IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., MWANGESI, J.A., And MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 22 OF 2017

MIRIAM E. MARO ..... APPELLANT

VERSUS

BANK OF TANZANIA ..... RESPONDENT

(Appeal from the Judgment and decree of the High Court of Tanzania at Dar es Salaam)

(Mkasimongwa, J.)

dated the 1st day of April, 2016
in
Civil Case No. 159 of 2004

JUDGMENT OF THE COURT

15th & 30th September, 2020

MWAMBEGELE, J.A.:

This appeal has its genesis in an agreement between the Respondent, the Bank of Tanzania (BoT) and Jumuiya ya Wafanyakazi Tanzania; a trade union commonly known by its acronym JUWATA, executed on 14.11.1990. The Agreement was titled "Mkataba wa Hiari baina ya Jumuiya ya Wafanyakazi Tanzania (JUWATA) na Benki Kuu ya Tanzania (BOT) Kuhusu Hali Bora za Kazi na Mishahara". The agreement,

essentially, stipulated for payment of gratuity to the retiring employees of the Respondent. We shall henceforth refer to the Agreement as the Voluntary Agreement.

The appellant, Miriam E. Maro, was an employee of the respondent from 04.12.1969 until 15.05.1997 when she retired. Upon retirement, the appellant was paid gratuity of Tshs. 22,871,640/=. Later, she claimed that, in accord with the Voluntary Agreement, she ought to have been paid gratuity at the tune of Tshs. 109,736,222/75. The respondent, on the other hand, elected that at that time the Voluntary Agreement was not in force. The appellant thus instituted a suit in the High Court claiming the balance of Tshs. 86,864,582/75, interest thereon and costs of the suit.

The main issue which was drafted at the trial by the court and agreed by the parties was whether the Voluntary Agreement executed on 14.11.1990 by JUWATA and the BoT was still in force at the time the appellant retired. The appellant's case comprised one witness (the appellant herself) and three documentary exhibits; the certificate of service (Exh. P1), the salary slip (Exh. P2) and the Voluntary Agreement (Exh. P3). The respondent's case comprised one witness; Emmanuel Wilson Kahalwe

(DW1) and two documentary exhibits; circular letter from BoT to the Trade Union of Industrial and Commercial Workers (TUICO) dated 13.09.1996 with Ref. 4050/B (Exh. D1) and circular letter with Ref. No. 2036/11 of 14.02.1997 from the BoT Governor to the respondent's staff (Exh. D2). After hearing the witnesses for both parties, the High Court (Mkasimongwa, J.) found that the suit was without merit and dismissed it. Dissatisfied, the appellant has preferred this appeal assailing the decision of the High Court on only one ground; that is:

> *"That the Honourable Judge erred in law and in fact in holding that the Voluntary Agreement entered into between the Bank of Tanzania and JUWATA Headquarters ceased to operate on 13th September, 1996".*

The appeal was argued before us on 15.09.2020 during which both parties were represented by learned advocates. While the appellant was represented by Ms. Mariam Joyce Mcharo, learned advocate, the respondent, a legal person, appeared through Ms. Dosca Kemilembe Mutabuzi, also learned advocate. The appellant, through a law firm going by the name JM Chambers, Advocates, had earlier; on 22.03.2017 to be particular, lodged her written submissions which Ms. Mcharo urged us to

adopt as part of her oral submissions. The respondent, through Mutabuzi & Co. Advocates; a law firm to which Ms. Mutabuzi belongs, had also filed reply written submissions on 21.04.2017. Ms. Mutabuzi also urged us to adopt them as part of her oral arguments. Both learned advocates, having so beseeched us to adopt their respective written submissions, had nothing to add to them. Their prayers on what the Court should do were, naturally, diametrically opposed. While Ms. Mcharo implored us to allow the appeal with costs, Ms. Mutabuzi urged us to dismiss it, also with costs.

In the appellant's written submissions, the High Court is faulted for its finding that the Voluntary Agreement was inapplicable at the time of the appellant's retirement. The appellant argues that the finding is not backed by evidence and in contradiction with DW1's testimony in that he testified that the notice issued to TUICO BoT Branch was never responded to. Even if TUICO BoT Branch responded to the notice, she argues, the response could not be valid because TUICO BoT Branch was not a party to the Voluntary Agreement. Thus, the appellant argues, it was wrong for the respondent to serve the said notice on them.

The appellant argues further that the purpose of any notice under an agreement is to notify the other party of any intended amendments so that the parties may negotiate and come to agree on the intended agreements. It is argued further that the Voluntary Agreement provides that the parties should agree on any proposed amendments and thus there would be no amendments without consensus.

On the other hand, the respondent submitted that DW1 testified that due to policy change in 1994, it became imperative to opt out of the Voluntary Agreement and in July, 1994 the respondent restructured its organization which culminated into consolidation of all allowances to the salaries with a view to improving the basic salaries and pensions of her employees. Following this, the respondent issued a notice; Circular No. 4050/B of 13.09.1996, to Chairman of TUICO on her intention to amend the Voluntary Agreement. That notice was tendered and adduced in evidence as Exh. D1. She went on to argue that the foregoing notice was issued in terms of article 4 (b) and (c) of the Voluntary Agreement. The respondent, she submitted, issued yet another notice; Circular No. 2036/111 dated 14.02.1997 to its employees which was admitted in

evidence as Exh. D2 notifying them of the alternative formula on how gratuity would be calculated upon their retirement.

It is argued further that notice was properly served on TUICO BoT Branch. The respondent countered the argument by the appellant to the effect that the purpose of notice was to notify the other party so that they could negotiate as a misconception in terms of clause 4 (b) and (c) of the Voluntary Agreement as the clause does not provide for future negotiations but requires a party which intends to amend or vary the terms of the agreement to notify the other party of its intention.

Having summarized the facts of the case and the rival submissions of the parties, we should now be in a position to confront the sole ground of appeal before us. The ground of appeal as reproduced above seeks to fault the High Court for holding that the Voluntary Agreement entered into by the BoT and JUWATA ceased to operate on 13.09.1996. The basis upon which the High Court made such a finding were the provisions of clause 4 (a) and (c) of the Voluntary Agreement (Exh. P3), a circular letter to the Chairman of TUICO BoT Branch dated 13.09.1996 bearing Ref. No. 4050/B (Exh. D1) and a circular letter to all employees of the respondent dated

14.02.1997 bearing Ref. No. 2036/III (Exh. D2). Having reproduced clause 4 (a) and (c) of the Voluntary Agreement, the High Court observed at p. 244 of the record of appeal that the parties had agreed that the duration of the Agreement would be two years and that it would be recognized even after expiry of the two years if one party has notified the other party of the intention to amend it or enter into a new one.

Then the High Court concluded at pp. 245-246 of the record of appeal that the respondent had, through Exh. D1, notified TUICO BoT Branch of her intention to enter into a new agreement and, after the latter responded, the appellant and other employees were notified through Exh. D2. In the premises, the High Court held that the respondent acted well within the dictates of the Agreement and dismissed the suit without any order as to costs.

As seen above and as evident in the contents of the Voluntary Agreement itself, under clause 4 (a), the parties had agreed that the life span of the Agreement would be 24 months reckoned from 01.01.1991. However, in terms of clause 4 (c), the parties agreed that the agreement could go beyond the 24 months prescribed if no party sought any

amendment to it upon a three months' notice to the other party in terms of clause 4 (b). It is abundantly clear in the record of appeal that the respondent notified the appellant through a circular letter to TUICO BoT Branch dated 13.09.1996 (Exh. D1). The relevant part of the letter was reproduced by the High Court in its judgment at p. 45 of the record of appeal. For easy reference, we find it pertinent to, again, reproduce it here:

> *"**YAH: MKATABA WA HIARI: TAARIFA YA KUREKEBISHA MKATABA***
>
> *Kumekuwa na mabadiliko mengi nje na ndani ya Benki Kuu ya Tanzania tangu Mkataba wa Hiyari kati ya Benki na Wafanyakazi wa Benki uanze kutumika tarehe 14 Novemba, 1990. Mabadiliko hayo yanaufanya Mkataba huo uwe umepitwa na wakati.*
>
> *Hivyo napenda kutoa taarifa ya kufanya marekebisho ya Mkataba ili kuingia Mkataba mpya.*
>
> *Naambatanisha mapendekezo ya Mkataba mpya. Ningependa maoni ya TUICO yafikishwe kwa Uongozi wa Benki kabla ya tarehe 14 Oktoba, 1996.*
>
> *(sgd)*
>
> *C. J. Nyoni*
>
> ***Kny: GAVANA**"*

As if the foregoing was not enough, the respondent issued a circular letter to its staff on 14.02.1997 (Exh. D2) notifying them of the contents of and response to Exh. D1. The relevant part of the letter reads:

"YAH: KIINUA MGONGO KWA WAFANYAKAZI WA BENKI KUU

Rejea sekula yangu ya 9 Oktoba, 1996 ambayo iliwaelekeza Wanachama wa TUICO wa Benki Kuu ya Tanzania madhumuni ya Menejlmenti ya Benki kurekebisha Mkataba wa Hlyari kati yao na Benki. Waraka huo pia uliambatanishwa na mapendekezo ya Menejimenti katika kurekebisha Mkataba huo. Rejea pia sekula yangu kwa Wafanyakazi wote ya tarehe 5 Desemba ambayo ilieleza nia ya Menejimenti kuboresha utoaji wa kiinua mgongo kwa wafanyakazi wanaostahafu na kwamba kwa wakati huu ambapo Menejimenti inaandaa namna bora ya kutoa kiinua mgongo hicho, wafanyakazi wanaostaafu watalipwa kiinua mgongo sawa na mishahara ya miezi sita.

Katika barua yake kwa Gavana ya tarehe 22 Novemba, 1996 TUICO iiipendekeza kwamba kusiwe na mabadiliko katika Mkataba huo kwa vile unalenga katika kuwahamasisha wafanyakazi wa Benki. Bodi ya Benki Kuu ya Tanzania, ilikutana tarehe 6 Februari, 1997 na kuamua kwamba kutokana na mabadiliko katika mishahara ya wafanyakazi, si

busara kuendelea na malipo ya kiinua mgongo kama ilivyopendekezwa na TUICO na pia si busara kuendelea kutoa malipo hayo kwa kuzingatia Mkataba wa Hiyari wa mwaka 1991 kwa kuwa malipo hayo yatakuwa ni makubwa sana kushinda uwezo wa Benki na pia kiasi hicho hakitazingatia maslahi ya nchi kwa ujumla. Kwa hiyo basi, Bodi iliamua kuanzisha mpango wa kutoa kiinua mgongo au bakshishi kwa wafanyakazi wanaostaafu na malipo hayo yatatengewa mfuko maaium ili wafanyakazi wanaostaafu wallpwe kama ifuatavyo:

(a) Wafanyakazi watakaostaafu kwa mujibu wa sheria watalipwa mishahara ya miezi 36.

(b) Wafanyakazi watakaostaafu kwa hiyari yao wakiwa kati ya umri wa miaka 50 na 55 watalipwa mishahara ya miezi 24.

(c) Wafanyakazi watakaopunguzwa kutokana na ukosefu wa kazi au kutokana na marekebisho ya muundo wa Benki watalipwa mishahara ya miezi 12.

(d) Ndugu au familia ya mfanyakazi atakayefariki dunia watalipwa kulingana na umri wa mfanyakazi huyo. Kama alikuwa chini ya miaka 50 basi atalipwa mishahara ya miezi 12 na ikiwa alikuwa na umri kati ya 50 na 55 watalipwa mishahara ya miezi 24.

(e) Wafanyakazi watakaoachishwa kazi kwa sababu za ugonjwa baada ya kukubalika na jopo la madaktari

watalipwa mishahara ya miezi 12 au 24 kama ilivyo katika (d) hapo juu kufuatana na umri wa mfanyakazi.

Wafanyakazi wafuatao hawatafaidika na malipo hayo:

(a) Wale ambao watafukuzwa kazi au kuachishwa kazi kwa makosa ya nidhamu.

(b) Wale ambao wataacha kazi kwa hiyari yao kwa sababu zozote zile.

Kwa mantiki ya maamuzi ya Bodi, Menejimenti ya Benki sasa itazingatia malipo ya kiinua mgongo kama ilivyoelezwa hapo juu. Malipo hayo yataanza kutumika kutoka tarehe 9 Oktoba, 1996 tarehe ambayo Menejimenti ilikusudia kubadili Mkataba wa Hiyari. Pia, Menejimenti ya Benki ingependa kuwaeleza wafranyakazi wote kwamba malipo hayo yatakuwa ni ya kudumu na kwamba yatajumuishwa katika orodha ya maiipo ya kustaafu na yatatolewa kwa mkupuo mmoja wakati mfanyakazi anapostaafu. Ni matumaini yangu kwamba TUICO na wafanyakazi wote watazingatia maamuzi hayo ambayo lengo lake ni kuboresha masharti ya kazi na kuwahamasisha wafanyakazi waendelee wakati wanapostaafu kazi kwa michango yao.

Kufuatana na utaratibu wa malipo ya kustaafu, kiinua mgongo pamoja na malipo mengine ya kustaafu yatalipwa na Mkurugenzi wa Utumishi na Utawala.

Ni matumaini yangu kwamba wafanyakazi wote watazingatia maamuzi hayo.

(sgd)

Dr. Idris M. Rashidi

GAVANA"

Flowing from the above, we have not been able to comprehend the appellant's complaint to the effect that the notice was served on a wrong party. She complained at p. 183:

> *"It [Exh. D1] was addressed to the JUWATA BOT Branch who were not party to the Voluntary Agreement. It was JUWATA National office which was a party to the Agreement."*

We do not think the appellant has any iota of justification in this complaint. She does not dispute that she was aware of such a notice but only that it was served on a wrong party. On our part, having scanned through the Agreement (Exh. P3) we have not seen anywhere to justify the allegation that it was signed by JUWATA National Office; and not by JUWATA BoT Branch as the appellant would have us believe. What we could glean from Exh. P3 is that the same was signed by one N. N. Kitomari, Deputy Governor of the Bank of Tanzania for the one part and one J. S. Makongwa on behalf of the Secretary General for the other part. And to clinch it all, the appellant was notified through Exh. D2. In the

circumstances, we, like the High Court, are of the view that the notice was served on a proper party and we do not think the appellant was prejudiced by the same being served on TUICO BoT Branch office.

The Voluntary Agreement thus ceased to exist on 13.09.1996; the date of Exh. D1. It was not therefore in existence on 15.05.1997 when the appellant retired. Her gratuity was therefore not supposed to be calculated in terms of the Voluntary Agreement.

In view of the above, we are of the considered view that the respondent acted well within the letter of the Voluntary Agreement. It is the law that parties are bound by the terms of the agreement they freely enter into. We find solace on this stance in the position we took in **Univeler Tanzania Ltd v. Benedict Mkasa t/a Bema Enterprises**, Civil Appeal No. 41 of 2009 (unreported) in which we relied on a persuasive decision of the Supreme Court of Nigeria in **Osun State Government v. Dalami Nigeria Limited**, Sc. 277/2002 to articulate:

> *"Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed*

between themselves. It was up to the parties concerned to renegotiate and to freely rectify clauses which parties find to be onerous. It is not the role of the courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute."

Taking a cue from the decision above, in the case at hand, the parties are bound by the contents of clause 4 (c) of the Voluntary Agreement which gave the parties the rights to change the terms of the Agreement upon requisite notice being served on the other party. We agree with Ms. Mutabuzi that the contention by the appellant to the effect that the purpose of any notice under the Voluntary Agreement of any intended amendments so that the parties may negotiate and come to an agreement of the intended amendments is but a misconception. If anything, it comes out clearly from the interpretation of clause 4 (b) and (c) of the Voluntary Agreement, that a party which intends to amend or vary its terms must notify the other party of its intentions. We do not read anywhere in the Agreement providing for negotiations as Ms. Mcharo would have us believe. We find and hold that the decision of the High Court was, on evidence, sound at law. We find nowhere to legally fault it.

This appeal was filed with no scintilla of merit. It stands dismissed. As the appeal stems from the employer-employee relationship which has lasted for close to three decades, we, like the High Court, make no order as to costs.

DATED at **DAR ES SALAAM** this 30th day of September, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The judgment delivered this 30th day of September, 2020 in the presence of the Appellant in person and Ms. Joan Mwesigwa, legal officer for the Respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL