THE REPUBLC OF UGANDA

IN CIVIL DIVISION AT KAMPALA

CIVIL APPEAL NO. 49/2010

NATIONAL SOCIAL SECURITY FUND :::::::::::::::::::: APPELLANT

VERSUS

MARGARET ORUNNI ::::::::::::::::::::: RESPONDENT

BEFORE HON. MR. JUSTICE MIKE J. CHIBITA

JUDGMENT

This is an appeal from the orders of Her Worship Juliet Nakitende, Magistrate Grade I Mengo in Civil Suit No. 1450 of 2007.

The brief facts of the case are that the Respondent was employed by the Appellant till 10/2/2006 when she was terminated. This followed her appearance before the Disciplinary Committee, which found her guilty of diverse offences.

She disputed the decision and was accorded an appeal.

The Appeals Committee confirmed her guilt and upheld the termination. She filed a suit in Mengo Chief Magistrates' court seeking damages, a temporary injunction and costs of the suit.

The trial Magistrate found for the Respondent and awarded damages and costs hence the appeal.

The Appellant was represented by learned Counsel Isaac Ogwang assisted by Rachel Nsenge while the respondent was represented by learned Counsel Philemon Shwekyerera. They presented oral arguments.

At the start of the appeal, learned Counsel sought to tender in additional evidence in the form of the Mortgage Deed. He averred that the trial Magistrate made a finding on the basis of the Deed without addressing herself to clause 27 referred to above. In the case of **Daharasani vs. Hara SCCA No. 27 of 1996** it was held that appellate courts have the discretion to receive additional evidence.

The justification for the additional evidence, he added, is that the trial Magistrate made a finding based on a document without the benefit of looking at it.

Learned counsel for the Respondent opposed the application. He stated that Order 43 rule 22(1)(b) implies that court would be the one to move itself to require the additional evidence not a litigant.

Additionally, during the trial the Appellant had opportunity to produce all the documents it required. Therefore, he argued, introducing them at this point amounts to an ambush.

He therefore prayed that the application is disallowed so the parties can proceed with the appeal based on the court record.

I reserved the ruling to form part of the main judgment.

After listening to both sides, reading the judgment and the rest of the record, I find it harmless to the Respondent's case to allow the Mortgage Deed in evidence. Indeed it is central to the ground of appeal relating to loan repayment.

The Mortgage Deed will therefore be relied on during the writing of this judgment.

Arguing ground I, learned Counsel Ogwang averred that the trial Magistrate relying on clause 9.7 of the NSSF Handbook, concluded therefore that once the Chairman has made a decision it is final. The offences the Respondent was found guilty of are under group D, section 23, of the Handbook.

The penalty for such offences is dismissal. The Committee recommended down grading the offences from group D to group C and therefore to a final warning instead of dismissal.

These were presented to the Employer who exercised his right under section 45.6.7 to terminate the services of the Respondent. Termination letter refers.

He stated that it was not true that employer dismissed the respondent contrary to the findings of the Disciplinary Committee. She was furthermore accorded the benefits of an appeal. The Appeals Committee confirmed the termination.

The employment Act provides for penalties under schedule I. Regulation 3 (5) (d) provides for dismissal if inability to perform work is cited.

Respondent was guilty of failure to perform her duties and therefore the employer was within its right to mete out the punishment. He submitted that it was wrong therefore for the trial Magistrate to confine her finding on whether employer acted lawfully or not. She erred to find that termination was unlawful.

Furthermore, **BOU vs. Tinkamanyire CA No. 12 of 2007** referred to **Barclays Bank Vs. Mubiru CA No. 1 of 1998.** It was held that employer is entitled to terminate by giving notice.

The respondent was terminated with notice and therefore employer was within his right, according to Counsel.

Regulation 7.9 does not give DC final say on disciplinary matters. Termination is guided by section 40 of the Handbook which gives employer power to terminate.

That offences were under Group C is not true, the letter of termination refers to Group D offences. DC decided to re classify the charges as Group C offences based on their own reasons.

This is not provided for under the Handbook hence the DC was acting *ultra vires* its powers. Therefore Employer exercised its right lawfully.

Regarding failure to uphold rules of natural justice, there was the first hearing where the Respondent nominated two representatives who attended and signed off the report. She had liberty to call witnesses and to cross examine but chose not to.

Furthermore, she made a presentation to the DC as per record of proceedings. It cannot therefore be said that principles of natural justice were not upheld. He therefore called upon court to allow ground 1 of appeal.

In reply, learned Counsel Shwekyerera contended that the trial Magistrate came to the right conclusion that termination was unlawful. She correctly addressed herself to the regulations cited.

Although the preliminary procedures were flouted by jumping to termination of the respondent, the recommendations to reinstate made by the DC, were ignored.

Even the information regarding her re instatement was never communicated to her. Instead she received a letter of dismissal.

Regulation 9.7 provides for DC to be left to make a decision, which is clear and unambiguous. Management's role is to implement DC decisions.

After termination she filed her appeal, which was heard and determined without her knowledge. Termination took place before the Management had received the report of DC. The report recommendations are at variance with what the termination letter states. DC found the offences to fall in group C, there was a jump of one stage and instead terminated the respondent's services.

She was not given a fair hearing by the DC as required by the principles of natural justice. Regulation 9.3 and 9.5 gives employee a right to call witnesses but this right was denied her. This affected the outcome of the DC proceedings.

He referred Court to the case of **Obwol vs. Barclays Bank Ltd 1992-93 HCB 179,** where it was held that dismissal was unlawful because he was not give an opportunity to defend himself.

The findings of the trial Magistrate should be upheld in this ground, he concluded.

According to section C, clause 12 of the NSSF Staff Handbook the Appeal procedure is from Disciplinary Officer's decision to Disciplinary and Grievance Committee to Appeals Committee to Managing Director and finally to the Chairperson of the Board Staff and Administration Committee.

The chronology of events leading to the termination of the Respondent was as follows: Interdiction was on 31st July, 2006, hearing by the Disciplinary Committee was on 6th November, 2006 where a decision was made to give her a final warning, termination by the Managing director was on 5th December, 2006, appeal to the Board Staff and Administration Committee was on 18th December, 2006, Appeals Committee was constituted and heard the appeal on 27th July, 2007 and its decision communicated on 7th August, 2007.

It is apparent that the Managing Director contravened the provisions of Section C clause 12 of the Staff Handbook by terminating the Respondent before the Appeal process had been exhausted. There is absolutely no legal basis for the decision of 5th December to terminate the Respondent.

Interestingly the Managing Director's letter of 7th August, 2007 tried to cure the incurable by confirming the decision of the Appeals Committee that sat after it had been bypassed by the Managing Director's office. He also advised the Respondent of her right to appeal that decision to the Managing Director in accordance with the provisions of the Handbook!

This was a complete disregard of the established procedure as laid down in the Handbook. How could an appeal be made to the Managing Director after he had already jumped the gun and pronounced himself on the matter vide his termination letter of 5th December, 2006?

There was gross abuse of process and violation of the NSSF Handbook and the principles of natural justice. Learned counsel for the appellant's reference to the Employment Act does not arise because the NSSF Handbook is what was cited as the basis for the disciplinary procedure yet it was grossly flouted.

This ground of appeal therefore fails.

Ground 4 refers to the award of general damages, learned Counsel Ogwang referred court to the decision in **URA vs. Wanume Kitamirike CA No. 43 of 2012 CA** where it was held that court will not reverse an award of damages unless it was based on a wrong principle.

Trial Magistrate stated that in the instant case the Disciplinary Committee recommended reinstatement but Management went ahead to terminate. This finding is based on a wrong premise and he prayed that court reverses the award of damages premised on a wrong principle.

Counsel for the Respondent however retorted that ground 4 on award of Shs 10,000,000/= for unlawful termination should be upheld. In **Lwamafa vs. AG CS No. 079 of 1983 KALR 1992, 21** it was held that valuation of damages should be at time of judgment.

In **Mawagala Estates vs. Mateeka CA No. 19 of 2000 HCB 2001-2005, 68** it was held that appeal court can only tamper with award if too high or too low. Also the authority held that Courts may take into account current value of money in terms of food and services.

Respondent was earning over Shs 1,600,000/= per month and amount awarded is reasonable, submitted Counsel for the Respondent.

Ground 4 of appeal also fails since its outcome was based on ground 1. I find that the award of general damages was based on a right premise and therefore **Kitamirike vs. URA** (supra) comes into play.

I find the award neither too high nor too low so in keeping with **Mawagala Estates vs. Mateeka** (supra), I will not tamper with it.

Grounds 2, 5 and 6; the trial Magistrate found it to be defamatory to refer to respondent as suffering from acute paranoia. Counsel referred Court to a Text on Torts by David Howarth page 581 refers to **Harrison vs. Bush 1856 5 E&B 348**.

The said defamation was accessed by Disciplinary Committee, Appeals Committee and Management. A matter that comes to knowledge of someone in course of their duty does not amount to defamation.

Defamation refers to a publication according to **Restetuta Twinomugisha vs. Uganda Aluminium Ltd CA No. 19 of 2001** which defined defamation as publication to members of society. In the instant case this did not amount to publication and therefore not defamatory. There was no publication to a 3rd party.

He prayed that court finds that trial Magistrate erred when she held that the Respondent had been defamed without evidence of publication.

Ground 2 regarding defamation, even if the defamatory statement is read by a single person is ample to find for defamation. In **Kisasi vs. UCB CS No.1061 of 1990 HCB 1992-93, 112,** it was held the words were defamatory in the eyes of the person to whom the cheque was issued, according to Counsel for the Respondent.

The mere fact that the report was circulated to DC and AC was enough publication. PW 2 stated that he had heard about the paranoia from a Mr. Ofwono. Therefore apart from DC and AC other people like PW 2 heard about the defamatory statement.

In **Ntabgoba vs. New Vision HCB 2001-2005, 109** it was held that where the words complained of are defamatory in their ordinary meaning, there is no need to prove more than publication.

The trial Magistrate fully captured the evidence adduced and was justified in reaching the conclusion she did, he submitted.

The reference to **Kisasi vs. UCB** (supra) can be distinguished. Defamation first has to be defined as by Black's Law Dictionary. Key to defamation is publication. In the instant case there was no publication as envisaged by the law.

Mr. Ofwono obtained information as a representative of the respondent at the hearings. There was no publication to a 3rd party, he concluded.

Ground 2 of appeal therefore succeeds.

On grounds 5 and 6, Counsel Ogwang stated that court has discretion to overturn an award whose basis is a wrong principle of law. She erred when she awarded the Respondent exemplary damages.

The law on exemplary damages is that they must be pleaded and proved specifically **Rookes vs. Barnard (1964) AC 1129.** It must be in cases of oppressive, arbitrary or unconstitutional actions, conduct that was calculated to make a profit or where statute expressly authorizes the same.

Respondent was given a hearing, a right of appeal and letter of appeal informed her of availability of her money in lieu of notice; and so it cannot be said appellant acted as above.

He prayed that it be found that award of special damages was made in error.

In response to grounds 5 and 6 as argued by Counsel for the Appellant, Counsel Shwekyerera averred that it is a general rule that awards will be awarded to a successful party for the wrong suffered **Ntabgoba** (supra) refers. In **Lugayizi vs. Confidential CS No. 644 of 2001 HCB 2001-2005,** it was held that court considers position and standing, etc.

At the time of defamation, the Respondent was an employee of the Appellant earning Shs 1,600,000/= per month and therefore of high repute.

The trial Magistrate was justified in awarding Shs 4,000,000/= as general damages and Shs 3,000,000/= as exemplary damages, he contended.

On defamation, I find that there was no publication as envisaged by the law to warrant a finding that the Respondent was defamed. This ground of appeal therefore succeeds.

Grounds 2, 5 and 6 therefore succeed and the award of Shs 4,000,000/= as general damages and Shs 3,000,000/= as exemplary damages is hereby quashed.

Grounds 3 and 7 according to learned Counsel for the Appellant refer to deductions made to the Respondents payment in lieu of notice. These are statutory deductions provided for by the Income Tax Act. The order for full payment without tax therefore is an error.

Under section 11 NSSF Act, requires deduction of 5% from Employees. Evidence was led by DW 2 to the effect that deductions of NSSF and PAYE were made. Trial Magistrate instead held that full amount of Shs 4,881,000/= was due and owing.

He asked court to find that the holding that payment of the whole amount was due and owing to the Respondent was founded on a wrong principle.

Counsel for the Respondent argued that ground 3 concerns the award of payment of three months in lieu of notice without deductions. He conceded to the averments regarding the Income Tax Act provisions. He however disagreed that NSSF was entitled to make deductions.

At time of termination, respondent ceased to be an employee and therefore any deductions were unlawful, he contended. The section cited only applied to employees not ex employees like the Respondent.

From the testimony of respondent she was asked to collect two months' worth of notice and until the matter was filed in court there was no admission of the error.

It only came out during cross exam of DW 2 and so there was no way she would have gone to pick the money while in court. Moreover she was opposed to the NSSF deduction.

In rejoinder to ground 3 regarding NSSF deductions, Counsel Ogwang contended that section 1 of NSSF Act defines a wage and section 11 provides for the deduction. A wage is derived from a contract of services.

Learned Counsel for the Respondent conceded that the Respondent's payment was indeed subject to Income Tax deductions. The only contention out of this ground therefore is whether the payment was subject to NSSF deductions.

In my view this severance package was not subject to NSSF deductions. This is because the spirit of the NSSF law is to encourage savings for workers so that at the end of their contracts or working life they have something saved to start retirement with.

In the instant case, the Respondent was indeed going into forced early retirement. She therefore needed every coin that she could genuinely lay her hands on. How could a deduction then be made at the end of her contract?

NSSF was no longer her employer from the time she was terminated. NSSF therefore could no longer deduct her payments because it was not her employer. If this deduction were allowed to stand it would be the only such money on her account.

Therefore if Respondent was never going into employment again she would have to commence a process of requisitioning for this money almost immediately. This is superfluous and is against the spirit of the NSSF Act.

This ground of appeal fails.

On interest as per ground 7, learned Counsel for the appellant asked court to find that the trial Magistrate erred to award the interest at the rate she did. The money was availed to the Respondent but she has refused to pick the same and therefore it would be unfair to penalize the Appellant with interest.

Such money was for three months in lieu of notice. The reference to two months in her letter was in error.

He prayed that the interest of 24% p.a. be overturned.

Learned counsel for the Respondent agreed with the learned trial Magistrate concerning the interest awarded in this respect. He argued that the money became owing from the time of termination. If she had been paid this money at the time, the issue of interest would not have occurred.

From that time if the money had been invested, she would have made even more money than the interest awarded. The interest awarded was therefore in order.

Under ground 7 it is respondent's contention that three months was never notified to her. It was an admission of an error during examination in chief not later.

The letter notifying the Respondent was fraught with errors either deliberately or due to carelessness. The letter stated that Respondent was entitled to two months' salary in lieu of notice. Counsel for the Appellant has conceded that indeed the Respondent was entitled to three months' notice.

The letter indicated that the payments would be subject to deductions, one of which was unlawful. If the Respondent had picked the payment as it had been offered to her she would have been prejudiced.

She was within her right not to pick payment which was still contested. This contest was not clarified until the matter was brought to court.

The learned trial Magistrate was therefore right to impose the interest since the Respondent could not access her payment till court had made a ruling on the contentious points.

Ground 7 of appeal therefore fails.

On ground 8 regarding payment of loan, learned Counsel for the Appellant submitted that the trial Magistrate held that respondent should have been allowed to continue making payments towards her loan for 15 years.

The Mortgage Deed signed by the parties on 24th August, 2005 provides under clause 27 that a loan becomes due should employee leave employment or die.

15 years contradicts the provisions of the Mortgage Deed. Clause 27 was mentioned in the letter to the Respondent by the Appellant on the subject at hand.

He prayed that the holding giving 15 years should be replaced by the time frame provided for by the Mortgage Deed.

He therefore prayed that the appeal is allowed and court grants costs of the appeal to the Appellant.

Learned counsel for the Respondent contended that concerning the loan, the trial Magistrate was justified in finding that the respondent repays the loan in 15 years as provided by the Loan Agreement.

From the time of termination, respondent has not been gainfully employed anywhere and needed reasonable time to repay the loan.

He therefore prayed that the appeal is dismissed with costs in this court and the court below.

On the issue of loan repayment, the learned trial Magistrate had the following to say:-

> ***"Although no evidence…or a copy of the Mortgage Agreement was brought for court to look at the terms of the Mortgage Agreement. I agree with the recommendations of the committee…"***

It is evident therefore that she did not have the benefit of perusing the Mortgage Deed. Had she done so she would have encountered clause 27 which provides as follows:-

> ***"Notwithstanding any clause herein to the contrary, the whole of the unpaid loan amount plus the accrued interest shall immediately become due and payable in full should the borrower leave the employment of the Mortgagee for any reason whatsoever or die."***

The provision is as clear as daylight and it was entered into, executed and signed by both parties. The loan amount therefore became due and owing when the Respondent ceased being an employee of the Appellant.

However since the issue of whether the termination of her employment was lawful and effective was central to this suit, it follows that the loan did not, and will not, become due until the Appellant has fully settled her benefits.

Having failed on all but four grounds, the appeal is dismissed in relation to the four other grounds. I therefore give the following orders:-

1. The Respondent will be paid three months salary in lieu of notice less PAYE.
2. Interest of 24% will be paid on the above amount from the date of filing of Civil Suit No 1450 of 2007 till payment in full.
3. The Respondent's award of Shs 10,000,000/= as general damages for unlawful termination stands.
4. Interest of 10% on the Shs 10,000,000/= from date of judgment is sustained.
5. The amount due for loan repayment will fall due immediately after settlement of the Appellant's indebtedness to the Respondent.
6. The Respondent is awarded 50% of costs in this court and full costs in the lower court.

Dated at Kampala this 29th day of November, 2012

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JUSTICE MIKE J. CHIBITA

JUDGMENT READ AND DELIVERED IN THE PRESENCE OF:-

COUNSEL FOR THE APPELLANT: RACHEL NSENGE

COUNSEL FOR THE RESPONDENT: PHILEMON SHWEKYERERA

APPELLANT: ABSENT

RESPONDENT: MARGARET ORUNNI

COURT CLERK/INTERPRETER: LIZ CHEPTOEK

BY: ……

MIKE J. CHIBITA

JUDGE