IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KENTE, J.A., And, RUMANYIKA, J.A.)

CIVIL APPEAL NO. 84 OF 2018

MICHAEL MWINUKA AND 428 OTHERS.....APPELLANTS

VERSUS

TANZANIA ZAMBIA RAILWAYS AUTHORITY.....1ST RESPONDENT

THE DIRECTOR GENERAL NATIONAL SOCIAL SECURITY FUND (NSSF).....2ND RESPONDENT

THE BOARD OF TRUSTEES, NATIONAL SOCIAL SECURITY FUND (NSSF).....3RD RESPONDENT

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

(Moshi, J.)

dated the 17th day of November, 2017
in
Labour Complaint No. 03 of 2015

.....

JUDGMENT OF THE COURT

29th May, & 7th August, 2023

KENTE, J.A.:

This appeal arises from the judgment of the High Court (Labour Division) in which the trial Judge (Moshi J. as she then was), dismissed the appellants' claim for general damages allegedly resulting from the respondents' breach of their statutory duties as prescribed under the Employment and Labour Relations Act, No.6 of 2004 and the National

Social Security Fund Act (hereinafter respectively the ELRA and the NSSF Act).

The facts giving rise to the suit before the trial court as accepted by the trial judge, are briefly to the following effect: The appellants were employed in various capacities by the first respondent Tanzania Zambia Railways Authority. On diverse dates between June, 2005 and January, 2008 their contracts of service came to an end upon attaining compulsory retirement age. This process was however not to the appellants' liking as it was a subject of complaint and litigation in labour Complaint No.37 of 2008 and TD No.140 of 2006.

Having heard the parties, both the erstwhile Industrial Court of Tanzania in Trade Dispute No. 140 of 2006 and the Land Division of the High Court in Complaint No.37 of 2008 resolved a labour dispute arising out of the appellants' grievances on compulsory retirement but the two courts declined to entertain the appellants' claim for damages following the first respondent's alleged failure or neglect to remit in time their contributions to the third respondent herein the National Social Security Fund (the NSSF or the Fund). Upon leave being sought and obtained from the High Court (Land Division) in Miscellaneous Labour Application

No.115 of 2015, the appellants instituted a complaint against the respondents claiming among others, damages in compensation for the incessant pains and sufferings as a result of the first respondent's failure to remit in time their monthly contributions to the NSSF.

When one gets right down to it, the appellants were complaining that, the first respondent had deducted their salaries but failed to remit their monthly contributions to the NSSF leading to a long-standing feud between them and the NSSF. It was further alleged by the appellants but strongly denied by the respondents that, all of them (the respondents) had failed to timely perform their statutory duties and obligations prescribed under the NSSF Act thereby causing the appellants to suffer continuous damage for which they sought to be recompensated.

For their part, the second and third respondents tried to distance themselves from the allegations levelled against them by the appellants. According to them, they had performed their statutory duties by instituting civil claims and criminal proceedings against the first respondent for her delayed or non-remittance of the appellants' statutory contributions.

After hearing the parties and reviewing the applicable law, the learned trial judge came to the conclusion that, while it was established that indeed the respondents had breached their duties under the NSSF Act, the appellants had fallen short of proving that, as a result, they had suffered damage as to be entitled to the relief of damages. She also found and consequently held that, however, the statutory duties prescribed under the NSSF Act were not enforceable by the Labour Division of the High Court. The learned trial judge went on concluding that, since that was the case, the dispute between the parties was not enforceable by her court as it was not a dispute between an employer and employee. If we understood her as we reckon we did, the learned trial judge took the view that, the dispute between, the appellants and respondents was not a labour dispute properly so called. On that account, she went on dismissing the appellants' claim with no order as to costs.

Rattled by the decision of the trial court which left them scratching heads after being told that the trial Labour Court could not enforce their rights under the NSSF Act, the appellants have appealed to this Court fronting two grounds of complaint, thus:

1. The trial judge erred in law when she held that the appellants had failed to prove that they suffered general damage; and

2. The trial judge erred in law when she held that the High Court (Labour Division) cannot issue declaratory orders against the respondents in relation to the breach of their statutory duties under the NSSF Act.

At the hearing of the appeal, whereas Mr. Evans Nzowa learned advocate appeared for the appellants, the respondents were represented by a team of five State Attorneys namely; Ms. Mercy Chintawi and Opio Marcellus learned Principal State Attorneys together with Ms. Grace Lupondo, Ms. Kause Kilonzo and Mr. Yohana Odada learned State Attorneys. Both parties had filed written submissions in terms of Rule 106(1) and (7) of the Tanzania Court of Appeal Rules, 2009 in support of their respective positions.

We must however state at the outset that, notwithstanding the two grounds of appeal as fronted by the appellants, this appeal should stand or fall on the determination of the most fundamental question as to

whether what was referred to the Labour Division of the High Court was a complaint as envisaged by section 4 of the ELRA.

It is worthwhile to state at this juncture that, the appellants' self-named "complaint" which they lodged in the Labour Division of the High Court to formally initiate this dispute was based on the respondents' alleged breach of terms of their employment contracts as implied by law. Specifically, the appellants accused the respondents for routinely violating sections 4 and 28(1)(a) of the ELRA together with sections 12,13,14 72(a),73 and 74 of the NSSF Act. For the sake of clarity, whereas section 4 of the ELRA defines the term "complaint" as used in the context of our labour laws, section 28(1)(a) of the same Act provides for the circumstances under which an employer can make any deductions from an employee's remuneration. On the other hand, while sections 12, 13, and 14 of the NSSF Act which were cited by the appellants in a blanket manner relate to deductions and payment of employee's contributions to the Fund, sections 72, 73 and 74 are generally in relation to actions for recovery of contributions and criminal proceedings against defaulting employers.

In view of the position which we have taken in this matter, we will not, but not without respect or gratitude, belabour the submissions made by Mr. Nzowa in so far as they were exclusively meant to support the appeal on merit.

Submitting in opposition to the appeal, Ms. Lupondo who addressed the Court on behalf of the respondents was very brief and straight forward. She maintained that, the appellants' so called "complaint" before the trial court did not pass the threshold prescribed under section 4 of the ELRA. For ease of reference, the above-cited law defines a complaint as:

> *".....any dispute arising from the application, interpretation or implementation of:-*
>
> *(a) An agreement or contract with an employee*
>
> *(b) A collective agreement*
>
> *(c) This Act or any other written law administered by the Minister*
>
> *(d) Part VII of the Merchant Shipping Act."*

We take note of the fact that, in view of the above-quoted law, the present dispute would probably fall under paragraph (c) of section 4 of the ELRA, but for two reasons. **One**, given the undisputed fact that the appellants had already retired from employment when this dispute arose, it is crystal clear that they were no longer in the relationship of employer-employee with the first respondent as to be governed by the ELRA. On this account, we cannot fault the finding by the trial judge that the dispute between the appellants and respondents was not a labour dispute properly so called. **Two**, as correctly submitted by Ms. Lupondo, in terms of sections 81 and 82(3) of the NSSF Act, it was rather premature for the appellants to refer their grievances without an intermediary, to a court of law. For, in terms of section 81(1) of the NSSF Act, it is stipulated that, all claims to benefit shall be determined, in the first instance, by the Director General of the NSSF and, pursuant to subsection (3) of the same section, any person dissatisfied with the decision by the Director General on a claim to benefits or a question as to liability, may apply to the Social Security Regulatory Authority for review. Section 82(5) of the NSSF Act, makes the decision by the Director General final except where the matter to be adjudicated upon is

a question of law in which case it may be referred to a competent court for determination.

Now, the answer we have to give to the question which we had earlier on posed at the beginning of this judgment is that, the appellants ought to have exhausted all avenues available under the law by referring their claims to the Director General of the NSSF and, in case of necessity, to the Social Security Regulatory Authority for purposes of review before going to court as a last resort.

It follows in our judgment that, the unlimited jurisdiction which the High Court enjoys or in the circumstances of this case, the jurisdiction of the Labour Division of the High Court in labour related matters, is subject to, among others, sections 81 and 82(3) and (5) of the NSSF Act when it comes to claims involving retirement benefits. This is so because, an aggrieved party has no choice except to refer his complaint in the first instance, to the Director General of the Fund and, should the need arise, to the Social Security Regulatory Authority. Our view of the law which is shared by Ms. Lupondo for the respondents is that, it is only after going through the above-mentioned dispute settlement mechanisms that an aggrieved party may have recourse to the courts of

law. In other words, the courts of law have no jurisdiction to entertain a claim for retirement benefits directly unless the claim has been unsuccessfully referred to the Director General of the NSSF and, if necessary, to the Social Security Regulatory Authority.

And, for good measure, the situation obtaining in this case demands plain speaking that, sections 81 and 82(3) and (5) of the NSSF Act were put there not as a pretty tall order but for a purpose. For, it was not the intention of the Legislature in enacting the above-cited provisions of the law that, upon retirement and after returning home certainly lighter in their pockets than when they were still in the office, pensioners should pursue their hard earned retirement benefits through the court-processes which are invariably legalistic and tedious. So it should be because the Legislature had intended the disputes between pensioners and the Fund to be resolved through a simplified process without delay.

It must as well be observed in the present case that, the fact that the Labour Division of the High Court entertained a matter over which it had no jurisdiction is evidently supported by the trial judge's finding that, although the respondents had breached their duties under the NSSF Act,

the said duties were not justiciable in the Labour Court. In the circumstances, we have no doubt that the learned trial judge had inadvertently left it all too late in the day to realise that ultimately, for lack of jurisdiction, she could not decide the matters that were litigated before her.

It should be common and indeed very elementary knowledge to the legal fraternity that, unless otherwise provided by law, a court of law should adjudicate only upon a matter over which it has not only the jurisdiction but also the mandate to make and enforce the necessary accompanying orders. Otherwise, judicial proceedings would be inconsequential just as happened in the instant case and if that were the case, there would be no need for an aggrieved party going to court to seek a legal redress.

Following the foregoing exegesis, we find this appeal to have no merit and accordingly dismiss it in its entirety. In terms of section 4(2) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws, which vests in this Court revisionary jurisdiction while in exercise of its appellate jurisdiction in matters originating from the High Court, we nullify, the proceedings before the High Court in Labour Dispute No.3 of

2015, quash and set aside the judgment and decree arising therefrom for lack of jurisdiction.

Although costs should normally follow the event, given the nature of the dispute between the parties, we make no order as to costs.

DATED at **DAR ES SALAAM** this 04th day of August, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 7th day of August, 2023 in the presence of Mr. Francis Rogers, holding brief for Mr. Evans Nzowa, counsel for the Appellants, also Mr. Francis Rogers, Principal State Attorney assisted by Mr. Stanley Mahenge, learned State Attorney appeared for the respondents, is hereby certified as a true copy of the original.

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL