IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWARIJA, J.A., NDIKA, J.A., And KWARIKO, J.A.)

CIVIL APPEAL NO. 357 OF 2019

BARCLAYS BANK (T) LTD ..... APPELLANT

VERSUS

JACOB MURO ..... RESPONDENT

(Appeal from the Ruling and Order of the High Court of Tanzania, Labour Division at Mbeya)
(Ngwembe, J.)

dated the 5th day of November, 2018
in
Revision No. 51 of 2017

.....

JUDGMENT OF THE COURT

16th & 26th November, 2020

NDIKA, J.A.:

The appellant, Barclays Bank (T) Ltd., employed the respondent, Jacob Muro, from 19th May, 2010 under successive fixed term contracts in the capacity of Sales Manager – Local Business. Subsequently, on 31st May, 2013, the appellant engaged the respondent as Sales Relationship Manager on a permanent term contract at a monthly salary of TZS. 1,916,666.67 subject to a six months' period of probation, the start date of the service being 1st June, 2013.

Following a turn of events, the appellant initiated disciplinary proceedings on 7th February, 2014 against the respondent allegedly for violations of the Code of Conduct committed during the probation period. These proceedings culminated in the appellant terminating the respondent's employment vide a letter of 18th March, 2014. Dissatisfied, the respondent instituted a claim of unfair termination against the appellant in the Commission for Mediation and Arbitration ("CMA").

Initially, the matter had an uneasy progression. After mediation was certified to have failed, the dispute was arbitrated *ex parte* due to the appellant's non-appearance. On 28th November, 2014, the arbitrator (Boniface L. Nyambo) entered an award in favour of the respondent for sum of TZS. 307,666,632.00 as compensation having upheld the claim. Dissatisfied, the appellant lodged Revision No. 6 of 2015 in the High Court of Tanzania, Labour Division at Mbeya to challenge the award on several grounds including a grievance that the CMA had no jurisdiction to entertain the matter because it was time-barred. In its decision dated 27th May, 2015, the High Court (Nyerere, J.) dismissed the contention that the referral to the CMA was time-barred. Nonetheless, the learned Judge set aside the award on the ground that it was procured with a material irregularity contrary to

section 91 (2) of the Employment and Labour Relations Act, Cap. 366 R.E. 2002 (now R.E. 2019) ("the ELRA"). In consequence, she remitted the complaint back to the CMA for a fresh arbitration *inter partes* before a different arbitrator.

In line with the High Court's order, the complaint was placed before a new arbitrator, Naomi Kimambo. Before the matter proceeded for arbitration, the appellant, by way of preliminary objection, rehashed the grievance that the CMA had no jurisdiction to entertain the complaint due to its being time-barred. In her ruling dated 27th May, 2016 (at pages 221 to 226 of the record of appeal), the arbitrator dismissed the objection essentially on the ground that Nyerere, J.'s decision on the point was binding on her. Hence, she proceeded to arbitrate the matter and eventually rendered her award on 8th September, 2017 by which she sustained the claim. She thus awarded the respondent a total of TZS. 128,481,487.48 as compensation representing, *inter alia*, 20 months remuneration, severance pay as well as repatriation expenses and allowances.

Aggrieved, the appellant challenged the award by way of revision in the High Court of Tanzania at Mbeya in Revision No. 51 of 2017. In its ruling, the High Court (Ngwembe, J.) partly granted and partly denied the

application. Whereas the court upheld the arbitrator's finding that the respondent's termination was substantively and procedurally unfair, it trimmed down the quantum of awarded compensation by disallowing severance pay as well as repatriation expenses and allowances. The learned Judge also adjusted the salaries compensation upwards by setting it at 24 months remuneration.

Still aggrieved, the appellant now challenges the High Court's decision on six grounds thus:

1. *That the learned Judge erred in law in ruling that the respondent was not under probation during termination of his employment.*
2. *That the learned Judge erred in law in ruling that the arbitrator had jurisdiction to entertain and adjudicate the dispute as it was not time-barred.*
3. *That the learned Judge erred in law in finding that the respondent's termination was substantively and procedurally unfair.*
4. *That the learned Judge erred in law in awarding 24 months' salaries without any justification and contrary to the law.*
5. *That the learned Judge erred in law in holding that the decision by the appellant to terminate the respondent's employment on the ground of failure to demonstrate values and behavior of the appellant bank and failure to demonstrate leadership to his*

subordinates and going on leave without the appellant's Management Approval was substantially unfair.

6. *That the learned Judge erred in law and in fact by failure to re-assess and re-analyse properly the evidence on the record hence he reached a wrong conclusion.*

Before us, Mr. Tazan K. Mwaiteleke, learned counsel, prosecuted the appeal on behalf of the appellant whereas Ms. Irene J. Mwakyusa, also learned counsel, stood for the respondent.

In their respective oral arguments, the learned counsel adopted their written submissions in support of or in opposition to the appeal. Understandably, they particularly focused on the first and second grounds of appeal, which raise threshold issues. We propose to address, at first, the second ground of appeal as it raises a jurisdictional question – whether the referral to the CMA was made within the prescribed limitation period.

On the above issue, Mr. Mwaiteleke urged us to hold that the High Court erred in finding that the respondent's claim to the CMA was not time-barred and that the CMA had jurisdiction to arbitrate the dispute. Referring to Rule 10 (1) of the Labour Institutions (Mediation and Arbitration) Rules, 2007, Government Notice No. 64 of 2007 ("the Rules"), he submitted that the said claim ought to have been instituted within thirty days from the date

of termination. He contended that the said limitation period, reckoned from 18th March, 2014 indicated as the date of termination by the respondent on the referral form (CMA Form No. 1 – at page 15 of the record of appeal), had expired by the time the claim was lodged on 22nd April, 2014. Elaborating, he submitted that by calculating the said limitation period from 18th March, 2014 in terms of Rule 4 (1) and (2) of the Rules exclusive of the first day but inclusive of the last day, the complaint should have been lodged by 17th April, 2014. For ease of reference, we reproduce the aforesaid provisions thus:

> *"4 (1) Subject to sub-rule (2), for the purpose of calculating any period of time in terms of these Rules, the first day shall be excluded and the last day shall be included.*
>
> *(2) The last day of any period must be excluded if it falls on a Saturday, Sunday or public holiday."*

Replying, Ms. Mwakyusa strongly disagreed with her learned friend. While conceding that, indeed, the referral form indicated that the date of termination was 18th March, 2014 and that the claim was filed on 22nd April, 2014, she contended that the thirty days limitation period had to be reckoned from 20th March, 2014, it being the date on which the respondent received

the letter of termination as signified by his counter signature on it (Exhibit D.10 – page 251 of the record of appeal). In calculating the limitation period in terms of Rule 4 (1) and (2) of the Rules exclusive of the first day, she contended that the last day was 19th April, 2014, which, being Saturday, had to be excluded along with next two consecutive days – 20th April, 2014 (Sunday) and 21st April, 2014 (Easter Monday, a public holiday). On that basis, she submitted that the complaint, lodged on the following working day, Tuesday 22nd April, 2014, was duly instituted.

Ahead of our determination of the question under consideration, it is instructive to recall what we hinted earlier that the complaint under consideration was raised to the CMA as a preliminary objection and that the arbitrator dismissed it on the ground that it had been decided finally and conclusively by Nyerere, J. The same complaint, then, featured again in Revision No. 51 of 2017 before Ngwembe, J. as one of the grounds of revision. The appellant was yet again unsuccessful as Ngwembe, J. held that the referral was made within time. The learned Judge decided the point by adopting Nyerere, J.'s reasoning and finding in the earlier revision (Revision No. 6 of 2015). The relevant part of the quoted holding, at page 777 of the record of appeal, reads as follows:

> *"The records reveal that the respondent was terminated on* ***18th March, 2014 and employment dispute was referred to the CMA on 22nd April, 2014****. In normal calculation the dispute was referred to the CMA after 33 days, which is contrary to Rule 10 (1) of G.N. No. 64/2007. But in the eyes of law, the dispute was timely filed at the CMA. Why?* ***Because under section 60 (2) of the Interpretation of Laws Act, weekends and public holidays are excluded in computing time, that is not only the requirement of law but also the practice of this court in a number of cases. Thus, out of 33 days if I exclude weekends it remains 28 days hence the referral was timely filed at the CMA.*** *"*[Emphasis added]

We have emboldened the text in the above holding so as to make two observations, albeit very briefly. First, we are aware that in reckoning days prescribed by a statutory provision a court is enjoined to apply the provisions of section 60 of the Interpretation of Laws Act, Cap. 1 R.E. 2002 (now R.E. 2019) ("the ILA"). Yet, it seems to us that the language and context of Rule 4 of the Rules is that the said rule should be applied for computation of any period prescribed by and in terms of the said Rules. In our view, the

application of that rule will secure the same result as section 60 of the ILA. Secondly, while both section 60 (2) of the ILA and Rule 4 (2) of the Rules provide for exclusion of non-working days (Saturday, Sunday and public holiday) if the last day of any prescribed period of limitation falls on any such day, none of the said provisions has the effect of **excluding all weekends and public holidays falling within a particular period as suggested in the above holding**. Thus, it means the exclusion by Nyerere, J. of five days falling on weekends throughout the period of thirty-three days was manifestly erroneous.

Adverting to the question under consideration, for a start, it is common ground that Rule 10 (1) of the Rules provides a thirty-days limitation period for lodging an unfair termination claim. It stipulates as follows:

> *"Disputes about the fairness of an employee's termination of employment must be referred to the Commission within thirty days from* ***the date of termination or the date that the employer made a final decision to terminate or uphold the decision to terminate.***" [Emphasis added]

From the contending submissions of the learned counsel, the simple but crucial issue arising for our determination is whether the referral to the

CMA was made within thirty days of the date of the impugned termination. We note here that in addressing this issue the learned counsel, in essence, clashed over the point of reckoning of the aforesaid thirty days limitation: while Mr. Mwaiteleke contended that the said period must be reckoned from 18th March, 2014 stated on the referral form as the date of termination, Ms. Mwakyusa countered that the point of reckoning was 20th March, 2014 when the letter of termination was served on the respondent as shown by Exhibit D.10.

It is our firm view that in determining whether a referral to the CMA is made within time or not the date of termination indicated on the form would be the date of reckoning. Thus, we are not enjoined in this matter to interpret the meaning of the phrase "date of termination" in Rule 10 (1) of the Rules; for, the date of termination is as was stated by the respondent on the referral form, which is prescribed under section 86 (1) of the ELRA for referrals to the CMA. It should be emphasized that it is obligatory on the part of the complainant to state accurately the date of termination on the referral form so that the CMA may determine whether the referral was made within the prescribed period so as it can determine whether it has jurisdiction to deal with the dispute or not.

We feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored – see **James Funke Ngwagilo v. Attorney General** [2004] TLR 161. See also **Lawrence Surumbu Tara v. The Hon. Attorney General and 2 Others,** Civil Appeal No. 56 of 2012; and **Charles Richard Kombe t/a Building v. Evarani Mtungi and 3 Others**, Civil Appeal No. 38 of 2012 (both unreported).

By way of emphasis, we wish to refer, with approval, to a passage in an article by Sir Jack I.H. Jacob bearing the title, "The Present Importance of Pleadings," first published in Current Legal Problems (1960) at p. 174 thus:

> *"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings .... For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to*

meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation."

As indicated earlier, in the present case while the pleaded date of termination was 18th March, 2014, the respondent contradicted this fact by asserting that the 20th March, 2014 as the date of termination as shown by Exhibit D.10 that he introduced in the course of the hearing before the arbitrator. We are decidedly of the view that the respondent cannot be allowed to maintain the 20th March, 2014 as the date of termination contradicting what he had pleaded. By indicating the 18th March, 2014 on the referral form, it is apparent that the respondent was aware of his termination at that date. Hence, we hold that the sixty days limitation period ought to have been reckoned from 18th March, 2014 as pleaded.

In view of the above finding, we would agree with Mr. Mwaiteleke that by calculating the applicable limitation period from 18th March, 2014 in terms of Rule 4 (1) and (2) of the Rules exclusive of the first day but inclusive of the last day, the complaint should have been lodged by 17th April, 2014. The High Court (Ngwembe, J.) certainly fell into error in his computation of the limitation period by adopting Nyerere, J.'s computation by which all days falling within the weekends were excluded as we explained earlier. We are, therefore, constrained to hold that the respondent's complaint to the CMA made on 22nd April, 2014 was time-barred and that the CMA had no jurisdiction to take cognizance of the matter. The second ground of appeal is, therefore, meritorious.

In view of the foregoing finding on the jurisdictional question in the second ground of appeal which is dispositive of the appeal, we find no need to deal with the rest of the grounds of appeal.

In the final analysis, we allow the appeal. Since the CMA acted without jurisdiction as the referral was time-barred, we nullify its proceedings as well as its award. The same fate befalls upon the proceedings in the High Court, Labour Division as well as the decision thereon as they stemmed from a

nullity. This matter being a labour dispute not attracting an award of costs, we make no order as to costs.

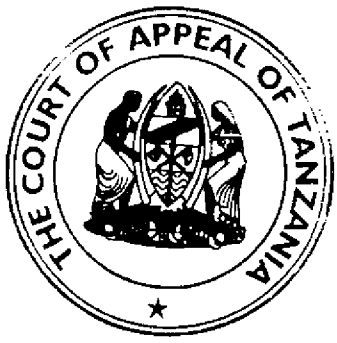
DATED at **MBEYA** this 26th day of November, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgment delivered this 26th day of November, 2020 in the presence of Mr. Gerald Msegeya holding brief for Mr. Tazan Mwaiteleke the counsel of the Appellant and Ms. Irene Mwakyusa, counsel for the Respondent is hereby certified as a true copy of the original.



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL