IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KOROSSO, J.A., KITUSI, J.A. And KHAMIS, J.A.)

CIVIL APPEAL NO. 80 OF 2021

TANZANIA CIGARATTE PUBLIC LIMITED COMPANY (FORMERLY KNOWN AS TANZANIA CIGARETTE COMPANY LIMITED) .....APPELLANT

VERSUS

BAKARI SALEHE, UPENDO MBUGHU AND 232 OTHERS .....RESPONDENTS

(Appeal from the decision of the High Court of Tanzania (Labour Division) at Dar es salaam)

(Muruke, J.)

dated the 25th day of September, 2020

in

Revision No. 525 of 2019

.....

JUDGMENT OF THE COURT

7th February & 1st March, 2024

KITUSI, J.A.:

The respondents, about 234 of them, were employees of the predecessors of the Tanzania Cigarette Company PLC, the appellant. Between 1996 and 1999, the respondents were retrenched following an alleged voluntary agreement signed by them and the appellant. Subsequently however, the respondents got better ideas and made several attempts to challenge the retrenchment. These are; Misc. Civil Application No. 154 of 2001 by some of the respondents, which was struck out, High Court Civil Cases No. 239 of 2002 and 432 of 2003 which were consolidated before being struck out for want of jurisdiction.

High Court Civil Case No. 295 of 2002 was also stuck out for want of jurisdiction.

Then, 62 of the present respondents preferred Trade Inquiry No. 67 of 2007 before the defunct Industrial Court of Tanzania. This was, on 29th December, 2008, dismissed for being time barred. Thereafter, nothing happened until 23rd October, 2017 when the respondents instituted Labour Dispute No. CMA/635/2007 at the Commission for Mediation and Arbitration (CMA), which was struck out for non-compliance with the requisite procedure.

Relentless, on 3rd March, 2018 the respondents presented another Labour Dispute which was registered as CMA/DSM/LAB/04/18/394 from which these proceedings stem. This dispute was presented through the Labour Commissioner. Upon a preliminary objection raised by the appellant that the matter had previously been held to be time barred in respect of the 62 respondents, it was dismissed by the CMA. The CMA also considered whether the complaint by the remaining 259 respondents was within time. It held that it was also out of time.

The respondents were aggrieved and successfully applied for revision at the High Court, Labour Division. The High Court was invited to resolve the issue whether the CMA's decision that the matter was

time barred was correct in view of the fact that the same was referred to it by the Labour Commissioner.

The prime argument by the respondents at the High Court was that labour disputes that arose before the enactment of the Employment and Labour Relations Act No. 6 of 2007 (ELRA) or Cap. 366 and referred to the CMA by the Labour Commissioner, are not subject to the Law of Limitation as per paragraph 13 (1) and (5) of the Third Schedule to Cap. 366 as amended by section 42 of the Written Laws (Miscellaneous Amendments) Act, No. 11 of 2010.

On the other hand, the appellants maintained that all respondents were bound by the decision in Trade Inquiry No. 67 of 2007 which was dismissed for being out of time, arguing that the said Inquiry and the present proceedings arise from the same cause of action.

Relying on the cardinal principes of natural justice particularly on the right of a person to be heard before an adverse decision is made against him, the learned judge of the High Court rejected the appellant's argument and held that the 232 respondents were not bound by the dismissal in Trade Inquiry No. 67 of 2007 because they were not parties to it nor heard. She cited the case of **Ridge v. Baldwin** [1963] 2 All 66 and **Kijakazi Mbegu & 5 Others v. Ramadhani Mbegu** [1999] TLR 174 to support her decision. Those cases are on the right to be heard; a

well-known principle. Consequently, the learned judge quashed the ruling of the CMA and set aside its orders. She ordered the CMA to hear the dispute on merits from the stage it had reached before.

The appellant seeks to fault the High Court on basically three grounds which we reproduce as under:

1. *The Court erred in law in quashing and setting aside the ruling of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/LAB/04/18/394 which was legally valid in holding that the matter was time barred.*

2. *That having accepted that the cause of action in Labour Inquiry No. 67/2007 is the same with the one in this application as they are about retrenchment claims which arose at the same time, the Court erred in law in holding that the matter was exempted from the law of limitation by virtue of section 42 of the Written Laws (Miscellaneous Amendments) (No. 2) Act, No. 11 of 2010 amending paragraph 13 (1) and (5) of the third Schedule of Cap. 366 R.E. 2019.*

3. *The Court erred in law in condemning the Appellant for failure to admit or deny on the Respondents' allegation of non-payment of terminal benefits. It will be contended at the hearing of the appeal that since the matter was determined at the stage of preliminary objection the question of admission or denial could not arise.*

At the hearing of this appeal, Ms. Blandina Harrieth Kihampa, learned advocate, appeared for the appellant. The respondents had the services of two learned advocates, Messrs. Twaha Issa Taslima and Jonas Kilimba who addressed the Court jointly.

We had earlier toyed with the idea that the decision of the High Court that the matter was not out of time and remitting it to the CMA for continuation, did not conclusively dispose of that matter so it was not appealable. However, upon consideration of the arguments made by the counsel for the parties in addressing that point, we are satisfied that the issue of time limit was determined by the CMA and subsequently conclusively determined by the High Court. Under the circumstances, the appellant cannot reagitate and address that issue in the course of the resumed hearing before the CMA. The respondents had also intended to argue two points of preliminary objection regarding time limit, but they withdrew them upon reflection. The appeal is therefore competently before us.

Back to the appeal in respect of which we are going to consider the parties' written submissions filed ahead of the date of hearing as well as their oral submissions made at the hearing. The parties have taken two diverging positions in relation to this appeal. Counsel argued

the appeal rather generally on whether the dispute at the CMA was time barred or not.

Ms. Kihampa for the appellant maintained that the labour dispute before the CMA was time barred even though it was lodged through the Labour Commissioner's letter. She submitted that the provisions of section 42 of the Written Laws (Miscellaneous Amendments) (No. 2) Act. No. 11 of 2010 which amended paragraph 13(1) and (5) of the third Schedule to the ELRA, apart from being merely transitional, did not mean that the disputes that arose during the repealed law have no time limit. In addition, she submitted that the Labour Commissioner's referral letter did not have the effect of exempting such matters from the law of limitation. She submitted further, using an analogy, that just as the Civil Procedure Code (CPC) provides that a suit shall be instituted by presentation of a plaint, so is with presentation of disputes at the CMA that it may be instituted by a referral letter of the Labour Commissioner. She wound up by arguing that in both scenarios, the court or Commission may still address the issue of time limit. As we shall later demonstrate in the course of interpreting section 86 (1) of the ELRA and paragraph 13 1(1) and (5) of the third schedule to Cap 366, the learned counsel's argument makes sense.

The learned counsel split her arguments into two. First, she argued in relation to the 62 respondents whose Trade Inquiry No. 67 of 2007 was dismissed for being time barred. Citing the case of **Hashim Madongo & 2 Others v. Minister for Industry and Trade & 2 Others**, Civil Appeal No. 27 of 2003 (unreported), she insisted that the only remedy available to a party whose case is dismissed for being time barred, is an appeal or any other legal action to challenge the dismissal. She concluded that since the 62 respondents did not appeal against the dismissal of Trade Inquiry No. 67 of 2007, they are bound by it so the CMA rightly dismissed the labour dispute in relation to them.

Secondly, in relation to the remaining 232 respondents who were not parties in Trade Inquiry No. 67 of 2007, Ms. Kihampa took the view that since the matters i.e Trade Inquiry No. 67 of 2007 and Labour Dispute No. CMA/DSM/LAB/04/18/394 arose from the same cause of action, the CMA was correct in treating that Labour Dispute to be time barred too in relation to the 232 respondents.

On the other hand, it was submitted for the respondents that section 42 mandates the Labour Commissioner to refer to the CMA, labour disputes, under the repealed law. Mr. Kilimba argued that the 232 respondents who were not parties to Trade Inquiry No. 67 of 2007

cannot be bound by its decision, submitting that to hold so would amount to condemning them unheard.

The High Court resolved this issue in favour of the respondent taking the view that the 232 respondents who were not parties in Trade Inquiry No. 67 of 2007 could not be bound by its decision, therefore the CMA condemned them unheard. We note that the second ground of appeal invites us to resolve this issue.

If we must state the obvious, the principle that no one should be condemned unheard is all too familiar to invite any further debate. Therefore, to that extent, the learned judge of the High Court was right in stating that principle. The question that lingers is whether, in fact, the respondents other than the original 62 were not heard by the CMA before it held the dispute to be time barred.

We have noted that from page 101 to 104 of the record, the CMA addressed arguments from the appellant who was the objector and from the respondent. After satisfying itself that the 62 respondents could not re open the dispute that was dismissed in Trade Inquiry No. 67 of 2007, the learned Arbitrator considered the fate of the remaining respondents who were 259 according to him. The appellant had argued that these respondents ought to have instituted their claim within 6 years, but they did so after 9 years. The respondents submitted that their dispute was

not covered by laws of limitation and referred to us the decision of the High Court in **Bora Industries Ltd v. Mohamed Ally & 18 Others**, Revision No. 64 of 2016 (unreported). Before us the learned advocates for the respondents emphasized the position in **Bora Industries Limited** (supra) by reproducing the relevant part that says:-

> *"In my understanding of the law, all disputes which were referred by the Labour Commissioner are not subject to the law of limitation; the law deemed the said dispute has been duly instituted under section 86 of the Act. Therefore, the argument by the applicant's counsel ... that CMA entertained the referral without condonation is without legs to stand as the dispute was referred to the Commission by the Labour Commissioner".*

First of all, the foregoing goes to demonstrate that the respondents other than the original 62 were also heard by the CMA in the course of which they argued that their dispute was exempt from the law of limitation. It was therefore wrong for the High Court to hold, as it did, that they were not heard. It must be made clear that it is true that the other 259 or 232 respondents were not heard in Trade Inquiry No. 67 of 2007, but the record shows that they were heard in Labour Dispute No. CMA/DSM/LAB/04/18/394. It is therefore our finding that

the High Court erred in its conclusion that the 259 or 232 respondents were condemned unheard.

Secondly, we interrogate whether the provisions of section 42 of the ELRA and paragraph 13 (1) and (5) of the third schedule to Cap 366 expressly or impliedly exempt this dispute from limitation laws, as argued by the respondents relying on the decision of the High Court in **Bora Industries** (supra).

The learned Arbitrator was of the view that it is against public policy and the object of Labour laws expressed under section 3 (a) (f) of the ELRA, to say that the dispute is not governed by limitation laws. He associated himself with the doctrine of limitation which says that laws come to the assistance of the vigilant, and reproduced the following paragraph from the decision of the High Court in **Processor Ltd v. Christopher Lungala,** Civil Case No. 16 of 1994 (unreported):-

> *"Limitation is a material point in the speedy administration of justice, limitation is there to ensure that a party does not come to court as and when he chooses".*

Although the Arbitrator did not say whether section 42 of the Act and paragraph 13 (1) and (5) of the third schedule exempt the dispute from limitation laws, he appears to have resolved the issue generally

that no party has a right to institute a dispute in disregard of limitation periods.

With respect, we agree with the position taken by the Arbitrator and approve the decision of the High Court in **Processor Ltd** (supra). This is the position the Court took in **Basil Gerald Mosha & 3 Others v. Ally Salimu** [2004]. T.L.R. 96 when it stated:-

> *"It is well established that the underlying policy rationale for periods of limitation, statutory or regiementary such as Rule 45 (b) include that of the diligence in the speedy determination of disputes with a reasonable, rather than an unreasonable or inordinate length of time; of fairness to the opposing party who is not to be the subject of an indefinite threat of being dragged to Court on undetermined dates by an applicant who does not pursue his or her remedies timely; interminably and ..... promoting certainty in the rights and title of preventing the potential loss of evidence oral or documents and public interest in the timely resolution of disputes".*

See also; **Sopa Management Limited v. Tanzania Revenue Authority**, Civil Appeal No. 25 of 2010 (unreported).

That aside, we have scrutinized paragraph 13 (1) and (5) and cross referred it with section 86 of the ELRA. What is clear from paragraph 13 (1) (5) is that it confers the Labour Commissioner with powers to refer to the CMA disputes that arose from repealed laws. Then section 86 of the ELRA provides for the general procedure of reference of disputes to the CMA. It provides:-

> *"86 (1) Disputes referred to the Commission shall be in the prescribed form".*

Our understanding of the above provisions is that section 86 (1) of the ELRA provides for the general rule governing presentation of disputes to the Commission, that is, in a prescribed form, but paragraph 13 (5) provides for an exception. That is, disputes that arose from repealed laws shall not be referred in the prescribed form but through a letter by the Labour Commissioner. Further that, when a dispute is referred by a letter of Labour Commissioner, it shall be deemed to have been duly instituted. There is nothing in paragraph 13 (5) that expressly or even impliedly suggests that disputes referred to the Commission by the Labour Commissioner are exempted from limitation laws. We are of the view that if the learned judge had given those provisions proper interpretation, she would not have determined the revision before her the way she did.

Ms. Kihampa submitted that the decision of the High Court in **Bora Industries** (supra) is not a good one. In response to this argument, Mr. Kilimba submitted that the decision in **Bora Industries** (supra) is valid until such time when it is overturned by this Court. With respect, considering our above interpretation of the relevant provisions, that is section 86 (1) of the ELRA and paragraph 13 (5) of the third schedule to Cap 366, we agree with the learned counsel for the appellant. This, in our view, is a question of statutory interpretation, which we resolve by adopting what we stated in **Ngasa Kapuli @ Sengerema v Republic**, Criminal Appeal No. 160 "B" of 2014 cited in **Barclays Bank Tanzania Limited v. Phylisiah Hussein Mcheni,** Civil Appeal No. 19 of 2010 (both unreported):

> *"The first general rule, is that, if the words of statute are clear, the duty of the court is to give effect to their natural ordinary meaning, unless it finds that to do so, would lead to hardship, serious consequences, inconvenience, injustice, absurdity or anomaly. If that is so, then preference should be given to that construction which would avoid such results. The second principle is that a statute must be read as a whole. One provision of the section should be construed with reference to the other provisions in the Act so as to make consistent enactment of*

the whole statute. In that way any inconsistency, or repugnancy either in the section or between a section and other parts of a statute, would be avoided. Here the duty of the court is to harmonize the provisions of the same Act as much as possible, so as to avoid a head on collision between two sections of the same Act. The last, third principle is the rule of construction in favour of presumption of constitutionality".

In our judgment, to go by the respondents and the cited decision in **Bora Industries** (supra), will cause confusion and disharmony, while the words of the statute are clear.

It is our conclusion therefore, that we allow the first and second grounds of appeal but on a different reasoning. Much as we agree with the respondents, and the learned judge rightly held, that the other respondents could not be bound by the decision in Trade Inquiry No. 67 of 2007 which they were not parties to, we disagree with the judge's finding that those other respondents were not heard in Labour Dispute No. CMA/DSM/LAB/04/18/394. As earlier demonstrated, they were heard and even sought to rely on the case of **Bora Industries** (supra). We agree with the learned Arbitrator that the dispute was presented to the Commission beyond the statutory six years. In our interpretation of section 86 (1) of the Act and paragraph 13 (5) of the third schedule,

there is no exemption to limitation laws in respect of disputes that arose from repealed laws. We reiterate that to hold otherwise will invite uncertainties and it will be inconsistent with public policy as well as the objects of the ELRA expressed in section 3 (a) – (g).

The decision of the High Court is assailed for another reason appearing in the third ground of appeal. The complaint is that the High Court condemned the appellant for failure to admit or deny the respondents' allegation of non-payment of terminal benefits. It is contended by the appellant that the learned judge erred in so holding and deciding substantive issues of evidence while the matter was determined on the basis of a preliminary objection. For the respondents it was argued that the appellant should not employ technicalities to defeat substantive justice. Article 107A (2) of the Constitution of the United Republic, 1977 was cited. In a short rejoinder, counsel for the appellant observed that one should seek substantive justice according to law.

It could be that the learned judge of the High Court in appreciation of the above sentiments, was too determined to see substantial justice addressed. This can be seen from the following statement by the learned judge:

> *"As explained earlier, (the) applicants have been struggling to pursue their rights since retrenchment. They have been in Court of law seeking for right to be heard for more than 20 years. [The] applicant has not been paid their terminal benefits in terms of exhibit TCC 1. [The] respondent has not proved, or annexed evidence to prove such payments to the applicants. So,* ***there is an issue to be discussed seriously****".* [Emphasis supplied.]

Earlier, the learned judge had correctly identified the following as being the decisive issue:-

> *"Whether the arbitrator was correct to hold that the matter was time barred".*

It is therefore quite unfortunate that the learned judge later digressed and condemned the appellant on issues that were extraneous and not placed before her for determination. With respect, this erroneous view by the learned judge seems to have influenced her final decision when she said:-

> *"There are* ***serious issues*** *mixed together in this matter, that* ***need to be seriously*** *determined on merits by the CMA".* [The bold is ours].

The learned judge allowed herself to be carried away and consequently, lost sight of the real issue of time limit which goes to the very jurisdiction of the court. Thus, we allow the third ground of appeal too.

It naturally follows that this appeal is allowed. The judgment of the High Court is quashed and its order remitting the matter to the CMA for determination on the merits, is set aside. We order no costs, this appeal's origin being an employment cause.

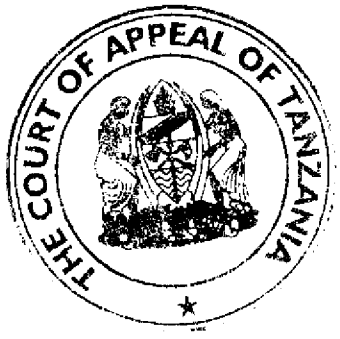
DATED at **DAR ES SALAAM** this 28th day of February, 2024.

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

This Judgment delivered this 1st day of March, 2024 in the presence of the Ms. Blandina Harrieth Kihampa, learned counsel for the appellant and Mr. Twaha Issa Taslima, learned counsel for the respondents, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL