

COUR DE JUSTICE

APPEAL NO. 1 OF 2015



COURT OF JUSTICE



**IN THE COURT OF JUSTICE OF THE COMMON
MARKET FOR EASTERN AND SOUTHERN AFRICA –
APPELLATE DIVISION – KHARTOUM SUDAN
(TEMPORARILY SITTING AT NAIROBI, KENYA)**

APPEAL NO. 1 OF 2015

**THE COMMON MARKET FOR EASTERN
AND SOUTHERN AFRICA.....APPELLANT**

Versus

COLLINS HWALIMA DUBE.....RESPONDENT

**Coram: Lombe P. Chibesakunda, President, Abdalla E. El
Bashir, Michael C. Mtambo, David C. K. Cheong
and Dr. Wael M. H. Y. Rady LLJ**

Registrar: Hon. Nyambura L. Mbatia

Assistant Registrar: Hon. Nemaduthsingh Juddoo

Counsel for the Appellant: Mr. Gabriel M. Masuku

JUDGMENT OF THE COURT

Ch. of Nyambura L. Mbatia

I- Introduction

1- The Appellate Division of the COMESA Court of Justice is seized with an appeal by the Common Market for Eastern and Southern Africa (COMESA) against the judgment delivered by the First Instance Division on 11 May 2015 in the case of *Collins Hwalima Dube v. Common Market for Eastern and Southern Africa*, Reference No. 1 of 2013.

2- The First Instance Division found that the respondent's summary dismissal by the Secretary General of the appellant was without just cause and procedurally unfair and was, therefore, wrongful and unlawful.

3- The appellant is challenging only part of the judgment of the First Instance Division. This appeal revolves around the issue as to whether there was any requirement for the Secretary General to comply with due process under the COMESA Staff Rules and Regulations (the Staff Rules) when he summarily dismissed the respondent.

4- The respondent, who was properly served with a notice of the appeal, has not put in an appearance before us.

II- Background

5- In 2006, the respondent was employed by COMESA as a chauffeur to the Assistant Secretary General. By a letter of 30 September 2009, the Secretary General renewed his contract of employment for four

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years. The respondent duly accepted the terms of his renewed contract by signing the duplicate of the contract.

6- By a letter of 2 November 2010, the Secretary General of COMESA summarily dismissed the respondent "with immediate effect" on the ground that the respondent had been involved in a case involving (sic) the forgery of a COMESA *Note Verbale* to Finland Mission. The summary dismissal was stated to be in accordance with Rule 71 as read with rules 65 (b) and 67 (b) of the Staff Rules.

7- On 18 November 2010, the respondent appealed to the Secretary General against his summary dismissal given that he had denied involvement in the forgery and that Mr. Akakondo, the principal suspect in the forgery, had confirmed the respondent's innocence in his warn and caution statement to the police.

8- By a letter of 29 November 2010, the Secretary General informed the respondent that the warn and caution statement of Mr. Akakondo clearly corroborated the respondent's participation in the crime and dismissed the respondent's appeal for being frivolous and vexatious.

9- The respondent requested the Secretary General, by two letters of 18 January 2013 and 4 March 2013, to review his decision of summary dismissal.

10- The Secretary General, by a letter of 18 March 2013, declined the respondent's request and informed him that he was at liberty to proceed to the COMESA Court.

III- Proceedings before the First Instance Division and the contested decision.

11- By application lodged at the registry of the Court on 27 March 2013, the respondent brought an action, pursuant to Article 27 of the COMESA Treaty, to invalidate the Secretary General's administrative action of summary dismissal.

12- The respondent's complaint was that the summary dismissal was unfair, erroneous, unlawful and malicious. His contention was that the dismissal was not based on sufficient evidence and that the forgery was not established before summary dismissal was meted out. Moreover, the appellant as its employer had, when it summarily dismissed him, failed to comply with due process as prescribed by the Staff Rules.

13- The First Instance Division recognized the power of the Secretary General, pursuant to Rule 71 of the Staff Rules, to summarily dismiss an employee for serious misconduct. It pointed out that summary dismissal should be limited to serious misconduct or serious breach of the contract rendering the continuation of the employment relationship untenable. Moreover, it held that the power of summary dismissal is one that must be exercised responsibly, advisedly and on the basis of the gravity and seriousness of the staff member's misconduct.

14- After duly considering the whole evidence on record adduced on behalf of the appellant and the respondent, the First Instance Division concluded that the decision of summary dismissal was not based on sufficient evidence.

15- The First Instance Division then went on to consider whether there was any requirement for the Secretary General to comply with due process under the Staff Rules when he summarily dismissed the respondent.

16 - The First Instance Division found that issues of due process were addressed in Rule 66 of the Staff Rules. With regard to the application and the interpretation of Rule 66, it held as follows:

“ 51. The essence of the above provision is that although the Secretary General has the discretion to determine whether certain misconduct warrants summary dismissal, the exercise of that discretion is subject to the requirements of due process set out in Rule 66. These requirements are that before a staff member is charged of any misconduct, there should be a written communication of the allegations against him, and that the staff member should be given at least fifteen days to answer to the allegations in writing. The only exception with regard to summary dismissal is that there is no need to refer the matter to a disciplinary committee before a disciplinary measure is taken. It may be argued that Rule 67(2) envisages a situation where immediate separation is warranted. However, this Court believes that the power under Rule 67(2) should be exercised in a manner



consistent with the due process requirements provided under Rule 66.”

17- In the light of the above principles, the First Instance Division decided that the Secretary General’s letter communicating his decision to summarily dismiss the respondent failed to notify him of any specific charge or accusation of his wrong doing, against which he would or could then defend himself. Furthermore, the letter merely referred to the respondent’s involvement in the forgery of the *Note Verbale* to the Finland mission without any details.

18 – The First Instance Division concluded, *inter alia*, that the respondent had been denied his right to be informed of the charges against him and the right to answer to them in breach of Rule 66 of the Staff Rules.

19- Finally, the First instance Division held that the respondent’s summary dismissal was without just cause and procedurally unfair and was, therefore, wrongful and unlawful.

IV- The appeal

20- By its appeal, the appellant seeks the following reliefs:

- To set aside in whole or in part the judgment of the First Instance Division ;
- To declare the summary dismissal of the respondent by the appellant to be lawful and procedurally fair.

21- At the hearing of this appeal, learned Counsel for the appellant made it clear that he was not seeking the invalidation of the whole judgment. Rather he was looking for a pronouncement from this Court as to whether the First Instance Division has not misdirected itself in ruling that there is a requirement for the Secretary General to comply with due process under Rule 66(1) and (2) of the Staff Rules when summarily dismissing an employee.

22- Learned Counsel has submitted as follows:

Rule 66 on due process provides for the general rule to be applied in cases where an employee is given the right to be heard. However, Rule 67(b) provides an exception to this right to be heard and, consequently, to Rule 66, which exception is emphasized in Rule 66(3).

The Secretary General availed himself of the exception provided under Rule 67(b) when summarily dismissing the respondent so that there was no requirement for him to comply with due process as provided under Rule 66. Rule 66 outlines the procedure to be followed when the Secretary General has taken a decision not to summarily dismiss an employee but to charge him with an offence which requires the employee to appear before a Disciplinary Committee.

Summary dismissal, as envisaged under Rule 71 as read together with Rule 67(b), is (a) immediate termination of an employee's contract of employment due to gross misconduct and (b) dismissal without notice and does not require an advance notification to be issued to the employee.

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The First Instance Division was, therefore, wrong in its interpretation and application of the law when it found, at paragraph 51 of the judgment (*supra*), that the Secretary General should have written to the respondent to communicate the allegations against him and given him at least 15 days to answer the allegations in writing.

Discussions and Conclusions

23- As already stated above, the real issue in the present appeal is whether the First Instance Division was right in holding that there was a requirement for the Secretary General to comply with due process under Rule 66(1) and (2) of the Staff Rules when he summarily dismissed the respondent.

24- The determination of this issue entails the interpretation and application of Rules 66, 67(b) and 71 of the Staff Rules. It is, therefore, appropriate to set out the following relevant provisions of these rules for the purposes of the present appeal:

“Rule 66

Due Process

- 1. No staff member may be charged for an offence under these Rules without communicating to him or her in writing the allegations made against him or her.*
- 2. No disciplinary proceedings may be instituted against a staff member unless he or she has been given at least fifteen*

working days to enable him or her answer the allegations in writing.

3. *Except in a case of summary dismissal, no disciplinary measure shall be applied against a staff member unless the matter has been considered by the disciplinary committee.*
4. *A staff member against whom disciplinary proceedings have been instituted may call witnesses, including from among the staff.*

Rule 67

Exceptions

A disciplinary case may not be referred to the disciplinary committee:

- (a) *.....*
- (b) *In respect of summary dismissal imposed by the Secretary General in cases where the seriousness of the misconduct warrants immediate separation from the service.*

Rule 71

Summary Dismissal

.....In the case of a General Service staff member the power of summary dismissal may be exercised by the Secretary General."

25- The power of the Secretary General to summarily dismiss an employee for serious misconduct under Rule 71 is not disputed. The

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First Instance Division, however, found that the exercise of that power was subject to the requirements of due process set out in Rule 66(1) and (2), namely that there was a need for the Secretary General to have written to the respondent to communicate the allegations against him and given him at least 15 days to answer the allegations in writing. The First Instance Division found that the only exception to the application of Rule 66 was that there was no need in cases of summary dismissal to refer the matter to a disciplinary committee pursuant to Rule 66(3) and 67(b).

26 -We have duly considered the submissions of learned Counsel for the appellant. It should be noted that we have not had the benefit of hearing submissions on behalf of the respondent.

27- The appellant's contention is that Rule 67(b) provides an exception to the application of the whole of Rule 66 in respect of summary dismissal imposed by the Secretary General so that there was no need for him to comply at all with the requirements of due process set out in Rule 66.

28- This Court is unable to accept the appellant's contention. We find that the First Instance Division was right and correct in its interpretation and application of Rules 66 and 67(b). The wording and language of these rules, in our opinion, support the interpretation of the First Instance Division.

29- Rule 66 provides for the observance of requirements of due process when disciplinary measures are contemplated. If, as contended by



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learned Counsel for the appellant, the legislator had intended cases of summary dismissal to be exempted wholly from the application of Rule 66, it is our opinion that the legislator would not have then confined the exception to the application of Rule 66 in cases of summary dismissal only to its paragraph 3. The legislator would instead have made it clear that the whole of Rule 66 would not apply to cases of summary dismissal. It is only in paragraph 3 that the words “*Except in the case of summary dismissal...*” appear and nowhere else in Rule 66. The end result is that Rule 66(3) provides a specific exception with regard to cases of summary dismissal in that it applies only to the need to refer the matter to a disciplinary committee. But this does not mean that cases of summary dismissal are exempt from the other requirements of due process provided for under Rule 66.

30- It follows that due process is to be complied with in any case of dismissal, including summary dismissal, under Rule 66. Rule 66(3), however, provides for an exception in that there is no need to refer the matter to a disciplinary committee in cases of summary dismissal. In effect, there is no difference between summary dismissal and ordinary dismissal as regards the requirements of due process under Rule 66, except that there is no need to hold a disciplinary committee in cases of summary dismissal.

31- This Court finds that the above views are buttressed by the wording and language of Rule 67(b). It is to be noted that learned Counsel for the appellant has contended that Rule 67(b) provides an exception to the application of the whole Rule 66 in cases of summary dismissal.



We disagree. On the contrary, we believe that Rule 67(b) makes it clear that the exception only relates to the need to refer the matter to a disciplinary committee in cases of summary dismissal. Rule 67(b), which is entitled “*Exceptions*”, provides that a disciplinary case **may not be referred to the disciplinary committee** (emphasis ours) in respect of summary dismissal imposed by the Secretary General. This is in line with the specific exception provided in Rule 66(3). Tellingly, Rule 67(b) does not provide that there is no need to comply with the other requirements under Rule 66 in cases of summary dismissal. In effect, Rule 67(b) only provides that there is no need to comply with Rule 66(3) in such cases.

32- Moreover, learned Counsel for the appellant has submitted that summary dismissal means immediate dismissal without the need for the Secretary General to write to the respondent to communicate the allegations against him and to give him at least 15 days to answer the allegations in writing. In the light of our findings as to the interpretation and application of Rules 66 and 67(b), we are unable to accept that submission. We find that Rule 66 provides that, even in a case of summary dismissal, there is still a need to comply with due process except for the need to refer the matter to a disciplinary committee. However, it also means that after the expiry of the period of at least 15 days provided for at rule 66(2) and in the light of the reply of the employee, or absence of reply, if the Secretary General still considers that summary dismissal is warranted, he may **immediately** dismiss the employee without compensation and without notice, i.e the contractual

or statutory notice applicable in cases of ordinary termination of a contract of employment.

33- This Court cannot ignore the fact that, as a general principle governing summary dismissal, disciplinary measures, even in cases of serious misconduct, require a minimum of due process. It is generally admitted that an employee should be informed as soon as possible after the behaviour occurs that the employer considers that the said behaviour may constitute serious misconduct. The employee should be advised to respond to the allegations.

34- In this context, the power of summary dismissal does not give the right to instantly dismiss an employee for gross misconduct without giving the employee the right to be heard. While summary dismissal does not require giving the employee a notice of the effective date of the layoff, the employer should, in most cases, investigate the incident and give the employee a chance to respond before deciding to dismiss him. **In Yusuf v. Union Bank of Nigeria (1996) 6 SCNJ 203 at 214, Wali JSC** stated that before an employer can dispense with the services of his employee under the common law, he needs to afford the employee an opportunity of being heard before exercising his power of summary dismissal.

35- In ordinary disciplinary proceedings, prior to dismissing an employee, the employer should often comply with procedural requirements which guarantee fair treatment to the employee. It is clear that summary dismissal is a precise process involving limited

procedural requirements. Summarized procedural requirements, however, mean that they would take less time, not that they can be done away with completely.

36- The Court finds that the most distinctive character of summary dismissal is its non-requirement of a notice of termination prior to dismissal and/or the establishment of a disciplinary committee. The employer will not have to wait for the end of the contract of employment or establish a disciplinary committee prior to dismissing the employee. However, he needs to afford the employee an opportunity of being heard within a short span of time before exercising his power of summary dismissal.

37 -We, therefore, find the words “*immediate separation from the service*” in Rule 67(b) to mean that the separation would effectively take place **immediately** after these shorter and summarized procedural requirements have been complied with. In other words, in our case, summary dismissal means termination without notice and without the need to refer the matter to a disciplinary committee, and not immediate dismissal without any advance notification. In any case, where the Secretary General considers that the misconduct attributed to the employee is serious, he may suspend the employee with immediate effect.

38- In the light of the above, this Court is of the view that the ruling of the First Instance Division that there is a need to comply with due process under Rule 66, even in cases of summary dismissal, is in conformity with the modern trend and with what obtains elsewhere in

other international bodies and organisations and national jurisdictions. It is widely recognized that there is a need for procedural fairness even in cases of summary dismissal.

39- For the above reasons, this Court finds that the First Instance Division has not misdirected itself in ruling that there was a requirement for the Secretary General to comply with due process under Rule 66 of the Staff Rules when summarily dismissing an employee. We are in agreement with the First Instance Division in its interpretation and application of Rules 66 and 67(b) in the present case. This Court, therefore, finds no merit in this appeal which is dismissed.

Done at Nairobi this 26th day of May, 2016.

Delivered this 26th day of May, 2016.

Ch.
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Hon. Lombe P. Chibesakunda - **Lady Judge President**
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Hon. Mr. Abdulla E. El Bashir - **Lord Justice**
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Hon. Dr. Michael C. Mtambo - **Lord Justice**
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Hon. Mr. David Chan Kan Cheong - **Lord Justice**
.....
Hon. Dr. Justice Wael M. H. Y. Rady - **Lord Justice**

