THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - MC - 010 - 2010

PROFESSOR MONDO KAGONYERA .... APPLICANT

Versus

1. ATTONEY GENERAL ....
2. NATIONAL SOCIAL SECURITY FUND .... } DEFENDANTS

BEFORE: HON. JUSTICE GEOFFREY KIRYABWIRE

R u l i n g

This application is brought by Prof. Mondo Kagonyera (herein after called the applicant) against the Attorney General (hereinafter called the first respondent) and National Social Security Fund (hereinafter called the second respondent) under S. 36 and 37 of the Judicature Act Cap 13, Rules 3,4,5,6,7 and 8 of the Judicature (Judicial Review) Rules 2009 for orders that;

a) ***The prerogative order of certiorari be issued by this Honourable court to quash the decision of the Minister of Finance, Planning and Economic Development refusing to approve the payment of age benefit claim to the applicant.***

b) ***The prerogative order of mandamus be issued by this Honourable court directing the Minister of Finance, Planning & Economic Development to authorise the payment of the age benefit claim of the applicant by the second Respondent.***

The general ground of this application is that; the Minister of Finance, Planning and Economic Development made a decision that the applicant be denied his age benefit from the 2nd respondent and that was done in disregard of the rules of natural justice because the applicant was not given a fair hearing before the said decision was arrived at.

The brief background to this application is that; the applicant was appointed the Deputy Managing Director of the second respondent for a period of three years. The applicant desired to contribute for his benefit to the fund of the second respondent. The applicant sought the authority of the Minister of Finance, Planning and Economic Development, to authorise the applicant to contribution to the second respondent's fund. The Minister of Finance, Planning and Economic Development in this regard issued Statutory Instrument No. 27 of 2008 cited as National Social Security Fund (Special Contributions) Order, 2008 (herein after referred to S.I. No. 27 of 2008), authorising the applicant

and his employer the National Social Security Fund (the 2nd respondent) to contribute to the fund of the National Social Security Fund, for the benefit of the applicant. Upon the expiry of his contract, the applicant put in an age benefit claim but the 2nd respondent refused to honour the claim on the ground that S. 36 (2) of the NSSF Act provides that no benefits flow from the reserve account.

It is the case for the applicant that the 2nd respondent wrote to the Minister of Finance, Planning and Economic Development who made a decision not to approve the applicant's age benefit claim, on the recommendations of the 2nd respondent and legal opinion of the 1st respondent. It is this decision made by the Minister of Finance, Planning and Economic Development not to approve the applicant's age benefit claim that is the basis of this application.

The case for the applicant as stated in his affidavit in support of the application is that the 2nd respondent by virtue of Rule 2 of S.I No. 27 of 2008 was supposed to contribute for the applicant's benefit, a monthly special contribution of 10% of the applicant's monthly wages for a period of three years. The total amount of contributions after the expiry of the three year contract would be Ushs 57,600,000/=. The applicant further deponed that, the 2nd respondent's refusal to honour the applicant's age benefit claim on the ground that Section 36 (2) of the NSSF Act provides that no benefits can flow from the reserve account, was not proper because the statutory Instrument (S.I.) No. 27 of 2008 originally issued and signed by the minister did not contain the words "pay to reserve account". The applicant averred that the reference to the words "pay to reserve account" that appeared in the published draft were erroneous as they were added by the second respondent without the approval of the Minister who signed the draft. The applicant further deponed that the decision by the subsequent Minister that the applicant be denied his age benefit claim by the 2nd respondent was made in disregard of the rules of natural justice because the applicant was not given a fair hearing before the said decision was arrived at.

The respondents on the other hand contended that the Minister of Finance, Planning and Economic Development, in reaching the decision not to approve the applicant's age benefit claim considered all the documents relevant to the applicant's case and thus came to a conclusion that the applicant's claim had no merit. It also the case of the respondents that after the publication of S.I. 27 of 2008 the applicant did not make any contributions to the fund (the sums he had contributed having been refunded) and so the second respondent was not obliged to pay its portion to the said fund either. Furthermore, the 1st respondent also contends that the discretion to authorize release of funds lies solely with the Minister, on account of S.36 (2) NSSF Act.

The applicant was represented by Mr. Omongole, while the 1st respondent was represented by Mr. Mwaha and the 2nd respondent was represented by Ms. Nabisanja.

The main ground of this application is that the decision by the Minister of Finance, Planning and Economic Development, disapproving the applicant's age benefit claim was made in disregard of the rules of natural justice because the applicant was not given a fair hearing before the said decision was arrived at.

The law and rules relating to natural justice are well settled. The authors, DE SMITH, WOOLF AND JOWELL, "JUDICIAL REVIEW OF ADMINSTRATIVE ACTION" pg 377-378; note that the

expression 'natural justice' has become identified with two constituents of a fair hearing. That the parties should be given a proper opportunity to be heard and to this end should be given notice of the hearing and that a person adjudicating should be disinterested and unbiased.

DE SMITH, WOOLF AND JOWELL at pg 437(above), further note that a fair hearing does not necessarily mean that there must be an opportunity to be heard orally. In some situations, it is sufficient if written representations are considered.

At the heart of the principles relating to a fair hearing is a constitutional right to just and fair treatment and Art 42 of the Constitution of the Republic of Uganda 1995, provides that,

> ***"Right to just and fair treatment in administrative decisions.***
> ***Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her."***

Furthermore in the case of MPUNGU & SONS LTD V ATTORNEY GENERAL AND ANOR (CIVIL APPEAL 17 OF 2001) [2006] UGSC 15, the Supreme Court held that,

> ***"…the Audi Alteram Partem rule is a cardinal rule in our administrative law and should be adhered to. Simply put the rule is that one must hear the other side. It is derived from the principle of natural Justice that no man should be condemned unheard. (See Black's Law Dictionary) 6th Edition. However one would have to prove that one had a right to be heard which had been breached, and that the decision arrived at by the administrative authority had either deprived him of his rights or unfairly impinged on those rights thereby causing damage to the individual concerned. Most cases involving the right to be heard have dealt with situations where a person was being deprived of his property or livelihood. But each case has to be looked at on its own merits."***

In the case of RUSSELL -VS- NOLFOLK [1949] 1 All ER 109 Turker, L.J, found that,

> ***"The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth."***

The effect of a decision made in disregard to the principles of Natural Justice is provided in the case of RIDGE V. BALDWIN [1963] 2 W.L.R. 935, [1964] AC 40, HL where Lord Reid found that a decision given without regard to the principles of natural justice is void.

A member of the fund (meaning the National Social Security fund) may make an age benefit claim in accordance with S. 20 of the National Social Security Fund Act which provides that,

> ***" Age benefit.***
> ***(1) Subject to section 19, a member of the fund shall be entitled to age benefit—***

(a) if he or she attains the age of fifty years and has retired from regular employment; or

(b) if he or she attains the age of fifty-five years"

In this case it appears that the applicant by reason of his age (above 60) at the time he Joined the National Social Security Fund as a Deputy Managing Director could be treated as fund member in the normal way and therefore a statutory instrument signed by the Minister had to be made to enable him save with the fund.

There is also some contest between the parties as to what the said statutory instrument (S.I. 27 of 2008) signed by the minister provided for. The applicant states that the words "pay into a reserve account" that appear in the published instrument were not in the instrument signed by the then Minister of Finance Planning and Economic Development (herein after referred to as MOFPED) Dr. Ezra Suruma but were just added in by the second respondent. This is significant because payments out of the reserve account under section 36 (2) of the NSSF Act have inter alia to be authorized by the Minister of MOFPED. A look at annexure 'D' (which is dated 9th April 2008 but with out an instrument publication date or number) to the applicant's affidavit shows hand written insertions "… **pay into a reserve fund**…"after the words "shall" and "a special contribution…" and "**security**" between the words "social" and "fund…" (Emphasis mine) and reads as follows without the alterations.

> ***"With effect from February 2007, the National Social Security Fund shall make a special contribution in respect of Professor Mondo Kagonyera calculated at the rate of 10% of all his total monthly wages earned in each month from 2nd February, 2007 until he leaves the service of the Social Fund."***

This appears to me to have been the original draft presented to the Minister to sign. According to counsel for the applicant in the said draft there was no requirement for the said contributions to be made to the reserve fund instead that the second respondent was required to make a special contribution of 10% of the applicant's salary.

The published instrument on the other hand also dated 9th April 2008 (but with a publication date 18th July 2008) however relied on by the respondents reads at para 2

> ***"With effect from February 2007, the National Social Security Fund shall pay into the reserve account a special contribution in respect of Professor Mondo Kagonyera calculated at the rate of 10% of all his total monthly wages earned in each month from 2nd February, 2007 until he leaves the service of the Social Security Fund."***

It is the respondents' submission, based on the published instrument, that since money had to be paid out of the reserve fund then the Minister would have make a decision to authorize its payment. It is also the respondent's case that in arriving at a decision, the Minister of Finance, Planning & Economic Development took into account all documents in respect of the applicant's case. The documents considered included;

- ***The applicant's appointment letter dated 31st January, 2007***
- ***The salary refund memo dated 23rd April, 2007***
- ***S.I. 27 of 2008***
- ***The NSSF letter dated 9th July 2010***
- ***The applicant's claim letter dated 9th August 2010***
- ***The Minister's letter dated 9th August 2010***
- ***The Solicitor General's legal opinion dated 20th October, 2010***
- ***The NSSF letter dated 6th January, 2011***
- ***The Minister's letter dated 14th February, 2011***
- ***The Minister also considered the applicant's Notice of intention to sue dated 17th February, 2011.***

I have perused all these documents listed above, which were considered by the Minister of Finance, Planning & Economic Development in arriving at the decision not to approve the applicant's age benefit claim.

As stated in the Russell Case (Supra) requirements of natural justice must depend on the circumstances of the case in question.

Furthermore, in the case of **KASIBO JOSHUA V THE COMMISSIONER OF CUSTOMS, UGANDA REVENUE AUTHORITY** (MA 044 of 2007) I found that, the remedy of judicial review was well articulated by Kasule Ag. J. in the case of **JOHN JET TUMWEBAZE V MAKERERE UNIVERSITY COUNCIL AND 3 OTHERS** (Civil Application No. 353 of 2005) (unreported) where he held that,

> ***"…The orders be they for declaration, mandamus, certiorari or prohibition are discretionary in nature. In exercising its discretion with respect to prerogative orders, the court must act judicially and according to settled principles. In the JOHN JET TUMWEBAZE case (supra) such principles may include;***
>
> - ***Common sense and justice***
> - ***Whether the application is meritorious***
> - ***Whether there is reasonableness***
> - ***Vigilance and not any waiver of rights by the Applicant …"***

To my mind the applicant faults the use by the Minister of MOFPED of the published and dated statutory instrument instead of the draft instrument without the hand written insertions.

The law relating to statutory instruments is provided for in part 4 of the Interpretation Act (Cap 3).

Section 16 of the Interpretation Act provides

> ***"…Every statutory instrument shall be published in the Gazette and shall be judicially notice…"***

Section 15 of the same Act also provides

“…any statutory instrument may be cited by reference to its short title, if any, or by reference to the number of the notice under which it appeared in the Gazette…”

The draft statutory instrument (supra with or without the hand written insertions) does not meet the tests in sections 15 and 16 of the Interpretation Act. It is not published in the Gazette nor as a result does it have a number. The Court can only take judicial notice of the statutory instrument with a number published in the Gazette. In any event there is no affidavit from the Minister who signed the said instrument that there is an error on the face of the published instrument.

It would therefore be contrary to common sense and justice for Court to exercise its discretion based on an unpublished instrument of this nature when a published instrument exists. It would also be unreasonable to do so.

That being the case I find the application to be without merit and according hereby dismiss it with costs.

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Justice Geoffrey Kiryabwire

JUDGE

Date: 25/06/2012

25/06/12

10:04

Ruling read and signed in open court in the presence of;

- Richard Omongole for the Applicant

In Court

- None of the parties
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 25/06/2012