IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

REVISION NO. 114 OF 2020

BETWEEN

TANZANIA AGRICULTURAL DEVELOPMENT BANK LIMITED (TADB) ..... APPLICANT

VERSUS

THOMAS M.F. SAMKYI ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

In this revision application, I am called to determine two main issues; **first** is an issue of jurisdiction in which I am to determine whether the respondent, who was the employee of the applicant, was a Public Servant pursuant to the Public Service Act, Cap. 298 R.E 2019 ("the PSA") which shall then determine whether the Commission for Mediation and Arbitration ("CMA") had jurisdiction to entertain a dispute by a public servant (if so found) who did not exhaust other available remedies. The **second** issue is whether the contract of employment for a fixed period of four years that was

entered between the parties herein (EXT-1) was subject to the compulsory age of retirement of sixty years stipulated under the law.

The reason why I am to determine the two issues lies behind the award of the CMA in **Labor Dispute No. CMA/DSM/KIN/R.80/17/149** ("the Dispute") that declared the termination of the respondent by the applicant herein to be unfair both substantively and procedurally. The applicant was subsequently ordered to pay the respondent compensation to the tune of **Tshs. 368,125,000/-** (say Three Hundred Sixty Eight Million, One hundred and Twenty Five thousands). The award did not amuse the applicant, hence this application.

How the dispute came into existence may be grasped from the brief background that is narrated. The Applicant, Tanzania Agricultural Development Bank, is a Public Company established under the Companies Act Cap. 212 R.E. 2002 and supervised by Treasury Registrar under Section 7(1) of Treasury Registrar (Power and Functions), Act, Cap. 370, R.E. 2002; with status of Public Corporation as stipulated under Section 3 of Public Corporation Act, Act No. 2 of 1992 ("The PCA"). In this application, the applicant will also be referred as the Bank or the employer interchangeably (but in all cases, it will mean the applicant). On the 9th May, 2014, the

Ministry of Finance appointed the Respondent as Directed General of the Bank pursuant to Section 13(1) of the PCA. Following his appointment, on 30th June, 2014 the Applicant and the Respondent executed a four years Employment Contract starting form 1st July, 2014 to 30th June 2018.

It is alleged that at the time of execution of the contract, the respondent did not disclose his age. The dispute arose in 2016 when on 20th September, 2016 the respondent herein attained the age of 60 years. According to the applicant, when the respondent reached 60 years of age, he was subjected to compulsory retirement and was therefore supposed to notify his employer six months before his retirement date. The applicant complains that the respondent deliberately did not notify his employer on his retirement age. Upon getting the knowledge on the retirement age of the Respondent, the Applicant notified him and instructed him to go on a retirement leave and that his employment is subject to the permit from Chief Secretary. The Respondent then wrote a letter with Ref. No. TADB/HR/CONF/001/2016/3 dated 1st November, 2016 showing that he has attained the age of 60 years old and his employment is subject to the permit.

The applicant alleged to have requested for the permit but the request was in vain and consequently the employment of the Respondent ended on

07/12/2016. Aggrieved by the termination, on 02/01/2017, the Respondent instituted the Labour Dispute claiming of unfair termination of employment by the applicant. The CMA decided in his favor and awarded him compensation for the remaining period of the contract amounting to the tune of **Tshs. 368,125,000/-**. Aggrieved by the award, the applicant has lodged this revision under the provisions of Section 91(1)(a), 91(2)(a) (b) and 94(1)(b)(i) of the Employment and Labour Relations Act, No. 6 of 2004, read together with Rule 24(i) 24(2)(a),(b),(c),(d),(e),(f), 24(3)(a),(b),(c),(d) 24(11) (a),(b),(c) and 28(1)(a)(b)(c),(d),(e) of the Labour Court Rules, 2007) for the following:

1. This Honourable Court be pleased to call for and examine the records, proceedings and subsequent Award of the Commission for Mediation and Arbitration in the Labour Dispute No. CMA/DSM/KIN/R.08/17/149 by Honourable Mwakisopile, E.I. – Arbitrator dated 21st February, 2020 due to fundamental material irregularities and errors on facts and law in exercising vested powers as an Arbitrator of Commission for Mediation and Arbitration.

(a) Upon calling and examination of the Records of the Dispute, this trial Court be pleased to enjoy its Revisional Jurisdiction by revising

the Records, nullifying and set aside Award of the Commission for Mediation and Arbitration in the Labour Dispute No. CMA/DSM/KIN/R.08/17/149 by Honourable Mwakisopile, E.I. – Arbitrator dated 21st February, 2020 Award in consideration of the following grounds;-

(i) That the Hon. Arbitrator erred in law by entertaining the matter in which he had no jurisdiction and went further to struck out the Preliminary objection raised by Applicant on point of Jurisdiction.

(ii) That, Hon. Arbitrator erred in law and fact for failure to understand the nature of contract of employment between Applicant and Respondent herein and their scope of relations that existed between the parties that the Hon. Arbitrator erred in law and facts by giving his verdict that there is termination while the Respondent's employment ceased through compulsory retirement as a public servant

(iii) That on other preponderance of the evidence adduced in the Commission, the Hon. Arbitrator erred in fact and law

for reaching their decision on favor of the respondent therein and failure to consider the evidence.

(b) Any other Order that this Honourable Court may deem just and feet to grant.

On the day of hearing, Mr. Masunga Kamihande and Mr. Edson Lwechungura learned State Attorneys appeared for the applicant while the respondent was represented by Mr. Roman Masumbuko, learned advocate. The submissions of the learned Counsels will be considered in due course of writing this judgment.

Having analysed the records of this application as said earlier, there are two issues to be determined. I will determine the first ground first and then I will determine the second and third grounds of revision together as they are both challenging the nature of employment contract that existed between the parties in relation to the ground of termination of the respondent. While the respondent firmly pressed for compensation on the basis that age was not a subject of his employment contract, the applicant is here to have the court determine that being a civil servant (if the first

ground succeeds), the respondent was subjected to the compulsory retirement age for civil servants (60 years) hence his termination was fair.

Starting with whether the applicant was a public servant or not, which would determine the jurisdiction of the CMA to have entertained the dispute, it was Mr. Kamihanda's submission that vide the contract dated 01/07/2014, the respondent entered into a fixed term employment contract with the applicant for a period of 4 years commencing on 01/07/2014 (EXT-1). That the applicant is a public corporation fully owned by the Government and as per the interpretation of the Court of Appeal in the case of **AG Vs. National Housing Corporation & Others, Civil Application No. 432/17 of 2017,** a corporation which is fully owned by the Government is a public corporation. He argued that on that ground, the respondent was a public servant in relation to that definition.

Mr. Kamihanda also submitted that the respondent is a public servant and according to the PSA, he was supposed to get a channel provided for under the PSA in terms of Section 32A of the Act, No. 3/2016 which requires a public servant to first exhaust remedies under the Act. He therefore argued that the CMA didn't have jurisdiction to entertain the respondent because he was to exhaust the remedies provided for under the Act.

In reply, Mr. Roman submitted that Mr. Kamihanda is confusing between a public servant and a public corporation. He agreed that a fully owned Government entity is a public corporation, but not every person working in a public corporation is directly a public servant. He argued that if a foreigner comes to work in a public corporation on contract, it will not make him a public servant hence that is a wrong interpretation. That in the case cited, of Attorney General and National Housing Corporation, the AG wanted to join and he had to make an application and show the government's interest in the case. That it was right to hold so because the Government owns NHC. That PSRC Act which amended the PSA and provided that if the Government has more than 51% shares then it is a public corporation. This provision was later amended; therefore the case is different from our situation in hand.

Mr. Masumbuko submitted further that in defining public servant, the law is Section 3 of the PSA, and the decision of the CMA considered this position and that the respondent didn't meet those conditions in Section 3. He pointed out that the applicant is company with its Memorandum and Articles of Association (MEMAT) and has been established under the Company Law and not established by any written law. He supported his

argument by citing the decision of this court in the case of **Deogratious John Lyakwipa & Another Vs. TAZARA, Revision Application No. 68 of 2019**, urging that the situation is different as TAZARA had its own law which established it. That the applicant has its own MEMATS and it cannot be termed as a Public Corporation to make the respondent a Public Servant hence he is not bound by the Public Service Act.

Mr. Masumbuko submitted that Section 2 of ELRA has defined the people subject to the jurisdiction of the CMA to determine all issues of employment. That the procedures are an internal mechanisms and failure to exhaust internal remedies does not bar a party to approach the courts. He argued that the submissions of the applicant didn't challenge the holding of the CMA and that the CMA had jurisdiction for the reasons he stated.

He pointed out that the clause of the exhibit EXT-1 says that the applicable laws in the contract are the Tanzania Labor Laws and they didn't exclude the Employment and Labor Relations Act. That wrong interpretation by the advocate will not change the law or the terms of the contract, he concluded that the respondent is not a public servant as per the cited case of Deogratius.

On my part I have followed the definition of a public servant on under the Public Service Act, Cap. 298 R.E 2019 ('The PSA") where a public servant is defined as:

"public servant" for the purpose of this Act means a ***person holding or acting in a public service office****;"*

The public office is defined as:

"Public Service Office" for the purpose of this Act means-

(a) a paid public office in the United Republic ***charged with the formulation of Government policy and delivery of public services*** *other than-*

(i) a parliamentary office;

(ii) an office of a member of a council, board, panel, committee or other similar body whether or not corporate, established by or under any written law;

(iii) ***an office the emoluments of which are payable*** *at an hourly rate, daily rate or* ***term contract;***

(iv) an office of a judge or other judicial office;

(v) an office in the police force or prisons service"

(b) any office declared by or under any other written law to be a public service office;

Therefore in order for the respondent to qualify as public servant, it must be established that the applicant/Bank is a public office either charged with formulation of Government policy or delivery of public service. This purpose which can be found either in a legislation or an instrument establishing the institution to be read together with the terms of the contract of employment that was entered between the parties herein.

It is undisputed that the Bank was established under the Companies Act, Cap. 212 R.E 2019 as a body corporate, supervised by Treasury Registrar and with status of Public Corporation. At this point, it is clear that she is not established by an Act of Parliament. Owing to this, I then visited the Bank's website on www.tadb.co.tz and in there, I found their Financial Statement for the 2nd Quatre ended 30th June, 2020. The statement was issued under the Banking and Financial Institution (Disclosures) Regulations, 2014 and the performance highlight caught my attention. The paragraph reads:

*"TADB **approaches agricultural lending through cluster-based value chain financing, with a mission to catalyse the entire value chain** ranging from spectrum of activities such as unlocking market potential and seed multiplication to providing funding for key infrastructure such as irrigation schemes and warehouses"*

I have reproduced the para in order to get a grasp of what actually the Bank does. It is a lending institution in the agricultural sector through cluster based chain financing. In short, the applicant is a banking institution and that is why even its financial reports were prepared pursuant to the Banking and Financial Institution (Disclosures) Regulations. Is that sufficient to establish that it is a public office? The key word in the definition of a Public Service Office is **Government Policy Formulation** and **delivery of public services**. With no need to hustle on the face of it, the applicant is not involved in Government Policy formulation. The remaining part is defining public service delivery.

Public service delivery is the mechanism through which public services are delivered to the public by local, municipal, or central governments. Few examples may include utilities delivery (for instance water or electricity), public education, or health services. On this meaning, I do not see where

the Bank fits in the public service delivery, rather it is a body corporate wholly owned by the Government and engaged in business termed as agricultural lending. It cannot therefore be categorized as a Public Office under Section 3 of the PSA in terms of public service delivery.

Up at this point, it is to my satisfaction that the Bank does not fall under the formulation of Government Policies nor delivery of Public services because the Bank is an entity engaged in Banking business particularly in the agricultural sector. I did not end there, I further went to the provisions of Section 30 of the PSA, whereby Act No. 18 of 2007 introduced subsection 2 of Section 30(1) of the PSA which further defines a Public Servant to include servant working in all government institutions. The institutions are also being governed by the Public Service Act. The Section reads:

> *(1) Servants in the* ***Executive Agencies and Government Institutions*** *shall be governed by provisions of the laws establishing the respective executive agency or institutions.*
>
> *(2) Without prejudice to subsection (1) Public Servants referred under this section shall also be governed by provisions of this Act.*

The question is whether the applicant Bank falls under the category of Executive Agency or a Government institution for the purpose of Public Service Act. The Executive Agencies are established under the Executive Agencies Act, Cap. 245 R.E 2002 as semi-autonomous Agencies within the ambit of Government Ministries, for the purpose of providing public services in selected areas in a more efficient and effective manner and for related matters. The Government Institutions on the other hand are mostly established by Acts of Parliaments for specific purposes. As stated earlier, the Bank is established as a body corporate under the Company's Act. In conclusion therefore, the Bank does not qualify to be a public office under the PSA.

Furthermore, the employment relationship between the respondent and the applicant falls under the provisions setting exceptions to the definition of a Public Service Office which provides:

"Public Service Office" for the purpose of this Act means-

(a) ***a paid public office*** *in the United Republic charged with the formulation of Government policy and delivery of public services* ***other than-***

(iii). *an office the emoluments of which are payable at an hourly rate, daily rate or* ***term contract;***

The contract under scrutiny is therefore within the exceptions of a public Service Office stipulated under clause (iii) of the exception of the definition of a Public Service Office.

Going to the contents of the contract of employment under scrutiny (EXT-1), in case it slipped the eyes of the learned State Attorney, the EXT-1 is very clear on laws governing the contract and I quote:

"3. OTHER TERMS AND CONDITIONS OF THE CONTRACT:

Without prejudice to the specific terms and conditions set out in the foregoing Clauses, the Employer and Employee hereby agree that this Contract shall be ***governed generally by the Laws of the United Republic of Tanzania relating to employment contracts****, the Company's Scheme of Service and Salary Structure and the Staff Regulations as all these documents are amended from time to time."*

Now the law that governs the issues of termination under a fixed term contract is the Employment and Labour Relations (Code of Good Practice) G.N No. 42 of 2007 (the Code). Rule 8 (2) (a) of the Code provides:

"(2) Compliance with the provisions of the contract relating to termination shall depend on whether the contract is for a fixed term or indefinite in duration. This means that:

(a) where an employer has employed an employee on a fixed term contract, the employer may only terminate the contract before the expiry of the contract period if the employee materially breaches the contract."

In principle, the applicant ought to have shown that before termination of the contract, there was material breach of the terms of the contract by the respondent, looking at the CMA records, none was shown. Even in this court, the applicant heavily relies on the issue of age which, as will be indicated later in this judgment, was not a factor in the terms of the contract under scrutiny.

On the above findings coupled with the contents of the contract of employment under scrutiny, it is to the satisfaction of this court that the respondent was not a public servant under the PSA hence not governed by the provisions of PSA regarding dispute settlement mechanism. It was a fixed term contract falling under the provisions of Rule 8(2)(a) of the Code.

Therefore the CMA was right to hold that they had jurisdiction to entertain the matter as the applicant was not a public servant.

Coming to the second issue, is whether the contract of employment for a fixed period of four years that was entered between the parties herein (EXT-1) was subject to the compulsory age of retirement of sixty years stipulated under the law. Mr. Masumbuko argued that age was not a factor in their contract while the applicant maintained that the termination of the respondent was substantively fair because the respondent had reached a compulsory retirement age of 60 years.

As per the evidence, the respondent had voluntarily retired from public service at the Tanzania Investment Bank, a Bank established under an Act of Parliament, and was paid all his due as per the law. This means the moment the respondent retired, he ceased to be the public servant and was hence not subjected to the Public Service Act unless he had taken a subsequent employment at a public service office. So when he applied for the job at the applicant Bank, that information was revealed in his CV. Th EXT1 was executed 2 years before the respondent attained the age of (years but yet the applicant went ahead and hired him on a four year fixe term contract, so at this initial point, even by implication and by conduct

the time of execution of the contract, age was not a factor to the employment awarded to the respondent.

Furthermore, when one looks at the EXT-1, age was not in any way mentioned as a factor to that employment. The terms in the contract were subject to expiration of the fixed term of four years and there was even an option of renewal of the contract. There is no place whether impliedly or expressly that made age of retirement of the contract as one of the factors of the termination of this contract. The mode of termination of the contract was contained in clause 2.6 of EXT-1 which reads as follows:

"Clause 2.6:

The Board of Directors of the Company may at any time recommend to the Minister to the Minister for Finance to terminate the Employee:

i. If the Employee neglects or refuses to perform as required, due to any cause other than ill health, or

ii. If the Employee becomes unable to perform any his duties or to comply with any order by his superiors, or

iii. If the Employee shall disclose any information concerning the affairs of the Company to any unauthorized person, or

iv. If the Employee is in contravention of the confidentially restrictions of the Company, or

v. If the Employee shall in any manner misconduct himself or shall abrogate from his duties under this contract.

Provided that before the termination, the Employee is afforded an opportunity to be heard and defend himself.

Notwithstanding the provisions herein above, the Minister for Finance may, in his absolute discretion, terminate this Contract. Provided that; in the event of such termination, the Employer shall pay the Employee the equivalent of the gross salary he would have earned during the un-expired term of the Contract in addition to the 25% gratuity on the drawn salary payable pursuant to sub-clause 2.4 herein above.

Further Provided That: Where the Employer terminates/dismisses the Employee or legally proven disciplinary grounds, the Employee will not be paid the equivalent of the gross salary he would have earned during the un-expired term except that he would be paid the 25% gratuity on the drawn salary.

On the reliefs that were sought, I have borrowed the holding of this court in the case of **Good Samaritan vs Joseph Robert Savari Munthu, Labour Revision No. 165 of 2011 reported in High Court Labour Digest No 09 of 2013** where it was held that:

> *"When an employer terminates a fixed term contract the loss of salary by the employee of the remaining period unexpired term is a direct foreseeable and reasonable consequence of the employers wrongful action. Therefore, in this case, probable consequence of the applicant's action was loss of salary for the remaining period of the employment contract which was 21 months. To that extent, the arbitrator's award is sound in law and I see no basis to revisit it"*

It was therefore correct for the CMA to order the applicant to compensate the respondent loss of salary for the remaining period of the contract.

In conclusion, I see no reason to fault the decision of the CMA. The decision was well founded and compensation properly awarded under the law.

In conclusion, the revision before me is lacking merits. Unfortunately, the respondent didn't make any specific prayers on the application apart from notifying the court that he opposes the application. That notwithstanding, since I have found the application for revision beforehand to be devoid of merits, it is hereby dismissed in its entirety.

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

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S.M. MAGHIMBI
JUDGE