unsettled claims before they left the Bank.
- the operative date entitling a worker in the employment of the (v) Bank to take benefit of the award is the date the dispute arose. that is to say, 1/1/93 and
- (vi) that the irrevocable letters of retirement were overridden by the provisions of the award.

The Bank brought an application for orders of certiorari and prohibition to call for and quash the interpretative decision of the Industrial Court on a number of grounds, the main ground being that the interpretative decision of the Industrial Court was ultra vires, null and void as being contrary to section 11(I) of The Trade Dispute (Arbitration and Settlement) Act (Cap. 200) as amended in so far as the award which was being interpreted had not been published in the Gazette at the time the interpretation application was brought and had not been published to date and accordingly the Industrial Court had no jurisdiction to entertain the application.

The Hon. the Principal Judge found that an award made under the Act must be published. If it was not published it could not be referred to the Industrial Court for interpretation. As the award had not been published at the time it was referred to the Industrial Court for interpretation, the Industrial Court should have declined to interpret it. He accordingly declared the interpretative decision of the Industrial court ultra vires the Act and was null and void and should not be obeyed, hence this appeal.

There are five grounds of appeal, namely:

The learned Trial Judge erred in Law when he held that the \$(1)\$ interpretation of the award without it being published was ultra vires The Trade Disputes (Arbitration and settlement) Act Cap. 200 and/or that the court had no jurisdiction to interpret an award if it has not been published.

- The learned Principal Judge erred in law and fact when he held \$(2)\$ that the Industrial Court made the award earlier than the date on which the dispute arose.
- Alternatively, but without prejudice to ground No. 2 hereof, the \$(3)\$ Learned Principal Judge erred in law when he held that the Industrial Court could not make an award earlier than the date the dispute arose.
- The Learned Principal Judge erred in law and fact when he held \$(4)\$ that the Industrial Court award applied only to employees who were still in the respondent's employment by 1st December 1993 and not those who had retired or were dismissed before then
- The Learned Principal Judge contradicted and misdirected \$(5)\$ himself and erred in law and fact when after holding that the letters of retirement had nothing to do with the award, held that the said employees who received such letters before the award could not take any benefit of the award.

At the hearing of the appeal, Mr. Masembe-Kanyerezi, who appeared for the respondent Bank, conceded ground No. 2. That naturally affected ground 3 as it was alternative to ground 2.

Ground one of this appeal raises a question of considerable general importance about the effect of section 8(1) of The Trade Disputes (Arbitration and settlement) Act as amended by section 8(1); of The Trade Disputes (Arbitration and Settlement) Amendment) Decree 1974, Decree 18.

As I have mentioned earlier on the Industrial court made an award on 30 The parties disagreed on how to implement the award. 18/4/95. In accordance with Cap. 200 the Union applied to the Industrial Court to give an interpretative decision of the arrears of disagreement.

Under S. 8(1) of Cap. 200, as amended by Decree 18, the Chairman or his deputy was required to announce the award in the presence of both parties to the dispute and cause it to be published in the Gazette.

S. 11(1) of Cap. 200 is in the following terms:

"If any question arises as to the interpretation of any award of..... the Industrial Court, the Minister or any party to the award may apply to the Court for a decision on a such question. and the court shall decide the matter after hearing the parties, or without such hearing provided the consent of the parties has been first obtained".

Under the above section, there was no time limit within which an application could be made to Industrial Court to interpret an award once given and published in the Gazette. Decree 18 introduced time limit in which an \$50\$

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application for interpretation of an award could be made to the Industrial Court - The amended provision of subsection 1 of section 11 of Cap. 200 reads as follows:

"11(1) If any question arises as to the interpretation of any award of..... the Industrial Court, the Minister or any party to the award may within twenty – eight days from the time of the publication of the award apply to the court for a decision on such question, and the court shall decide the matter after hearing the parties or without such hearing provided the consent of the parties has been first obtained".

A number of points about the amended provision are immediately obvious: (i) Is the requirement of within twenty eight days from the time of the publication of the award mandatory or directory?, (ii) apart from the penalty for failure to implement an award within twenty-eight days from the date of its publication under subsection (1) of section 8A of the Act, the amended provision does not specify what is to happen if an application for interpretation of an award is not made within twenty-eight days from the date of its publication; (iii) of particular importance for the present case, is what is the position if the award was not published when an application for interpretation was made?

The problem of what is the consequence when a statutory provision or regulation which ought to have been complied with, but is not, is one which has frequently occupied the courts. There is a long line of relevant authority on the matter. I wish to refer to a few of them. These are **David B. Kayondo Vrs The Co-operative Bank Ltd**, Civil Appeal No. 10 of 1999 (Unreported) Supreme Court and **Jaffer Brothers Ltd V Mohammed Najib Baagalaliwo and 2 others** Civil Appeal No. 43 of 1997. This line of authority was most recently considered by this Court in **Edward Byaruhanga Katumba Daniel Kiwalabye Musoke**, Civil Appeal No. 2 of 1998 where this court cited with approval the relevant principles summarised in the passage from *Smith's Judicial Review of Administrative Action* (4th Ed. 1980) pp 142 – 143 and adopted by the British Court of Appeal in the case of *Secretary of State for Trade and Industry v Langrabe* [1991] 3 All ER. 591, which I now repeat:

"When Parliament prescribes the manner or form in which a duty is to be performed, or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts must therefore formulate their own criteria for determining whether the procedural rules are regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done (though in some cases it has been said that there must be "substantial compliance" with the statutory provisions if the deviation is to be excused as a mere

irregularity.) Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered, and one *must assess "the importance of the provision that has been* disregarded, and the relation of that provision to the general object intended to be

secured by the Act". In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision, and the importance of the procedural requirement in the overall administrative scheme established by the statute. Furthermore, much may depend upon the particular circumstances of the case in hand. **Although** "a breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirement were introduced, or if serious public inconvenience would be caused by holding them mandatory or if the court is for any reason disinclined to interfere with the act or decision that is impugned".

There was no dispute between the parties before us that these are relevant principles. The problem, as always, is the application of these principles to the provisions of the particular statute in question.

It will be convenient to consider separately the following questions: (i) what is the importance of the requirement that the award must be published in (ii) what is the importance of the 28 days requirement the Gazette? introduced by the amendment Decree? and (iii) what are the relevant circumstances of the present case?

Publication in the Gazettee. There can be no dispute that the requirement of the Publication of the award in the Gazettee is to make the award known not only to the parties but to the public in general. The other importance of the publication of the award relates to the effective date of the award. This is provided for in section 8(4). The section reads:-

"The decision of the arbitration tribunal or the Industrial Court as to the effective date of the award shall be conclusive so, however, that if no such date has been determined by the tribunal or the Court the award shall take effect from the date of its publication".

The other provision worth mentioning under this heading is section 8A(1) which deals with penalty for failure to implement the award of the \$50

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Industrial Court. It is an offence under the section for any employer to refuse to implement an award made by the Industrial Court "within twenty eight days from the date of its publication under subsection 1 of Section 8 of the Act".

There is nothing in the Act which prohibits the implementation of an award before it is published in the Gazettee. It follows that if there is no disagreement between the parties about the terms and the effective date of the award, they could implement it once it was announced. Therefore, in my view, the publication of the award in the Gazettee has limited significance.

The importance of the twenty eight days requirement. \$(11)\$

As I have mentioned earlier on, there is no time limit under sub-section 1 of Section 11 of Cap 200. The twenty eight days requirement was introduced by the amendment Decree. As that requirement was introduced by a Military Regime that ruled by Decrees, it is not possible to lay hands on the proceedings of the legislature and find out what motivated the law makers to impose a time limit within which an application can be made to the Industrial court for an interpretative decision when there is a disagreement on the interpretation of an award. The preamble to the Decree only stated that the amendment was "to provide for an easier method of settling disputes". Be that as it may, since in this case the Judge found that the award had not been published in the Gazettee, the provision is of little or no importance.

(111) The relevant circumstances of the case.

I have already given the facts of the case and the circumstance that led the Union to apply to the Industrial Court for the interpretative decision. I need not to repeat them. It has not been suggested in this case that the Bank was in any way prejudiced by the fact that the award was not published when the appellant requested the Industrial Court to interpret it following disagreement between the Union and the banks, and when the Court assumed jurisdiction in the matter, except in so far as the Bank may now be deprived of the benefit of taking a technical point they took if the award had been published in the Gazettee. Equally, there is no suggestion that the failure of the chairman of the Industrial Court to publish the award was occasioned by anything other than a genuine mistake on the part of the official of the court who was dealing with the case.

In those circumstances, and applying the principles to which I have referred above. I would have no hesitation in holding that in this case the failure to publish the award in the Gazettee before the interpretative application was brought and heard was a procedural irregularity which did not render the interpretative decision either void or voidable.

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However, the learned Principal Judge came to a contrary view and it is now necessary to look at his reasons for doing so. The learned Judge held that the requirement for publication of the award was mandatory. He said that he was fortified in that view by the provisions of section 8A which make it an offence if an employer fails to implement an award within 28 days from the date of the Publication of the award. The learned Judge appreciated that the time within which an award should be published has not been provided for. That means an award can be published at any time. The 28 days requirement is relevant when a party wishes to apply to the Industrial Court for an interpretative decision after the award had been published. Time does not run against an intending applicant if there has been no publication. Thus, if the provisions of \$S.8(1)\$ are mandatory, and their nonobservance renders void all subsequent proceedings, the only result will be that when the flaw is discovered the applicant may at once start again, get the award

published and then apply for interpretation within the limitation period. The only thing he will suffer is the consequent wasted costs. It is difficult to conceive that Parliament intended so pointless and wasteful a result. The other point I wish to make is that an employer only commits an offence under S. 8A if he fails to implement an award within 28 days from the date of its publication. He commits no offence if the award is not published. Therefore the issue of condoning an illegality does not arise when the award had not been published. The obligation to implement the award and its been published. consequential criminal liability only arise after the publication of the award. The penalty provision therefore cannot make the provision for publication mandatory.

Accordingly, I am unpersuaded by the learned Principal Judge's reasoning to depart from my original view, that the provisions of subsection 1 of section 8 requiring publication of the award are directory rather than mandatory. I would allow the Union's appeal on this ground alone.

What I have said above is enough to dispose of the appeal. I wish, however to deal briefly with the remaining two grounds. The complaint in ground 4 is that the learned trial Judge erred in law and in fact when he held that the award applied only to employees who were still in the employment of the Bank on 1st December, 1993 and not those who had retired or dismissed before that date.

Mr. Kasule has submitted that the issue regarding the employees who are covered by the award is an issue of fact and not an error on the face of the record and consequently the learned Principal Judge erred in making a declaration on that in a certiorari proceedings. He further submitted that the learned Judge came to a wrong conclusion because he had earlier on held that the dispute arose on the 1/12/93 and not in 1992.

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The learned Judge dealt with the matter as follows:

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"There are two points to remember when Mr. Kanyerezi's above argument is being considered. One point is that the Industrial Court is empowered by S. 8(3) of the Act to make a retrospective award "to a date not being earlier than the date on which the dispute the award relates first arose".

This means that if the date on which the dispute arose which gave rise to the award was 1.12.93, then my second point is that the court was wrong to switch the award to 1st January, 1993 which is a date earlier than the dispute arose. The court's award should have been made retrospective but not to a date earlier than the date on which the dispute arose which, I am told, was 1.12.93. The award of the court to cover the period 1st January 1993 to 31st December 1993 was therefore manifestly wrong and I uphold Mr. Kanyerezi's contention that there was an error in the court's award and in its interpretation thereof on the face of the record".

The question in this case is whether the High Court can intervene to correct the decision of a statutory tribunal which is erroneous in law. The High Court relies on Prerogative Order of Certiorari to correct errors of inferior tribunals. I agree with Mr. Kasule that certiorari is only available to quash a decision for error of law if the error appears on the face of the record. See Northumberland Compensation Appeal Tribunal Ex Parte Rex **V** Shaw[1952] 1 K B 338.

Subsection 3 of Section 8 of Cap. 200 provides:

"An award of an arbitration tribunal or the Industrial Court should take effect from such date as may be determined by the tribunal or the court, as the case may be, and may be made retrospective to a date not being earlier than the date the dispute to which the award relates first arose".

It is clear from the above that the determination of the effective date of an award of the Industrial Court is regulated by a Statute. Therefore the determination of what is the effective date of the award is a matter of law and not an issue of fact. That means that if the Industrial Court made an error in determining the effective date of the award, and if the error is apparent on the face of the record, the High Court can intervene to correct the error. That was what the learned Judge did in this case. He did not commit any error.

The next point to consider is whether the Judge was right when he held that the Industrial Court made a mistake in fixing 1.1.93 as the effective date

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of the award. The Industrial Court made its award on 18/4/95. It, however, has power under subsection 3 of Section 8 of the Act to make the award retrospective "to a date of being earlier than the date on which the dispute to which the award relates first arose".

The evidence on record shows that the first collective agreement between the Union and the Bank was concluded on 24/6/84. Through established practice the remunerative Items, Appendix B, is revised annually. The dispute arose when the parties failed conclusively to revise Appendix B in The remunerative items disagreed upon were to be effective from 1992. January 1993. The dispute was referred to the Industrial Court on 1/12/1993 by the Minister of Labour and Social Welfare and was duly registered by the Industrial Court on 1/12/93 as Cause No. 2/93.

It is clear from the above that the dispute arose earlier than 1/12/93 when the suit was registered. Since the area of disagreement affected the remunerative items to be effective from 1/1/93, the Industrial court was right to fix 1/1/93\$ as effective date of the award. The dispute did not arise on the date the suit was registered. In the normal course of things suits are not filed on the very day the cause of action arose. Accordingly the award covers all those who were in the employment of the Bank on 1/1/93\$. Grounds 4 and 5 therefore should succeed.

I find it unnecessary to determine the issue of estoppel in ground 5(a)\$. In my humble view, a decision on the matter one way or the other, will not affect the outcome of the appeal.

Accordingly I would allow the appeal, set aside the decision of the Hon. Principal Judge. I would award the appellant the cost of the appeal and in the lower Court.

Dated at Kampala this 31st day of March 2000.

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J. P. Berke Justice of Appeal.

**THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 42 OF 1998**

**HON. MR. JUSTICE S. T. MANYINDO, DCJ. CORAM: HON. MR. JUSTICE J. P. BERKO,
JA. HON. MR. JUSTICE S. G. ENGWAU, JA.**

NATIONA UNION OF CLERICAL COMMERCIAL PROFESSIOAL)..... APPELLANT AND
TECHNICAL EMPLOYEES

VERSUS

BARCLAYS BANK OF UGANDA LTD..... RESPONDENT

(Appeal from a judgment of the High Court of Uganda at Kampala (Mr. Justice J. H. Ntabgoba, Principal Judge) dated 10/7/98 in Misc. Application. No. 314 of 1997)

JUDGMENT OF MANYINDO, DCJ

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I agree with the judgment of Berko JA just delivered.

As Counsel for the respondent rightly contended, the dispute is not whether the award is invalid by reason of its non publication in the Gazette, but whether it applies to the appellants. It seems clear to me that the appellants should benefit from the award since the dispute started while they were in the employment of the respondent. The suit was only a means of settling that dispute. It is therefore immaterial that at the time the suit was filed they

had left the employment. They would benefit up to the time they left employment. o

> I would allow the appeal with costs here and in the High Court. As Engwau JA also agrees it is so ordered.

DATED at Kampala thisT ,p ... day of March 2000.

S. T. MANYINDO DEPUTY CHIEF JUSTICE

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

HON. S. T. MANYINDO, DCJ. CORAM: HON. JUSTICE J. P. BERKO, JA. HON. JUSTICE
S. G. ENGWAU, JA.

CIVIL APPEAL NO 42 OF 1999

NATIONAL UNION OF CLERICAL <table> COMMERCIAL PROFESSIONAL AND
TECHNICAL EMPLOYEES \$\mathcal{L}\$

VERSUS

BARCLAYS BANK OF UGANDA LTD.....RESPONDENT

JUDGMENT OF ENGWAU, JA.

I have read the judgment of Berko, J. A. in draft form and I agree with it. This appeal should be
allowed with costs to the appellant here and in the court below.

Dated at Kampala this.....

S. G. ENGWAU, JUSTICE OF APPEAL.

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