IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPEAL NO. 13 OF 2019

ABUBAKARI S. MARWILO AND 172 OTHERS .....APPELLANTS

VERSUS

1. NATIONAL INSURANCE CORPORATION
2. CONSOLIDATED HOLDINGS CORPORATION .....**RESPONDENTS**
3. TREASURY REGISTRAR

(Appeal from the Ruling and Order of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Nyerere, J.)

dated the 11th day of November, 2016
in
Labour Dispute No. 1 of 2014

.....

JUDGMENT OF THE COURT

8th June, & 1st July, 2021

NDIKA, J.A.:

The appellants, Abubakari S. Marwilo and 172 other persons, are former employees of the first respondent, National Insurance Corporation. Following the termination of their employment by the first respondent on 4th February, 2009, the appellants instituted Labour Dispute No. 1 of 2014 in the High Court, Labour Division at Dar es Salaam against the first respondent along with Consolidated Holdings Corporation and the Treasury Registrar, who being necessary and interested parties, were cited as the

second and third respondents respectively. The said action was for the following reliefs:

> *"a. A declaration that the [appellants] were underpaid their salaries for the years 2001 to 2009, Group Pension Scheme and terminal benefits.*
>
> *b. An order for payment of salary arrears for the period from 2001 to 2009.*
>
> *c. An order for payment of arrears under the Group Pension Scheme as reflected in the Trust Deed and Rules.*
>
> *d. An order for payment of their terminal benefits from 2001 to 2009.*
>
> *e. Interest on the above sums from the date of judgment up to the date of satisfaction at court rate.*
>
> *f. Costs of this suit; and*
>
> *g. Any other relief(s) may this Honourable Court deem fit and just to grant."*

In their respective defences, the respondents denied liability and prayed that the complaint be dismissed. Before the trial commenced earnestly, the second and third respondents raised a point of preliminary objection contending that:

"The complaint is incompetent and bad in law for being in contravention of section 9 (1) of the Bankruptcy Act [Cap. 25 R.E. 2002]"

Having heard the parties, the learned High Court Judge (Nyerere, J.) sustained the preliminary objection. In her ruling, she took cognizance of the undisputed fact that the first respondent was a specified public corporation, a status it acquired pursuant to the Public Corporations (Specified Corporations Declaration) Order, 1998, Government Notice No. 330A of 12th June, 1998 ("Declaration Order") made under the Public Corporations Act, No. 2 of 1992 ("the PCA"). As such, the first respondent was effectively placed under the purview of the Bankruptcy Act, Cap. 25 R.E. 2002 (now Cap. 25 R.E. 2019) ("the BA"). Therefore, by dint of section 9 (1) of the BA, as elaborated by the Court in **Mathias Eusebi Soka v. The Registered Trustees of Mama Clementina Foundation & Others**, Civil Appeal No. 40 of 2001 (unreported), the first respondent, being a debtor subject to a receiving order, could not be sued unless requisite leave had been sought and obtained. Consequently, the learned Judge "dismissed" the complaint.

The memorandum of appeal raises four grounds of grievance, namely:

"1. That the Honourable Judge erred in law to hold that the leave was required before filing the appellants' complaint;

2. That the Court erred in law and fact in failing to construe and analyse the elements of section 9 (1) of the Bankruptcy Act, [Cap. 25 R.E. 2002];

3. That the Court erred in law in holding that the complaint in issue is a debt provable in bankruptcy; and

4. *The Court erred in law and fact in failing to distinguish the Court of Appeal of Tanzania's decision in* ***Mathias Eusebi Soka v. The Registered Trustees of Mama Clementina Foundation & Others****, Civil Appeal No. 40 of 2001 (unreported) and the Labour Dispute in issue (Labour No. 01 of 2014)."*

At the hearing of the appeal before us, the appellants were advocated for by Ms. Elizabeth John Mlemeta while the respondents had the services of Mr. Lukelo Samuel, learned Principal State Attorney, who was assisted by Mr. Charles Mtae, Ms. Jacqueline Kinyasi, Ms. Pauline Mdendemi and Ms. Doris Barnabas, learned State Attorneys.

In her oral argument highlighting the written submissions filed in advance, Ms. Mlemeta canvassed the first, second and third grounds of appeal conjointly and then rounded off addressing us on the fourth ground.

Replying for the respondents based upon the first respondent's written submissions, Mr. Samuel and then Mr. Mtae adopted the same approach. Having reflected on the contending submissions of the counsel, we are of the view that the appeal turns mainly on the question whether leave was required in terms of section 9 (1) of the BA for the appellants to institute their complaint in the High Court.

At the outset, it is common ground that at the time the complaint the subject of this appeal was instituted in the High Court in 2014 the first respondent was a specified public corporation, a status it acquired on 12th June, 1998 pursuant to the Declaration Order. It is also uncontested that in terms of section 43 (1) of the PCA, as amended by the Public Corporations (Amendment) Act, No. 16 of 1993, once a public corporation was declared a specified corporation the then Parastatal Sector Reform Commission (the "PSRC") became the official receiver of that corporation with powers and all the rights of a receiver appointed in accordance with or pursuant to the provisions of the BA. The PSRC, it should be noted, was subsequently disbanded and its role was taken over by the second respondent. In **Mathias Eusebi Soka** (*supra*), the Court affirmed that:

> *"We have no doubts at all that the unambiguous words of section 43 of the Act are that once a*

corporation has been declared a specified corporation ***the PSRC becomes its official receiver and the provisions of the [Bankruptcy Act] are engaged****. That is the position as borne out by the authorities referred to us by Mr. Maruma:* ***Said Mnimbo & Others v. State Travel Services Ltd.****, Civil Case No. 296/1997 (DSM Registry) and* ***Ali Haji Damdusti v. BP (T) Ltd. & BP Import and Export Co. Ltd.,*** *Civil Case No. 53/1999 (DSM Registry), and others by this Court."* [Emphasis added]

Section 9 (1) of the BA bars any unsecured creditor from commencing any legal action against the debtor without the leave of the court once a receiving order is made. It stipulates as follows:

"9.-(1) On the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, ***no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy*** *shall have any remedy against the property or person of the debtor in respect of the debt, or* ***shall commence any action or other legal proceedings, unless with the leave of the court*** *and on such terms as the court may impose."* [Emphasis added]

It is Ms. Mlemeta's essential submission that the appellants' complaint in the High Court was not subject to the requirement of leave of the court. She submitted that section 9 (1) of the BA was inapplicable because two of the conditions for its application did not coexist: one, that there was no debtor-creditor relationship between the parties involved; and two, the appellants' ciaim was not a debt provable in bankruptcy. Elaborating on the first condition, Ms. Mlemeta referred to **Black's Law Dictionary**, 9th Edition, at pages 424 and 461, defining the terms creditor and debtor respectively, as follows:

> *"**Creditor**: A person or entity with a definite claim against another, esp. a claim that is capable of adjustment and liquidation .... [in Bankruptcy] A person or entity having a claim against the debtor predating the order for relief."*
>
> *"**Debtor**: One who owes an obligation to another, esp. an obligation to pay money .... [in Bankruptcy] A person who files a voluntary petition or against whom an involuntary petition is filed."*

In line with the above definitions and also considering the term "debt", as defined in **Black's Law Dictionary** (*supra*) at page 462, as *"liability on a claim; a specific sum of money due by agreement or*

otherwise", the learned counsel submitted that the first respondent and the appellants had no debtor-creditor relationship primarily because the alleged debt or liability between them was indeterminate; that it still had to be determined by the trial court in the complaint. In other words, the debt or liability was yet to be definite or liquidated.

Coming to the second condition, Ms. Mlemeta reviewed section 35 of the BA, which provides a description of debts provable in bankruptcy. Because of the relevance of this provision to the instant appeal, we deem it necessary to extract the entire text thereof:

> *"35.-(1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust shall not be provable in bankruptcy.*
>
> *(2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice.*
>
> *(3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent,* ***to which the debtor is subject at the date of the receiving order,*** *or* ***to which he may become subject***

before his discharge by reason of any obligation incurred before the date of the receiving order, *shall be deemed to be debts provable in bankruptcy.*

(4) An estimate shall be made by the trustee of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value.

(5) Any person aggrieved by any estimate made by the trustee as aforesaid may appeal to the court.

(6) Where, in the opinion of the court, the value of the debt or liability is incapable of being fairly estimated, the court may make an order to that effect, and thereupon the debt or liability shall, for the purposes of this Act, be deemed to be a debt not provable in bankruptcy.

(7) Where, in the opinion of the court, the value of the debt or liability is capable of being fairly estimated, the court may assess the value, and the amount of the value when assessed shall be deemed to be a debt provable in bankruptcy.

(8) "Liability" shall, for the purposes of this Act, include-

(a) any compensation for work or labour done;

(b) *any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring, before the discharge of the debtor;*

(c) *generally, any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of, or worth; whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on anyone contingency or on two or more contingencies; as to mode of valuation, capable of being ascertained, by fixed rules or as matter of opinion."* [Emphasis added]

Making specific reference to subsection (3) above, Ms. Mlemeta contended that a provable debt would arise only if the obligation to pay it was incurred before the date of the receiving order. For this submission, she cited a commentary on a similar statutory provision in English law in **Charlesworth's Mercantile Law**, 14th Edition by Clive M. Schmitthoff and David A.G. Sarre, at page 651, that no debt is provable unless the obligation to pay it was incurred before the date of the receiving order. She placed further reliance upon two decisions of the High Court: **Nas Hauliers**

Limited v. NBC (1991) Limited, Civil Case No. 428 of 1991 Dar es Salaam Registry; and **M/s Sanyou Service Station Limited v. B.P. Tanzania Limited**, High Court, Commercial Case No. 105 of 2002 (both unreported). In the latter case, Kalegeya, J. (as he then was) held that not every action against a specified public corporation requires the leave of the court before it is instituted. The relevant passage referred us by the learned counsel is at page 10 of the typed judgment of Kalegeya, J. (as he then was):

> *"Now, s.9 simply bars a creditor to whom the debtor (in this case a specified public corporation) is indebted in respect of any debt provable in bankruptcy from proceeding against the said debtor, its property or person, or to institute a suit or proceedings without leave of the court. What I understand this to mean is that there must be an entity called creditor. This creditor should have a provable debt in bankruptcy against the debtor (in this case, the specified public corporation). In that situation, the said creditor cannot mount any action without the court's leave. The catch phrases/words are "creditor" and "provable debt in bankruptcy."*

Kalegeya, J. (as he then was) finally found that in the suit before him leave was not required because the matter did not involve a "provable debt

in bankruptcy" and that the plaintiff was not a "creditor" in terms of section 9 (1) of the BA.

Applying the above stance to the instant case, Ms. Mlemeta contended that since the Declaration Order made on 12th June, 1998 predated the appellants' claim filed in the High Court in 2014 for payments for the period between years 2001 and 2009, the claimed debt was not a debt provable in bankruptcy and that the leave of the court was not required before the appellants mounted their action. In the premises, she prayed that the appeal be allowed.

Replying, Mr. Samuel countered that there was a debtor-creditor relationship between the parties because the salary arrears claimed constituted a liability on claim, consequently a debt owed by the first respondent to the appellants. Then, Mr. Mtae weighed in on the question whether the appellants' claim constituted a debt provable in bankruptcy. Making a specific reference to section 35 (3) of the BA, he posited that the said subsection covers two types of debts: one, a debt or liability, present or future, at the time of the receiving order. Two, a debt to which the debtor may become subject before the discharge.

Mr. Mtae went on submitting that the complaint filed in the High Court originated from the increase of salaries for the appellants approved in December, 1997 by the first respondent's Board of Directors as per the minutes at page 1,904 of the record of appeal. It was further contended that in paragraph 11 of the appellants' statement of complaint at page 241 of the record of appeal that the appellants claimed TZS. 3,053,765,883.46 as salary arrears for the period from year 1997 to 2000, implying that at on the date of the receiving order (12th June, 1998) the present cause of action existed. As for the claim for arrears from year 2000 onwards, it was posited that the alleged liability was in prolongation of the one predating the receiving order, the appellants having continued to work for the first respondent with the alleged non-payment of salary arrears enduring. He insisted that the said debt arose before the first respondent's discharge at the end of the bankruptcy proceedings.

It was further contended that the commentary in Charlesworth's Mercantile was inapplicable to the instant case as it concerned a one-off transaction, not a "prolongation of transactions" between the parties. As regards the decisions of the High Court in **M/s Sanyou Service Station Limited** (*supra*) and **Nas Hauliers Limited** (*supra*) relied upon by the appellants, it was argued that they were not only distinguishable but also

not binding on the Court. On that basis, we were urged to dismiss the first three grounds of appeal and, consequently, uphold the High Court's decision.

From the lucid contending submissions of the learned counsel, two issues arise for our determination: one, whether there was a debtor-creditor nexus between the first respondent and the appellants; and two, whether the appellants' claim constituted a provable debt in bankruptcy.

Beginning with the first issue, it is clear that the section 9 (1) of the BA imposes the requirement of the leave of the court on any *"creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy."* The terms "creditor" and "debtor" are not defined under the BA, but insofar as the latter term is concerned, it poses no difficulty. It is a term of art in bankruptcy used to mean a person or entity subject to bankruptcy proceedings owing obligations to settle debts and liabilities. Hence, in the instant case the first respondent is the debtor.

As regards the term "creditor", Ms. Mlemeta urged us to adopt a definition of that term limiting it to a person or entity with a definite claim against another, a claim that is capable of adjustment and liquidation. It

was her contention that since the alleged debt or liability between the parties had to be determined by the trial court in the complaint, the appellants were not creditors in terms of section 9 (1) of the BA. With respect, we do not agree with her. We think that the said word is also a term of art in bankruptcy to mean "a person or entity having a claim against the debtor predating the order for relief." This is part of the definition the learned counsel extracted from **Black's Law Dictionary** (*supra*) at page 424. The fact that the alleged debt or liability between the parties had to be determined by the trial court in the complaint is irrelevant. As long as the alleged claim is capable of computation or liquidation, the claimant qualifies as a creditor. In the instant case, the claim involved is clearly a debt in form of outstanding salaries and unpaid terminal benefits. Even though the total sum thereof was neither definite nor pleaded in the complaint, it was capable of computation and liquidation. In the premises, we hold that the appellants were creditors for the purposes of section 9 (1) of the BA.

We now turn to the issue whether the appellants' claim constituted a provable debt in bankruptcy in terms of section 35 of the BA.

First and foremost, it is undoubted that the outstanding salaries and unpaid terminal benefits claimed by the appellants constitute an unsecured

debt. That is so in terms of section 35 (8) (a) of the BA stipulating that compensation for work or labour is a liability, which, subject to the other subsections of section 35, is provable in bankruptcy. Both Ms. Mlemeta and Mr. Mtae concurred that the issue at hand turns on the interpretation and application of subsection (3) of section 35. We have duly considered that subsection in its natural and ordinary meaning. We think it explicitly applies to all debts and liabilities, present or future, certain or contingent, in two categories. The first category covers debts *"to which the debtor is subject at the date of the receiving order."* The second category concerns debts *"to which [the debtor] may become subject before his discharge by reason of any obligation incurred before the date of the receiving order."* In both cases, the debts or liabilities must arise by the reason of an obligation incurred before the date of the receiving order. In an English decision in **Re Hurren (a bankrupt), ex parte the trustee v. Inland Revenue Commissioners** (1982) 3 All ER 978, the Chancery Division took the same position when interpreting a similar provision of the Bankruptcy Act, 1914. As for the term "obligation", we would define it according to **Black's Law Dictionary**, 4th Edition, at page 1,223, as *"that which a person is bound to do or forbear; any duty imposed by law, promise, contract ...."*

As hinted earlier, the learned counsel are sharply divided on whether the claimed salary arrears and terminal benefits constitute a provable debt. On her part, Ms. Mlemeta essentially contended that since the Declaration Order made on 12th June, 1998 predated the appellants' claim for payments for the period between years 2001 and 2009, the claimed debt was not a debt provable in bankruptcy. For the respondents, Mr. Mtae argued that the appellants' claim originated from the increase of salaries for the appellants approved in December, 1997 by the first respondent's Board of Directors as per the minutes at page 1904 of the record of appeal. That the appellants pleaded to have initially claimed TZS. 3,053,765,883.46 as salary arrears for the period from year 1997 to 2000, implying that on the date of the receiving order (12th June, 1998) the present cause of action existed. And that the present claim for the year 2001 to 2009 was in prolongation of the one predating the receiving order, the appellants having continued to work for the first respondent with the alleged non-payment of salary arrears enduring. To resolve the issue at hand, it is essential to examine the appellants' statement of complaint at page 240 through 367 of the record of appeal and ascertain the nature and scope of the alleged claim.

Pertinent to our deliberation are paragraphs 9 to 16 of the statement of complaint. For clarity, we extract the text thereof at length:

"9. That the Complainant and other 177 Complainants are former employees of the 1st Respondent at various capacities, after having been terminated on 4/2/2009. List of the names and signatures of 178 of the Complainants are annexed herein and marked 'A2.'

10. That prior to the said termination, the Complainants were ***underpaid their salaries and consequential benefits, to wit, group pension pay and terminal benefits.***

11. That the Complainant and others had earlier on filed ***Trade Inquiry No. 52 of 2002 in the Industrial Court of Tanzania with a view to recoup arrears of salaries from the year 1997 to 2000****. In this inquiry, the Court noted that indeed there was underpayment and awarded the Complainants TShs. 3,053,765,883.46 (after verification) as arrears payable for the period in question (i.e., 1997-2000). Copy of the relevant award is annexed and marked 'B.'*

12. ***That despite the above findings, the 1st Respondent continued to underpay the Complainants from the 2001 up to the year 2009****. To date, the 1st Respondent has not paid the Complainants their arrears as required by law. The arrears for the period of 2001 to 2009 were beyond the scope, hence not part of the Trade Inquiry No. 52 of 2002.*

13. That the Complainants further claim arrears of payments regarding the 1st Respondent's Group Pension Scheme as reflected in the Trust Deed & Rules of the said scheme. The said

Deed and Rules are annexed and collectively marked 'C'. In this head, it is stated that the 1st Respondent the complainants in the following ways:

a. Used an outdated salary scale as a basis for computation of the complainants' salaries, while there was clear rules and understanding that the salary scale in use was the prevailing scale and or rate at the time of exit;

b. Relied on the lower and outdated scale or salary amount in computing the consequential benefits of the Complainants; and

c. The payments and the scale applied are a total violation of the Trust Deed and Rules referred to herein.

14. That at the time of termination, the Respondents offered to pay the Complainants and other ex-NIC employees terminal benefits to the tune of [TZS.] 5.2 Billion if they agreed which they did to forfeit their moneys awarded in Trade Inquiry No. 52 of 2002 which award covers and is limited to the period between 1997 and 2000 claims, and Voluntary Agreement No. 2 of 2005 which awarded the Complainants the sum of TShs. 3,800,000,000.00 as golden handshake.

15. That parties herein further agreed to mark as settled and withdraw Revisions No. 15 of 2007, No. 16 of 2007 and No. 16 of 2006, all arising from Trade Inquiry No. 52 of 2002 and Voluntary Agreement No. 2 of 2005. A copy of the said agreement and the order of the court signifying the withdrawal

of the revisions are attached and marked 'D' and 'E' respectively.

16. That the ***Complainants' claims in this complaint are for the year 2001 to 2009, and do not cover the period and items awarded in the two cases above named****, hence they are not and have never been part of the said two cases. The current claims are not part of the settlement stated above."*
[Emphasis added]

It is evident from paragraph 10 above that the genesis of the appellants' grievance was the alleged underpayment of salaries, which then, had a deleterious knock-on effect on the consequential benefits (terminal benefits and group pension). We have taken cognizance of the averment in paragraph 11 that the alleged underpayment was the subject matter in Trade Inquiry No. 52 of 2002, the claim therein being salary arrears for the years 1997 to 2000 and that an award of TZS. 3,053,765,883.46 was eventually made in favour of the appellants. The appellants essentially assert, in our view, that the first respondent had an obligation to pay the alleged salary arrears and that their claim for the years 1997 to 2000 was upheld by the court. At this point, it is reasonably inferable that the alleged obligation on the part of the first respondent existed in 1997, predating the date of the Declaration Order (12th June, 1998). In paragraph 12 the

appellants aver that despite the aforesaid unfavourable verdict against the first respondent, she continued breaching the obligation to pay salaries as per the applicable scales resulting in salary arrears accumulating for the subsequent years up to 2009. This assertion lends credence to Mr. Mtae's submission that the claimed arrears and benefits for the years 2001 and 2009 are necessarily an offshoot of the initial claim in Trade Inquiry No. 52 of 2002.

We are aware that the appellants allege in paragraph 16 of the statement of complaint that their claim is for the years 2001 to 2009 and that it does not cover the period and items awarded in the two cases above named. Indeed, that is correct but the claim, as we have stated, is a perpetuation of the grievance that the appellants asserted to have arisen in 1997. It is, therefore, our firm view that the alleged salary arrears and unpaid terminal benefits necessarily stemmed from an alleged obligation on the part of the first respondent incurred in 1997, well before the receiving order, to pay the appellants' salaries upon certain scales. The accumulated debts or liabilities may have arisen between the year 2001 and 2009 before the first respondent's discharge from the bankruptcy but, crucially, they arose from an alleged obligation incurred before the date of the receiving order (12th June, 1998). In the premises, we find that the appellants' action

for the debts and liabilities arising by the reason of the pre-existing obligation as we have explained was bad in law for want of the leave of the court required under section 9 (1) of the BA. Accordingly, the first, second and third grounds of appeal crumble.

Given that the above determination is sufficient to dispose of the appeal, we find no pressing need to address the fourth ground of appeal.

Nonetheless, before we take leave of the matter we feel constrained to point out that in her disposition of the suit after she sustained the preliminary objection, the learned High Court Judge slipped into error by dismissing the action. It is settled that an order of "dismissal" connotes that a matter has been heard and disposed of on its merits – see **Ngoni-Matengo Cooperative Union Ltd. v. Alimohamed Osman** [1959] 1 EA 577. See also **Hashim Madongo & Two Others v. Minister for Industry and Trade & Two Others**, Civil Appeal No. 27 of 2003; **Mustafa Fidahussein Esmail v. Dr. Posanyi Jumah Madati**, Civil Appeal No. 43 of 2003; and **Peter Ng'homango v. Attorney General**, Civil Appeal No. 114 of 2011 (all unreported). The learned Judge should, instead, have struck out the suit. On that basis, we vacate the dismissal

order and substitute for it an order striking out the suit. We hasten to say, however, that this variation is inconsequential to the outcome of the appeal.

In the final analysis, we dismiss the appeal as it is unmerited. This being a labour dispute, we leave the parties to bear their own costs.

DATED at **DAR ES SALAAM** this 24th day of June, 2021

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 1st day of July, 2021 in the presence of Mr. Erick Denga learned counsel for the appellants and Mr. Charles Mtao, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL