IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 113 OF 2020

BETWEEN

NATIONAL BANK OF COMMERCE LIMITED ..... APPLICANT

VERSUS

CHRISTINA B. MREMA ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The application beforehand was lodged under the provisions of Section 91(1)(a),(2)(b)&(c),(4)(1)(a)&(b) and Section 94(1)(b)(i) of the Employment and Labour Relations Act, 2004, as amended ("ELRA"), Rule 24(1),24(2)(a),(b),(c),(d),(e),(f),(3)(a),(b),(c),(d),(11)(c) and Rule 28(1)(c),(d)&(e) of the Labour Court Rules, GN. 106 of 2007 ("the Rules"). The applicant, National Bank of Commerce Limited has lodged this Revision against the decision of the Commission for Mediation and Arbitration ("the CMA") in Labor Dispute No. CMA/DSM/ILA/R.283/15/16/62, by Hon. Igogo ("The Dispute"). In her Notice of Application as well as the Chamber Summons, the applicant has moved the court for the following orders:

(a) That this Honourable Court may be pleased to call for records, revise and set aside the whole Award of the CMA in the dispute.

(b) That the Court may be pleased to determine the dispute in the manner it considers appropriate.

(c) That this Honorable Court be pleased to give any other relief it deem fit and just to grant.

On her part, the respondent opposed the application through a counter affidavit deponed by her advocate one Anthony Wilbald Teye under the provisions of Rule 24(4)(a) of the Rules. By an order of the court dated 27th May, 2021, the application was disposed by way of written submissions. The applicant's submissions were drawn and filed by Mr. Evold Mushi, learned advocate while the respondent's submissions were drawn and filed by Anthony Wilbald Teye, learned advocate.

Before I venture into determining the merits or otherwise of this application, it is prudent that the brief background that has led to the current application be narrated. From what I have gathered in the records of both the Labor Dispute and this Revision, it is undisputed that the respondent was employed by the Applicant as Guarantee Officer-Trade Finance Services up until 2015 where she retired due to health

complication that resulted into loss of her eye sight. Upon retiring, Retirement benefits were paid to the respondent according to the law and the Applicant's policies. However, the respondent was not satisfied with the amount of benefits paid challenging the amount of retirement award paid under the Collective Bargaining Agreement (CBA) entered between the applicant and the Trade Union of her workplace.

Upon conclusion of the Arbitration hearing, the CMA issued an award and ordered the Respondent to be paid TZS. 19,608,576.30 as retirement award under the CBA. Aggrieved by the decision of the CMA, the applicant has lodged this revision on the following grounds:

1. That the arbitrator failed to realize that the matter before her was clearly an issue on interpretation of Collective Agreement Clause, thus CMA has no jurisdiction
2. That the Arbitrator grossly erred in law in dealing with matter that falls under exclusive jurisdiction of the High Court Labour Division.
3. That the Arbitrator erred in law by awarding the Respondent retirement package while she was paid during her exit process. Which was effected to her in accordance to the Applicant's Procedure and Policy.

4. That the arbitrator completely disregarded the Applicant testimony in line of Clause 14.2 of the Collective Agreement, hence erred by relying his decision on unfounded evidence, reaching to an erroneous, illogical decision.
5. That the Arbitrator erred in law in in dealing matter which was time barred.

On those grounds, the applicant has tabled the following legal issues for determination:

1. Whether arbitrator has jurisdiction to entertain the dispute involve interpretation of Collective Agreement Clause
2. Whether arbitrator correctly awarded retirement package
3. Whether the arbitrator erred to disregard the applicant testimony in line of clause 14.2 of the collective agreement.
4. Whether the matter was time barred.

Having now considered the records of this application, I find that there are two very crucial issues concerning jurisdiction of the CMA to have entertained the dispute. The first issue of jurisdiction is on the subject matter of the dispute, the applicant argued that the CMA had no

jurisdiction to entertain an issue which involves the interpretation of a Collective Bargaining Agreement. The second issue of jurisdiction is on time limitation, whereby the applicant alleges that the dispute was referred to the CMA outside the prescribed time. I find it prudent that I begin with the issue of subject matter jurisdiction because whether the dispute was filed within time or not will only be valid if the CMA has jurisdiction to entertain the subject matter of the dispute in the first place.

Now on the issue of subject matter jurisdiction, it was Mr. Moshi's argument that the dispute that was lodged at the CMA originated from the CBA that was entered between the applicant and the Trade Union of the Bank (TUICO) on behalf of the employees. That the point for determination at the CMA was whether the applicant properly paid the respondent all her benefits including the "retirement award" provided for under the CBA. That according to Clause 14(2) of the said contract (EX-A1), all employees of the applicant prior to the year 2005 (including the respondent) were paid. On the other hand, at the CMA, the respondent argued that she was underpaid.

Mr. Moshi submitted further that Section 74(a)&(b) of the ELRA is clear that any dispute concerning use, interpretation and implementation of

the CBA will only go to the CMA for mediation (Section 74(a)) and if mediation fails then the dispute has to be referred to the Labor Court for adjudication. That since mediation at the CMA failed, then the dispute was supposed to be referred to this court and not to arbitration. He concluded that since the issue at the CMA was interpretation of the CBA agreement, then the CMA had no jurisdiction to entertain it.

In reply, Mr. Teye first prayed that the counter affidavit of the respondent be adopted to form part of his submissions. He then submitted that the CMA had jurisdiction to entertain the matter under Section 88(2) of the ELRA. That in filling the CMA Form No. 5, the Certificate of Settlement/Non-settlement of the dispute, the issues that were tabled before the arbitrator were "retirement award and terminal benefits" arguing that the CMA had jurisdiction. He argued further that the applicant ought to have tabled the issue of jurisdiction during arbitration, something which he did not do until the case was disposed inter-parties.

Mr. Teye submitted further that in their opening statements, both parties submitted on the retirement benefits to be paid to the respondent as per the company policy and the CBA. Further that while framing the issues, the CMA framed two issues, one is whether the applicant paid the

respondent all her dues as per the time of retirement on 31/03/2015 and the reliefs sought. He argued that the issue of interpretation of CBA under Section 74(a)(b) was not tabled for determination, the respondent was only claiming for her retirement benefits. On his part, Mr. Mushi did not make any rejoinder submissions.

My work here is to look at the claim that was lodged at the CMA in order to determine what whether the issue tabled was the interpretation of the CBA or just claim of her terminal benefits. But before I go there, I must clear one argument raised by Mr. Teye that the applicant did not raise the objection at the CMA hence he cannot raise it at this stage. With respect, the learned Counsel misdirected himself on the issue, it its trite law that since jurisdiction goes to the root of the validity and legality of a decision of a judicial or quasi-judicial body, hence the objection on jurisdiction can be raised at any time even during appeal (in this case, Revision). This is because a jurisdiction is a creature of statute and it can neither be assumed nor grow with time, it is either there or it is not. So even if the decision was made ten years ago, if it was made by a court which had no jurisdiction, then it is not a valid decision and its effect is as if the case was

never determined. On that note, I will proceed to determine the issue before me.

Coming to what was tabled at the CMA, I will start by looking at the CMA Form No. 1 which in Labor Laws, it is the document that initiates the claim (refer to a plaint under Order I of the CPC). It is trite law that parties are bound by their pleadings and any deviations from the pleading must be so done by amendment of the previous pleadings following an order of the Court. This position was held by the court of appeal in the case of Barclays **Bank T. Ltd vs Jacob Muro (Civil Appeal No.357 of 2019) [2020] TZCA 1875; (26 November 2020)** where the Court held:

> *"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:*
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> > *"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 not 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."*(Emphasis is mine)

Under the cited case, it is not only the parties that are bound by their pleadings, even the court is equally bound by the parties' pleadings and we have to ensure that we circumscribe ourselves within the parameters of the parties pleadings. As courts, we are not to go and open our own inquiries or introduce extraneous matters into the case w

Now, looking at the CMA Form No. 1 lodged by the respondent at Part 3 for Nature of Dispute, the applicant ticked the firs box which reads *"Application/Interpretation/Implementation of law or agreement relating to*

employment". Going to the Clause 4 on the outcome of the mediation, the applicant wrote:

"To be paid retirement award as per Collective Bargaining Agreement of 2006, Notice, ..."

On part 6 of Special Features/Additional Information, the applicant clearly wrote:

"The payment should be as per collective bargaining agreement".

My interpretation of the pleadings is that the nature of dispute that the applicant lodged at the CMA was an application, interpretation or implementation of a CBA. There is no better language that could have been used by the applicant than *"to be paid retirement award as per Collective Bargaining Agreement of 2006".*

Going further to the special features of the dispute, the applicant was clear that the payment she is claiming should be as per the CBA. It should be borne in mind that at the CMA, there was undisputed fact that the applicant herein had paid the respondent a sum of Tshs. 100,000/- claiming it to be the retirement award as per the CBA. The respondent was aggrieved by the amount paid because according to her, the amount ought to have been calculated differently from what the applicant did. That is by

all means, nothing but a different or contradicting interpretation of the amount to be paid under Clause 14.2 of the agreement, hence according to the pleadings as what the CMA determined, the disputed then was on the interpretation of the CBA agreement between the applicant and the trade union of her employees.

Having so found that what was lodged at the CMA was rather a complaint about interpretation of the CBA and not a dispute, the next question is who has jurisdiction to interpret the said Collective Bargaining Agreements. Section 74 of the ELRA provides:

"Unless the parties to a collective agreement agree otherwise –

(a) a dispute concerning the application, interpretation or implementation of a collective agreement shall be referred to the Commission for mediation; and

(b) if the mediation fails, any party may refer the dispute to the Labour Court for a decision."

According to the cited Section, disputes concerning the application, interpretation or implementation of a collective agreement shall be referred to the CMA only for the purpose of mediation and not otherwise. The Section further directs parties, in case mediation fails, to refer the dispute

to this Court for decision. As shown earlier, at the CMA, the respondent's nature of dispute was the interpretation of the CBA. She moved the CMA to determine whether she was adequately paid under the CBA by the applicant hence she was moving the CMA to make decision on the amount to be paid, which is nothing but interpretation of the CBA agreement. The jurisdiction to make such a decision under Section 74(b) is only vested with the Labor Court.

In conclusion therefore, looking at the pleadings, the award given and the nature of the dispute, it fell under the provisions of Section 74(b) and as per the issue raised by Mr. Moshi, the CMA had no jurisdiction to entertain the matter. That being the case, the award of the CMA was illegal as the arbitrator determined the matter which she had no jurisdiction to determine.

Having made those findings, I see no reason to dwell on the remaining grounds of revision because being founded on an issue that the CMA had no jurisdiction to determine, the whole proceedings of the CMA from the time the matter was referred for arbitration under Form No. 5 of the CMA (Certificate of Settlement/Non-settlement of the matter), are a

nullity. The same are hereby nullified and the subsequent award is hereby set aside.

Having so nullified the proceedings, I have considered the condition of the respondent (having been exposed to a total permanent disability in due course of employment and the kind of disability so imposed) I find it just that I go further than just nullifying the proceedings and leave the applicant back to square one where she will have to go through all kinds of procedural inconveniences of applying for condonation of time etc. I have also adopted the spirit of Section 52(1)(j) of the Labor Institutions Act provides:

> *(1) In the performance of its functions, the Labour Court shall have all the powers of the High Court, save that in making a judgment, ruling, decision, order or decree in so far as it is relevant, the Court may take into account or consider the need-.*
>
> *(j) for* ***any scientific or social matter of great importance*** *which the court may deem necessary and just to take into account or consider.*

In the spirit of the above cited Section, and having considered the condition and social situation of the respondent as stated earlier, and

having taken into consideration the time that had lapsed since the dispute arose, I find it only just that I leave it for the respondent to be at liberty, in case she is still interested to pursue her right, to be able to do so. Therefore should the respondent still be interest to lodge a dispute on the interpretation of the CBA, she is at liberty to so do within thirty (30) days from the date of this decision. She should do so by referring the dispute to adjudication to this court following failure of mediation under CMA Form No. 5 under the same dispute number of the CMA.

As for the Revision at hand, it is hereby allowed, having no jurisdiction to entertain the matter, the proceedings of the CMA on arbitration and the subsequent award thereto are hereby nullified.

Dated at Dar-es-salaam this 15th day of December, 2021.

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S.M. MAGHIMBI
JUDGE