

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
CIVIL SUIT NO.279 OF 2003

DAVID MUWONGE SSALONGO:..... PLAINTIFF

VERSUS

THE ATTORNEY GENERAL :..... DEFENDANT

BEFORE: HONOURABLE JUSTICE REMMY K. KASULE

JUDGMENT

The plaintiff sued the defendant for recovery of terminal benefits in the nature of a retrenchment package and for general damages.

The issues agreed upon for resolution by Court were:-

1. Whether the plaintiff's suit discloses a cause of action.
2. Whether the plaintiff is entitled to claim his terminal benefits from the defendant; and if so,
3. Whether the defendant is liable to pay Ug.Shs.68,578,342/= as claimed by the plaintiff.
4. What remedies are available to the plaintiff.

The plaintiff testified in person and called two other witnesses. The defendant called no witnesses.

The plaintiff's case is that he was on 20.04.66 employed by United Garment Industry Limited as headman of the sewing section. Later he was promoted to the office of furnishing manager, furnishing house limited, a subsidiary of the National Textiles Board. He was then further transferred to LEBEL EAST AFRICA LIMITED as Head, Marketing Department, a post he held until 21.03.88 when he was sent on an indefinite leave. He

was never re-assigned any other work since then. He was not paid his due terminal benefits, until 06.09.02, when he was part paid by the defendant, the Government having taken over, through the privatization process, the activities of the plaintiff's employers.

The United Garment Industry Limited, the African Furnishing House Limited and Lebel East Africa Limited, were all Government of Uganda state corporations in the sector of textiles, and all operated as subsidiaries of the National Textiles Board, also a state corporation. Through the privatization process the Government assumed responsibilities over the same, including settlement of their liabilities.

The first issue is whether the plaintiff's suit discloses a cause of action.

A cause of action is the fact or combination of facts that given a right of action. See: **High Court Miscellaneous Cause No.441 of 2004 (Arising from High Court Miscellaneous Cause No.60 of 2004): ANNEBRIT ASLUND V. ATTORNEY GENERAL**, unreported.

Three ingredients are essential for a cause of action to exist: The plaintiff must have enjoyed a right: that right must have been violated and the defendant is the violator of the right: See: **AUTO GARAGE V. MOTOKOV (NO.3) 1971 EA 514**. See also: **SUPREME COURT OF UGANDA CIVL APPEAL NO.13 OF 1990: LAWRENCE MUSIITWA KYAZZE V. EUNICE BUSINGYE**, unreported.

In order to determine whether the plaintiff has a cause of action, court only looks at the pleadings.

In the plaint of the plaintiff in this case, the plaintiff asserts he was an employee of entities over which the Government, through its privatization process, took over the responsibility to pay him the terminal benefits he earned by virtue of his being so employed. He thus enjoys a right. That right is violated by his not being paid what he

claims is due to him as terminal benefits. The defendant as the one responsible for making the payment, is the violator of the plaintiff's right by not paying.

The essential ingredients of a cause of action are therefore satisfied.

It is pleaded in paragraph 7 of the written statement of defence that the plaintiff has no cause of action against the defendant by reason of Res Judicata.

Court received no evidence to support the averment of Res Judicata. The plaintiff was not cross examined about the issue. So too were both his witnesses.

Court therefore holds that the plaintiff's suit discloses a cause of action.

The second issue is whether the plaintiff is entitled to claim his terminal benefits from the defendant.

It is a fact that since the late 1980s the Government of Uganda set itself to carry out a policy of reform and divesture of public enterprises. Through this policy, Government retained ownership and management of those economic enterprises which it found necessary to do so. In others, Government only retained majority shares and divested the minority shares to private individuals. In other enterprises Government totally divested itself by disposal of all the shares. Yet in others, Government totally liquidated the enterprises. The whole process executed by Government since the late 1980s later came to be consolidated into one law: The Public Enterprises Reform and Divesture Act, Cap. 98, Laws of Uganda, 2000 edition.

Of relevance to this case is the fact that under The Public Enterprises Reform and Divesture Act, the United Garment Industries Limited and Lebel (EA) Ltd, where the plaintiff was respectively employed, are listed in the first schedule of the Act, as one where the state is required to fully divest from i.e. Uganda Garment Industries Ltd, and another as one where the State is required to liquidate i.e. Lebel (EA) Ltd.

There is thus no doubt that the employers of the plaintiff were the subject of the reform and divesture policy of Government.

Section 21 of the Act enjoins the Minister responsible for finance to ensure, in respect of an enterprise the subject of privatization, the provision is made for payment of compensation to employees who are made redundant as a result of the structuring or liquidation of the enterprise; through establishment and operation of a redundancy account in a bank approved by the Minister.

The privatization unit, set up under the divesture guidelines under Section 22 of the Act has also a duty under divesture guidelines 4(4) (b) (i) (k) and (i) to determine fair and reasonable severance pension and other payment arrangements that are appropriate following a divesture of a public enterprise. The Unit has also to cause to be executed such agreements with the parties concerned, or cause proceedings to be taken for recovery of such payments; or such other acts as may be required to effect the divesture of the public enterprise.

The evidence of the plaintiff is that he placed his claim for terminal benefits before the Privatization Unit Ministry of Finance, on 13.12.81. The Privatization Unit responded to his claim by paying him by cheque Shs.6,468,068/= without any explanation as to what the amount represented, given that the total claim he submitted was Shs.75,046,410/=. He also received no guidance at all from the privatization unit as to how the figure of Shs.6,468,068/= had been calculated.

The plaintiff thus decided to sue the defendant pursuant to Article 119 (4) (c) of the Constitution and Section 2 of the Government Proceedings Act, Cap.77.

No one testified for the defendant as to why the plaintiff should not be entitled to claim his terminal benefits from the defendant.

This court on the basis of the evidence adduced before it and having applied the relevant law to that evidence; holds that the plaintiff is entitled to claim his terminal benefits from the defendant.

As to the third issue, whether defendant is liable to pay Ug. Shs.68,578,342/= claimed by the plaintiff, the plaintiff adduced the evidence of PW2, Edward Frederick Mulondo, a workmate of plaintiff as financial accountant at United Garment Industry from 1966 until 1982: when plaintiff was promoted to Lebel (EA) Ltd. on 24.07.02. This witness forwarded in writing to the director, privatization unit, the details of salary and benefits that plaintiff was earning in 1982, when plaintiff was a Manager, in United Garment Industries Ltd: Exhibit P8. He confirmed the details by consulting Phoenix Logistics who were the successors to United Garment Industries Ltd, and who thus kept all records of the said United Garment Industries Ltd.

The evidence of PW3, Augustine Lubega Matovu, now an advocate in private practice, but formerly a Board Secretary, National Textiles Board, was to the effect that in 1977 he was Assistant Board Secretary of the National Textiles Board; to which all textiles industries in Uganda were affiliated. When he became Board Secretary, he, as it was part of his duties, communicated to the plaintiff the terms and conditions of his service. He wrote exhibit P4, on 31.08.82, when plaintiff was appointed Acting Manager, African Furnishing House Ltd. Later plaintiff was promoted and transferred by the Board to Lebel (EA) Ltd, the marketing arm of the National Textiles Board. Subsequently a decision was taken that employees of Lebel (EA) Ltd be absorbed in Nyanza Textile Industries Limited. The plaintiff was sent on leave pending implementation of this decision. The decision was never implemented in case of plaintiff as he was never taken on by Nyanza Textile Industries Ltd.

In 2002, the director, privatization Unit contacted the witness (PW3) about the issue of plaintiff's terminal benefits. The witness contacted the auditors of National Textiles Board, who were still functioning as the skeleton staff of the Board, the Board having been dissolved by this time. The auditors furnished to the witness the particulars of the

terminal package the plaintiff was entitled to. The witness passed on the auditor's report and calculations of the package of the plaintiff to the director, privatization, Ministry of Finance on 21.03.02 as per exhibit P10. The total package due to plaintiff had been calculated at Shs.75,046,410/=.

According to plaintiff, out of the total package of terminal benefits, he was paid only Shs.6,468,068/=. No reason has ever been advanced to him for the non payment of the balance of the package of shs.68,578,342/=.

This court, on its own initiative, required the plaintiff to adduce more detailed evidence, and defendant to respond to that evidence, as to how the amount of shs.75,046,410/= claimed by the plaintiff had been calculated and arrived at.

The plaintiff called Mr. Wilson K. Zziwa as his witness: PW4. This witness, a Certified Public Accountant since 1973, had been, at the material time, Manager of Messrs Muyanja, Lwanga & Co., Certified Accountants. It is the firm that had been earlier contracted to compute the claims of the plaintiff's colleague employees of Uganda Garment Industry Limited, who, unlike the plaintiff, had been promptly paid their retirement benefits on their being retired.

The witness explained to court that he computed the retrenchment package of the plaintiff, using as the basis, plaintiff's basic salary, Housing allowance, monthly gross salary, period of service in years, period of service in months and period of redundancy. He came to the total retrenchment package of Ug.Shs.70,941,040/= from which he deducted the sum of Shs.6,468,068/= paid to plaintiff by the privatization unit on 05.09.02, leaving a figure of shs.64,472,972/= as the retrenchment package due to the plaintiff. The computations by this witness were tendered in evidence as exhibit P11.

The defendant offered no evidence to dispute these computations.

Court notes however, that a sum of Shs.40,033,660/= is claimed as redundancy pay by way of salary arrears for the period, March 1998 when plaintiff was told to go on leave and May 2002, when PW3, Augustine Lubega Matovu, former Board Secretary of the plaintiff's employer communicated to the Ministry of Finance, Privatization Unit, as per exhibit P10, setting out the terms of the retrenchment package plaintiff was entitled to. The total period of redundancy pay is 47 calendar months.

Plaintiff contends that for the said 47 months he was waiting to be deployed by his former employers in the process of Nytil absorbing Lebel (EA) Ltd. as per exhibit P5.

In the considered view of this court, the plaintiff had a duty to minimize his loss by, within a reasonable time, after the expiry of 30 days leave, taking steps to find out whether he would be absolved or not in some other alternative employment by his former employers and if not, to get alternative employment elsewhere. Court, in its judgment, holds that a period of 12 calendar months was such a reasonable time. It was unreasonable of the plaintiff to wait doing nothing about his future employment for a whole 47 months. Court therefore awards the plaintiff salary arrears for the 30 days leave which is one month and for an additional 12 months, being the reasonable period the plaintiff ought to have spent waiting to see whether or not he was to be absorbed in Nytil or elsewhere, failure of which, he was obliged, in order to minimize loss, to look elsewhere for alternative employment. Thus plaintiff is awarded a redundancy package by way of arrears of salary of Shs. $(851,780 \times 13) = 11,073,140/=$.

The plaintiff acknowledges having received from the privatization Unit Shs.6,468,068/=. The law is that payment of a smaller sum is not satisfaction of a liquidated debt of greater amount, when there is no consideration for giving up the remainder: See: **PINNEL'S** case: **(1960)5 CO REP. 117** and also **D & C BUILDERS LTD. V. REES (1966) 2qb 617: (1965) 3 ALL ER 837.**

Court has received no evidence from the defendant to the effect that plaintiff was not entitled to the payments attributed to him or that he gave up claim of the bigger sum of the claim by accepting the lesser sum of Shs.6,468,068/=.

The plaintiff has therefore, on a balance of probabilities, proved that the defendant is liable to pay him the sum of Shs.35,512,452/=.

It is submitted that the plaintiff has been deprived of use of his money and as such is entitled to substantial interest. Where a party does not get compensatory damages as at the date of dispossession of the subject matter, that party is entitled to interest on the monetary value of the subject matter: See: **KIMANI VS. ATTORNEY GENERAL [1969] EA 502 at 504-5.**

Interest, is regarded as representing the profit a party might have made if that party had use of the money or conversely the loss the party suffered because of the non use of the money See: **RICHES VS. WESTMONT BANK LIMITED (1947) AC 390.** See also **H.C.C.S NO.1100 OF 1998; RUTH ALIU & 136 OTHERS VS. ATTORNEY GENERAL**, unreported.

It is within the discretion of court to determine the rate of interest to be awarded: See: **UGANDA REVENUE AUTHORITY VS. STEPHEN MABOSI: SUPREME COURT CIVIL APPEAL NO. 26 OF 1996**, and also; **J.K. PATEL VS. SPEAR MOTORS LIMITED, SUPREME COURT CIVIL APPEAL NO.4 OF 1991.**

On the evidence availed to court terminal benefits of other former employees of the United Garment Industry Limited were calculated and were due to be paid on 01.02.1995. It is thus safe to have the 01.02.1995 as the date when interest became due in favour of plaintiff.

Court, given the delay to pay the terminal package to the plaintiff, awards interest of 20% p.a. on the sum of Shs.35,513,452/= due to the plaintiff. The said interest of 20% p.a. is to run from 01.02.1995 till payment in full.

Having awarded interest to the plaintiff for non use of the money, this court holds that the plaintiff is not entitled to general damages for non-payment and non use of the money.

Accordingly judgment is entered for the plaintiff for:-

- a) Shs.35,513,452/= terminal benefits
- b) Interest thereon at 20% p.a from 01.02.95 till payment in full.

The plaintiff is awarded the costs of the suit against the defendant.

REMMY K. KASULE

JUDGE

28th October, 2009