IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR DISPUTE NO. 07 OF 2022

TANZANIA UNION OF INDUSTRIES AND COMMERCIAL WORKERS (TUICO) ..... COMPLAINANT

VERSUS

SERENGETI BREWERIES LIMITED (SBL) ..... RESPONDENT

JUDGMENT

Date of last order: 18/04/2023
Date of Judgment: 29/05/2023

B. E. K. Mganga, J.

Facts of this dispute are that, on 08th April 2021, the Tanzania Union of Industries and Commercial Workers, a Trade Union, herein refereed by its acronym as TUICO, the herein complaint, signed a Collective Bargain Agreement with Serengeti Breweries Limited, the respondent on behalf of employees of the respondent. It was agreed in the said Collective Bargain Agreement that it will be effective from the date of signing and remain in force for twenty-four months' or until a new agreement is entered. It was further agreed that respondent will not discriminate her employees. It was also agreed that there will be periodical salary review conducted by the management of the respondent and that salary review process shall be transparent and

Labour Court-Tz.

further that TUICO, the complainant will be consulted. The parties to the said Collective Bargain Agreement also formed negotiation Committee.

It is a common ground that on 19th April 2022, Ms. Jacqueline Sarungi, Assistant Regional Secretary of the complainant signed and filed the Referral Form (CMA F1) filing the dispute before the Commission for Mediation and Arbitration (CMA). It is also a common ground that on 15th August 2022, the said Ms. Jacqueline Sarungi on behalf of the complaint and Erick Denga, Advocate, on behalf of the respondent, appeared before Hon. Kazimoto, A, Mediator, for mediation but the same failed. The mediator, therefore, issued a Certificate of none-settlement of the dispute.

On 20th October 2022, after mediation at CMA has failed, the complaint filed a statement of complaint alleging that on 21st April 2022, respondent breached the Collective Bargain Agreement by adjusting remuneration of some employees without consulting the complainant. It was further alleged by the complainant that, in so doing, respondent side-lined some employees hence discrimination. Complainant attached to the Statement of Complaint (i) Certificate of Non-settlement, (ii) a copy of the Collective Bargain Agreement and (iii) a paper showing some clauses of the Collective Bargain Agreement that were allegedly breached by the respondent. The said list of clauses allegedly breached

Labour Court-Tz.

by the respondent are (i) 3.1 that relates to commencement of the Collective Bargain Agreement, (ii) 3.4 relating to implementation and validity, (iii) 4.3.2 relating to Agency shop fee, (vi) 4.5, 4.5.1 relating to union/management meeting on quarterly basis, (v) 8.1.2 relating to discrimination, (vi) 9.3 relating to minimum wage 455,000 – 500,000/=, (vii) 9.4. and 9.5 relating to salary review and annual salary reviews, (viii) 9.6.2 relating to transport allowance, (ix) 9.6.3 relating to acting allowance, (x) 9.7.2 relating to substance allowance, (xi) 9.7.3 relating to on transit allowance, (xii) 11.2 relating to uniform and laundry, (xiii) 11.3.1 relating to education training, (xiv) 12.4 relating to company happy hour, (xv) 18.4 relating to establishment of consultative forum, (xvi) 8.1.5 relating to working hours, (xvii) 9.7.4 relating to night allowance and 6.2 relating to issue of mandate.

In the said Statement of Complaint, the complaint is praying (i) the court to order the respondent to include the side-lined employees in the adjustment of remuneration that was done by the Respondent on 21st February 2022 and order respondent to pay salary arrears to those employees, (ii) that respondent be ordered to implement the Collective Bargain Agreement, (iii) respondent be ordered to provide and pay all unprovided and unpaid benefits of the Collective Bargain Agreement to

Labour Court-Tz

all employees, (iv) all costs of this dispute be paid by the respondent and (v) any other orders the Court may deem fit and just to grant.

On 19th December 2022, respondent filed the response to the Statement of Complaint refuting allegations that she breached terms of the Collective Bargain Agreement or that she discriminated some of her employees. It was stated by the respondent that she performed salary review to all employees and found that some were below the minimum level of salaries and used the said salary review to increase salaries to those employees.

On 8th February 2023, the parties signed and filed a non-settlement order after failure of mediation before the deputy Registrar. In the said non-settlement order, they drew three issues namely:-

1. *Whether respondent breached the provisions of the Collective Bargain Agreement signed on 08th April 2021.*
2. *Whether the claim of breach of clause 8.1.2 and all reliefs were mediated at the Commission for Mediation and Arbitration.*
3. *What reliefs are the parties entitled.*

In his witness statement, Ally Buruhani Luoga (PW1) stated that he is the chairman of TUICO Union branch at Serengeti Breweries at Dar es Salaam branch and that he participated in discussion that led to the signing of the Collective Bargain Agreement on 8th April 2021. He stated that in June 2021, he got information from TUICO members that there

Labour Court-Tz.

was sudden salary increment for May 2021 but his salary was not increased. He added that he made follow up to respondent's employees at Moshi and Mwanza branches and that they confirmed that there was salary adjustment. That he called a meeting at Dar es Salaam branch and members admitted that respondent made salary adjustment to some employees and that there were complaints. He stated further that due the said complaint, on 5th July 2021 the applicant and the respondent held a meeting discussing salary adjustment that was made to some employees while discriminating others and that respondent admitted in the meeting that was held on 4th August 2021 that she will make salary increment to other employees too. It is evidence of PW1 that on 12th August 2021 another meeting was held but respondent refused to adjust salary of other employees who were discriminated. He tendered minutes of Zoom meeting of subcommittee between SBL Payroll Specialist and TUICO dated 27th July 2021(exhibit P2), minutes of Zoom meeting between SBL and TUICO dated 4th August 2021 relating to salary increment (exhibit P1) and an email dated 9th August 2021 5:59 Pm (exhibit P3) and email dated 08th August 2021 11:51 pm (exhibit P4).

While under cross examination, PW1 admitted that both exhibit P1 and P2 are not signed. He stated further that he printed exhibit P3 and

Labour Court-Tz.

P4 using the printer that was working properly. He maintained that he was a leader. He admitted that he did not attach pay slip to show that there was salary increment to some employees. He testified further that, increase of salary was supposed to base on the collective bargain agreement but respondent increased salary to some employees without adhering to the said collective bargain agreement. He stated further that, the act of the respondent to increase salary to few employees created double standard to employees because others were happy while others were not hence some were sidelined. He stated that, himself and others who were not paid salary increment namely Israel Mwakiowe, Marua Samwel, Hamidu Malunda, Juma Mwarabu, Ramadhani Ismail, Mfamao Tambwe, Dismas Daud, Gabriel Martine, Wilson Kaluto, Angolwisye Mpende, Jacob Kionjeo, Batista Agustino, Fred Kogan and many others were discriminated.

In his witness statement, Prosper William Mrema(PW2) stated that he is current Regional TUICO Secretary in Ilala Region and that previously he was Assistant Secretary of the Head of Industrial Sector at TUICO headquarters. He also stated that, he participated in signing recognition agreement between the complainant and the respondent and that thereafter the parties signed the Collective Bargain Agreement on 8th April 2021. He stated further that, later they received a complaint

Labour Court-Tz.

that respondent has breached terms of the Collective Bargain Agreement by adjusting salary without consulting the complainant. That they made efforts to unearth the truth and that through the accountants of the complainant, they noted that there was TUICO member union dues increment to some members but others being discriminated hence violation of terms of the Collective Bargain Agreement. In his evidence, PW2 tendered the Collective Bargain Agreement as exhibit P5.

While under cross examination, PW2 testified that, the information that respondent breached terms of the Collective Bargain Agreement came from employees at Moshi, Mwanza and Dar es Salaam branches. He admitted that in his witness statement, he did not mention the names of the persons who gave him that information. He stated further that, some of them are witnesses from Dar es Salaam branch. He also admitted that, in his witness statement, he did not mention employees whose salary was increased, those who were discriminated or specifically state the unclaimed benefits.

While under re-examination, PW2 stated that the information he received from the employees relates to breach of Collective Bargain Agreement. He added that from Mwanza, he received the information from Maroa Samwel, the Secretary of Mwanza branch, from Moshi it was

Labour Court-Tz

from Mungule Jonas who is the Chairperson of the branch and in Dar es Salaam it was from Ally Luoga (PW1), the Chairman of the branch.

In his witness statement, Habibu Fadhil Mswagilo(PW3) stated that, he is the Assistant Accountant at TUICO headquarters with the responsibility of handling *inter-alia* incoming membership fees from all employees who are members of TUICO. He stated further that, he was asked by the Head of industrial sector at TUICO headquarters to conduct due diligent and make comparison of the union dues from Serengeti Breweries Limited and see whether there was salary adjustment for the year 2022 or not. He stated further that, he conducted a research and found that there was huge increase to some employees. He added that, he found that salary of 60 employees have been adjusted from 2% which was paid in previous months'. It was stated by PW3 that salary of the said 60 employees was increased to 4% and others above 79%. He added that, there was increment of TUICO members union dues due to salary adjustment done by the respondent to some employees without consulting the complainant an indication that respondent discriminated some of her employees. in his evidence, PW3 tendered the Serengeti Breweries TUICO members Union dues comparison April and May 2021 as exhibit P6.

Labour Court-Tz.

While under cross examination, PW3 stated that, exhibit P6 is a comparison of dues of respondent's employees for the month of April, 2021 and May, 2021 and that he is the one who prepared the said exhibit. He further stated that, in paragraph 2 of his witness statement, he indicated that he conducted comparison of dues for the year 2022 but that was a typing error because it was supposed to be the year 2021. He went on that, in his witness statement, he was referring to the comparison of dues for April and May 2021 (exhibit P6). PW3 testified further that, they normally verify the dues whether there is increase or decrease. It was evidence of PW3 that after his research, he gave exhibit P6 to his boss showing the findings thereof. He maintained that, salary of 60 employees plus was adjusted as shown in exhibit P6. After being shown exhibit P6 by counsel for the respondent, PW3 clarified that there are 223 employees in the said exhibit P6 but dues for 80 employees was adjusted hence increase of the due payable to TUICO.

Giving evidence under re-examination, PW3 maintained that there was increase of dues according to his findings for the month of May 2021 as shown in exhibit P6 and that there was salary increment to 80 employees.

On the other hand, Anitha Swai(DW1) the only witness for the respondent stated in her witness statement that she is working with the

Labour Court-Tz.

respondent in the Human resources department and that her duties are *inter-alia* handling all issues relating to welfare of employees including review of salaries. In her witness statement, DW1 stated that, in the Collective Bargain Agreement that was signed by the parties on 8th April 2021, the parties agreed in clause 9.4 that there will be reasonable periodic salary review of three to four years conducted by the management of the respondent in consultation with the complainant. She stated further that, in reviewing salaries, factors that will be considered are company performance, economic situation and other factors relating to employment. DW1 stated further that, the said review is awaiting the agreed reasonable periodic salary review of three to four years which will be from April 2024.

In her witness statement, DW1 also stated that on 21st February 2022, respondent engaged Deloitte-Kenya, an independent auditing firm to do a comprehensive insight on macro-economic factors and outlook, market salary increase and salary payment distribution. That the said firm did comprehensive salary survey to all employees of the respondent in all branches in Tanzania. That, the aim of the said survey was to enable the respondent to familiarize herself with all employees whose salaries falls below minimum market standards as opposed to their counterparts so that they can be uplifted to the benchmark from where

Labour Court-TZ

a salary increment based under clause 9.4 of the Collective Bargain Agreement was to be made when the periodic review takes place. DW1 stated further that, what was done in February 2022 was not salary review in line of clause 9.4 of the Collective Bargain Agreement that would have required consultation, rather, was a salary survey. She stated further that respondent merely pulled salaries of the lowly paid employees so that they can reach a level of other co-employees of the same cadre while waiting for the agreed periodic review. She added that she analyzed the report and advised the respondent and based on the said report, respondent uplifted salaries of some employees whose salaries were below while other employees were to wait until the periodic review based on clause 9.4 of the Collective Bargain Agreement. She added that, the said uplifting of salary to those employees was as it was agreed between the complainant and the respondent in terms of clause 9.3 of the Collective Bargain Agreement. DW1 stated that there was neither breach of clause 9.1, 9.4 nor 8.1.2 of the Collective Bargain Agreement because there was neither salary adjustment nor discrimination. In her evidence, DW1 tendered F23 pay Review and Proposals Meeting-Tanzania(undated) as exhibit D2 and Referral of a dispute to the Commission for Mediation and Arbitration (CMA F1) that was filed by the complaint for mediation as exhibit D1.

Labour Court-Tz.

While under cross examination, DW1 stated that, after the salary survey, respondent noted that some employees were falling under the minimum scales. She admitted that scales are not salary. She stated further that, in May 2021 respondent pulled the employees with low scales so that they can be at the minimum scale. She admitted that she had no report of the auditing firm relating to audit that was conducted after the salary survey and admitted further that exhibit D2 was prepared in 2020. She stated further that, the Collective Bargain Agreement (exhibit P5) was signed on 8th April 2021 and that in terms of clause 9.4 of exhibit P5, respondent was supposed to consult the complainant. She admitted further that, in May 2021, there was salary increment to some employees and that in her witness statement she did not state that complainant was consulted.

In re-examination, DW1 stated that in the statement of complaint, complainant complains that the adjustment was done in 2022.

Having heard evidence of the witnesses, I allowed the parties to file their final submissions.

In his written submissions, MR. Ngowo, for the complainant submitted that PW1, PW2 and PW3 proved that respondent made salary adjustment to some employees without consulting the complainant and further that the said salary adjustment discriminated some employees.

Labour Court-Tz.

In short, Mr. Ngowo submitted that respondent breached clause 9.4 and 9.1.2 of the Collective Bargain Agreement. Mr. Jamal Ngowo, faulted evidence of DW1 arguing that it is hearsay.

On the other hand, Erick Denga, learned counsel for the respondent submitted that complainant has failed to prove that respondent breached the said Collective Bargain Agreement. Counsel submitted that exhibits P1 and P2 were not signed hence they have no evidential value. He added that, exhibit P3 and P4 have no evidential value because their authenticity is questionable because the witness was not led to explain their authenticity. He went on that exhibits P3 and P4 being emails, their authenticity is questionable because the witness did not testify on reliability, the manner they were generated, stored and communicated, the manner the originator was identified. He cited the provisions of section 18 of the Electronic Transaction Act, 2015 and the case of *Mohamed Enterprises (T) Limited and Another v. Shishir Shyamsingh,* Civil Case No. 03 of 2021, HC(Unreported) to implore the court not to act on those exhibits.

Counsel for the respondent submitted that evidence of PW1 and PW2 in relation to breach of clause 8.1.2 and 9.4 of the Collective Bargain Agreement is hearsay. He cited the case of *Dauimu Daimu Rashid@Double D vs. The Republic*, Criminal Appeal No. 5 of 2018,

Labour Court-Tz.

CAT(unreported) to implore the court not to act on evidence of these witnesses. Counsel for the respondent cited the case of *Jumanne s/o Marco vs. the Republic,* Criminal Appeal No. 522 of 2016 CAT(Unreported) and invited the court to draw adverse inference against the complainant for her failure to call as witnesses, employees whose salaries were adjusted and those whose salaries were not adjusted and discriminated. Counsel for the respondent submitted further that, members' union dues comparison (exhibit P6) is in conflict not only with PW3' evidence but the whole evidence of the complainant because the said exhibit shows that comparison was made in April and May 2021 while complainant's pleadings relates to 2022. Based on that, counsel for the respondent cited the case of *Yara Tanzania Limited v. Ikuwo General Enterprises Limited*, Civil Appeal No. 309 of 2019, CAT(unreported) to support his submissions that parties are bound by their pleadings and they are not allowed to depart. Counsel for the respondent submitted further that there is contradiction in evidence of PW3 in relation to the number and names of employees whose salaries were adjusted because in his witness statement he did not give the number but while under cross examination, he stated it was 60 and when probed by the court he stated that they were 80. He strongly argued that evidence of PW3 departed from pleading of the complainant

Labour Court-Tz.

Counsel for the respondent submitted that, complainant failed to prove the allegation because employees whose salaries were increased and those whose salaries were not increased were not mentioned and they were not called as witnesses. He added that pleadings shows that breach of the Collective Bargain Agreement occurred in February 2022 but witnesses testified that it was in April and May 2021.

Counsel for the respondent relied on evidence of DW1 that there was no salary review that needed consultation from the complainant in terms of clause 9.4 of the Collective Bargain Agreement rather, it was salary survey.

Counsel for the respondent submitted that PW1, PW2 and PW3 did not prove that the claim of discrimination was mediated at the Commission for Mediation and Arbitration(CMA) in terms of section 74(a) of the Employment ad Labour Relations Act[Cap. 366 R.E. 2019]. He argued that discrimination was not among the claims in CMA F1(Exhibit D1). Counsel for the respondent submitted further that the court has no jurisdiction to adjudicate on an unmediated matter.

On relief claimed by the complainant, counsel for the respondent submitted that there is names of the employees sidelined which the complainant is asking the court to be included. He submitted that the court should not give relief blindly to unidentified employees. He went

Labour Court-Tz.

on that, there is no breach of the Collective Bargain Agreement therefore the court cannot declare and order respondent to implement the said Collective Bargain Agreement. On the relief relating to payment of all un-provided and unpaid benefits, counsel for the respondent submitted that none of the complainant's witness mentioned the said un-provided benefits of the Collective Bargain Agreement and the amount thereof. Arguing in alternative, counsel for the respondent submitted that, if the court finds that complaint was not consulted, then, the court can only order the parties to go back to the round table discussions because the effect of non-consultation is not to order increase or adjustment of salaries. Counsel added that this court has no jurisdiction to order increase or adjustment of salaries on the basis that complainant was not consulted. On costs, counsel for the respondent submitted that in terms of section 51(2) of Cap. 366 R.E. 2019(supra) costs are not awardable. Counsel for the respondent concluded his submissions praying that the dispute be dismissed.

I have carefully examined evidence of the parties and submissions made thereof and in disposing this dispute, I will start with submissions relating to mediation raised by counsel for the respondent.

It was submitted by counsel for the respondent that the dispute relating to discrimination of some employees was not mediated at CMA

Labour Court-TZ.

hence the court has no jurisdiction to adjudicate on unmediated matter. I have opted to start with that complaint because jurisdiction of the court has been questioned. I would say from the word go that, submissions by counsel for the respondent are not correct in this aspect. Submissions by counsel for the respondent is based on CMA F1 that is pleading filed at CMA. In terms of section of 86(1) of Cap. 366 of R.E. 2019(supra), the dispute is filed at CMA by filing CMA F1 that is made under Rule 34(1) of the Employment and Labour Relations (General)Regulations, GN. No. 47 of 2017. On the other hand, in terms of Rule 6 of the Labour Court Rules, GN. No. 106 of 2007, pleadings are initiated by the complainant filing before this court a statement of complaint.

Counsel for the respondent relied on section 74 of Cap. 366 R.E. 2019(supra) to argue that the court has no jurisdiction because the dispute relating to discrimination was not mediated at CMA. The said section provides: -

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

Labour Court-Tz

In fact, the provisions of section 74(b) of Cap. 366 R.E. 2019(supra) is in line with the provisions of section 86(7)(b)(ii) of the same Act. I have examined the CMA F1 (exhibit D1) that was relied on by counsel for the respondent in submitting that the dispute relating to discrimination was not mediated hence the court has no jurisdiction and find that, that submission is a misdirection. I am of that view because, in the said CMA F1(exhibit D1) that was tendered by DW1, complainant prayed that respondent be ordered to adjust salary of the employees sidelined. From where I am standing, allegations by the complainant that some employees were sidelined by the respondent at the time of making salary adjustment means that, those employees were discriminated. It is my considered opinion therefore, that the dispute relating to discrimination was mediated at CMA because it is part of the complainant's claims in CMA F1(exhibit D1) that was tendered by the respondent. For the foregoing, I hold that the court has jurisdiction.

I should point albeit briefly that there is a need of harmonization of the law because while section 74(b) and 86(7)(b)(ii) of Cap. 366 R.E. 2019(supra) provides that mediation has to be conducted at CMA, Rule 10 of the Labour Court Rules, GN. No. 106 of 2007 provides that Mediation has to be conducted by the Registrar or the Mediator attached to the court. In terms of Rule 10(3) of GN. No. 106 of 2007(supra), if

Labour Court-Tz.

the parties reach a settlement, the Registrar or the Mediator shall draw a consented settlement order. If settlement fails, the parties shall draw up and sign a non-settlement order stating inter-alia facts that are common, facts in dispute, issues to be decided by the court, relief claimed, manner in which documentary evidence will be dealt with, party which will commence evidence as it is provided by Rule 10(2) and (4) of GN. No. 106 of 2007 (supra).

I should point out that, after failure of mediation at CMA, complainant filed the statement of complaint and respondent filed a reply thereto. The parties appeared before the Deputy Registrar and complied with the provisions of Rule 10(2) and (4) of GN. No. 106 of 2007(supra). In the statement of complaint, complainant indicated that respondent adjusted salary of some employees and discriminated others. It is my view that, since mediation before the Deputy Registrar failed and since the statement of complaint contained allegations of discrimination, then, in my view, submissions by counsel for the respondent that allegations relating to discrimination were not mediated, cannot be valid. See *Tanzania Union of Industries and Commercial Workers (TUICO) vs Serengeti Breweries Limited (SBL)* (Labour Dispute No. 07 of 2022) [2023] TZHCLD 1293. I will therefore proceed

Labour Court-TZ

to determine the issues drafted including the one relating to discrimination.

It is undisputed that on 8th April 2021, the complainant and the respondent signed the Collective Bargain Agreement (exhibit P5). It is also undisputed that under clause 8.1.2 of exhibit P5, the parties agreed that respondent shall not directly or indirectly discriminate any employee. It is further undisputed that under clause 9.4 of exhibit P5, the parties agreed that respondent will periodically conduct salary review and that salary review process shall be transparent, consistent and that complainant will be consulted. It was further agreed that three to four years is a reasonable period for the respondent to conduct salary review. It was alleged by the complainant that respondent reviewed and adjusted salary of employees without being consulted and in discrimination of some employees. Respondent has disputed stating that there was no salary review rather it was salary survey hence no need of consulting the complainant.

I have carefully considered evidence of the parties and find that respondent made salary review without consulting the complainant. Evidence of Ally Buruhani Luoga(PW1) and exhibits P1 and P2 are clear on this aspect. The minutes of Zoom meeting dated 27th July 2021 (exhibit P2) between TUICO, the complainant and SBL Payroll Specialist

Labour Court-Tz.

(respondent) is clear that there was salary review and discrimination. Exhibit P2 reads in part: -

> *"… Union asked payroll specialist to display employees position /title, department and level.*
>
> *Payroll specialist displayed as requested. According to payroll specialist all store assistants fall under level B, all operators from all business units/ departments (Brewing, Packaging, Engineering, ETP and logistic) fall under level 7C* ***except six forklift operators from Moshi plant are in level 7A.***
>
> ***Union asked why salaries were adjusted to some of level 7 employees and leaving others behind****?*
>
> *Payroll specialist responded, salaries were adjusted after receiving new salary scale for F22 and it was done based on job grade. Adjustment was done to put those employees in their salary range and to make an equity to employees performing same level.*
>
> *…*
>
> *Union questioned why only six forklift operators from Moshi fall under Level 7A while there many of them in other plants graded level 7C? union asked what criteria is used to move an employee from level 7C to Level 7A? according to employment history Moshi forklift operators were employed between 2015 and 2018 while other sites is between 2005 to 2016 and they are still level 7C, what speciality do Moshi forklift operators possess? Union asked, all level 7 employees were contributing the same 2% dues for 7 years or more…how come immediately others are moved to level 7A after adjustment?*
>
> *Payroll specialist responded as follows; The issue of forklift operators is known, and the management will work on it. Payroll specialist responded to the second question that; long service is not criteria to move from one level to another...*

Labour Court-TZ

Union asked explanation of level 7C employee contributing 2% dues of more than 20K+ TZS.

Payroll specialist said it depends on his point of entry, it is possible to be paid more than your salary range.

Union asked why management did not involve union during May salary review, and why implementation started right away in May 2021 while F22 starts in July 2021?

Payroll specialist stated that the question will be responded in the next meeting.

Union stated that most of engineering in Moshi are either in level 7A or 6C, asked management to justify it.

Management disagreed on the statement.

…

Union questioned why employees who are graded level 7A are paid below the salary range?

Payroll specialist responded the difference is not significant.

Union proposed that the management to adjust salaries to the rest of level 7 employees as it was done to their colleagues and should be done in consultation with union…"

I should point out that, exhibit P2 was tendered by PW1 and was admitted in evidence without objection. I should also point out that Ally Luoga(PW1) and Anitha Swai(DW1) attended the said meeting.

In addition to the foregoing, the other part of evidence showing that respondent made review without consulting the complainant and further that respondent discriminated some of her employees is minutes of

Labour Court-Tz.

Zoom meeting dated 4th August 2021 (exhibit P1) between the complainant and the respondent. Exhibit P1 reads in part: -

> *"…Union asked why management did not involve Union during salary adjustment which was done in May 2021.*
>
> *Management responded, it will sit and review the proposal, but what base line will be used to make decision on salary adjustment?*
>
> *Management will investigate each case to identify any of employee paid less than salary range and can be compensated, not all level seven can be compensated…*
>
> *Union responded the management knows grounds which will be used to adjust salaries, should be the same way as per May 2021 salary adjustment….*
>
> *Management stated it will work on it…"*

As it happened to exhibit P2, exhibit P1 was also admitted without objection.

As if that is not enough, minutes of the meeting held by respondent's employees at Moshi branch on 7th August 2021 (exhibit P3) and minutes of respondent's employees at Mwanza branch(exhibit P4) shows that in May 2021, respondent made salary increment discriminatively because the said salary adjustment did not cover all employees. According to these exhibits, some employees in the same category were discriminated. Exhibit P3 reads in part: -

> *"…Tuliweza fanya kikao na wajumbe wote waliohudhuria kikao waliafiki yafuatayo:-*

Labour Court-Tz.

1. Level 07 wa Moshi wako tayari mchakato wa salary increment usitishwe na menejimenti kama salary adjustment ilivyofanyika May kwa operators wengine haitafanyika kwa level 07 wote, wanachama walisistiza adjustment na increment vifanyike ndani ya Q1 ikiwa ni haki yao ya msingi na arrears ziwe included kwenye malipo."

Exhibit P4 reads in part: -

"…

Kikao kamekaa(sic) na kujadili kwa kina swala(sic) la salary increment na la May 2021 salary adjustment iliyofanywa na mwajili kwa njia ya sili(sic) na ubaguzi kwa wafanyakazi bila kukishirikisha chama na kwa pamoja mapendekezo ya kikao ni kama yafuatayo:-

1. Kikao kimeona kuna umuhimu sana mwajili kufanya salary increment kwa wafanyakazi wote ambao walipaswa kufanyiwa adjustment na hawakufanyiwa…"

I should point out that, PW1 was a recipient of exhibit P3 and P4. It is my view that, a statement by DW1 that respondent made salary survey and not salary review, in my view, is not correct. In her evidence under cross examination, DW1 admitted that in May 2021, respondent increased salary to some employee and that in terms of clause 9.4 of exhibit P5, respondent was supposed to consult the complainant. Evidence by DW1 that respondent made that increase to some employees so that they can be at the minimum scale cannot be correct because it does not tally with what was responded to by the respondent in exhibit P1 and P2. I should point out that, DW1 participated in meeting in exhibit P1 and P2 because, her name is mentioned. The

Labour Court-Tz.

quoted paragraphs of exhibits P1 and P2 do not support the conclusion that respondent just made salary survey. DW1 tendered a document titled F23 PAY REVIEW AND PROPOSALS MEETING TANZANIA as exhibit D2 to show that respondent only made salary survey. In my view, exhibit D2 is pay review and proposal for financial year 23 as it is titled and has nothing to do with salary adjustment/ increase that was made by the respondent in May 2021. It was further stated by DW1 in her evidence that exhibit D2 was made by Delote Kenya in 2020. That evidence bears no support from exhibit D2 itself. The date on which exhibit D2 was made is not stated in the said exhibit. Not only that but also, author is unknown. I have examined exhibit D2 and find that it is minutes of the meeting. In fact, exhibit D2 supports my conclusion that it is minutes of the meeting and not salary survey report. Exhibit D2 reads in part: -

> *"F23 PAY REVIEW AND PROPOSALS MEETING –TANZANIA*
>
> *ATTENDEE: MD, FD, GHRD AND HEAD OF REWARD*
>
> *FACILITATOR: HEAD OF REWARD"*

It is my view that, had exhibit D2 being salary survey report as DW1 wants the court to believe, the same could have shown findings of the alleged survey. There is nothing in exhibit D2 showing findings of the alleged survey. It is my view that, DW1 told nothing but a naked lie

Labour Court-Tz.

while under oath. Again, evidence of DW1 that respondent made salary survey, in my view, is highly contradicted by the contents of exhibits P1 and P2 in which DW1 participated.

In his submissions, counsel for the respondent argued that exhibits P1 and P2 should not be acted upon because they lack signature hence their genuineness is questionable and they lack evidential value. It is my view that, this argument came during final submissions as an afterthought. I am of that view because, both exhibit P1 and P2 were admitted without objection. It is my view that, counsel for the respondent was supposed to raise objection, at the time both exhibits P1 and P2 were to be tendered as it was held in the case of *The Director of Public Prosecutions vs. Nuru Mohamed Gulamrasul* [1988] T.L.R 82 but he didn't. He cannot be allowed at this time, indirectly, to raise an objection. It was further argued in favour of the respondent that, exhibits P3 and P4 are emails and that complainant did not comply with the provisions of the Electronic Transaction Act, 2015 relating to authenticity and originality. When PW1 was testifying under cross examination he stated that, he is the one who printed both exhibits P3 and P4 and that the printer was working. In the case of *Magnus K.Laurean vs Tanzania Breweries Ltd* (Civil Appeal No. 25

Labour Court-Tz.

of 2018) [2021] TZCA 578 the issue of authenticity was raised and the Court of Appeal held *inter-alia* that:-

> *"…regards 'authenticity of the report', it was contended that the report was unauthentic because …it lacked the signature of its maker… We think that this contention is clearly misconceived. Since the maker of the report and the person for whom it was intended did not disown it, the appellant's challenge against its authenticity is inconsequential. It is significant that when DW2 was cross-examined on this aspect, he maintained that the report was genuine and that he sent it to the respondent by email."*

In the case of ***Ami Tanzania Limited vs Prosper Joseph Msele*** (Civil Appeal No. 159 of 2020) [2021] TZCA 668 having quoted the provisions of section 18(1) of the Electronic Transactions Act and definition of data message in section 3 of the same Act,the Court of Appeal held that the law does not require any endorsement by anyone to authenticate a data massage. Again in the case of ***Standard Chartered Bank Ltd vs Justin Tineishemo*** (Revs Appl No. 184 of 2022) [2022] TZHCLD 1084 held *inter-alia* that authenticity of electronic evidence can be tested or cleared during cross examination. In the matter at hand, PW1 cleared it during cross examination that he is the one who printed it. The argument by counsel for the respondent in his final submissions that the witness did not mention the device that

Labour Court-Tz.

printed, stored or communicated the said exhibits, in my view, cannot affect weight to be attached to exhibit P3 and P4. I am of that view because, merely mentioning the type of the computer or any other device that was used could have added nothing. It was the duty of respondent to convince the court or lay foundation that the computer or device that printed exhibit P3 and P4 was not working in order the court to call upon complainant to prove that it was functioning. I am of that view because, in terms of section 18(3)(a), (b) and (c) of the Electronic Transaction Act, No. 13 of 2015 there is a presumption that for electronic documents to be printed then the computer or device must be working properly. It was not a duty of the complainant to file a certificate of authenticity while the law itself has created a presumption on authenticity. See *Tanzania Union of Industries and Commercial Workers (TUICO) vs Serengeti Breweries Limited (SBL)* (Labour Dispute No. 07 of 2022) [2023] TZHCLD 1292. It is clear that even final written submissions by the respondent are also electronic evidence because they were generated from a computer. See *Tineishemo's case*(supra) where this court held that even the court judgment is a product of computer. I can add, even submissions by the parties in this labour dispute are computed generated hence electronic documents.

Labour Court-TZ.

It was submitted by counsel for the respondent that evidence of PW1 and PW2 are hearsay in relation to breach of exhibit P5 and discrimination. With due respect, that is not correct. I am of that view because PW1 participated in zoom meeting (exhibits P1 and P2) hence he had direct knowledge of the matter that was discussed in relation to breach of collective bargain agreement. The name of PW1 appears in serial No. 1 and No. 9 in exhibits P1 and P2 respectively. According to PW2, having been informed of the breach, he participated in conducting due diligence from the respondent.

It was submitted that adverse inference should be drawn against the complainant by her failure to call as witnesses, employees whose salaries were adjusted and those who were discriminated. I should point out that there is no minimum number of witnesses required to prove a fact in issue. See the case of ***Masudi Amlima v. Republic*** [1989] T.L.R. 25 (HC) and ***Erick Maswi & Another vs Republic*** (Criminal Appeal No. 179 of 2020) [2022] TZCA 339. In ***Maswi's case***(supra) the Court of Appeal held *inter-alia* that: -

> *"Section 143 of the Evidence Act declares that there is no number of witnesses required to prove any fact. The court in the case of* ***Mwita Kigumbe Mwita and Magige Nyakiha Marwa vs. Republic,*** *Criminal Appeal No. 63 of 2015(unreported), held that a court looks for quality and not the quantity of evidence and that the best test for the quality of any evidence is credibility."*

Labour Court-Tz.

In his evidence under cross examination, PW1 apart from mentioning the names of other employees who were discriminated, he stated that, he was also discriminated because his salary was not adjusted. I therefore hold that evidence of PW1 was enough. More so, PW3 tendered Serengeti Breweries TUICO Union dues comparison April and May 2021(exhibit P6) without objection. The said exhibit has a total of 223 names of employees some their salaries adjusted while others not adjusted.

It was submitted by counsel for the respondent that evidence of PW3 was contradicted as to the number of employees whose salaries were adjusted. The alleged contradiction is that PW3 stated in cross examination that salaries of 60 employees were adjusted and in re-examination he stated that it is 80 employees. It is my view that, there is no contradiction whatsoever, rather, PW3 clarified the number during re-examination. It was further submitted by counsel for the respondent that in his witness statement, PW3 indicated that the alleged breach occurred in 2022 hence contradiction. In my view, that submission cannot waste my time because PW3 clarified while under cross examination that it was a typing error as intended to write 2021. In fact, PW3 stated that, he made comparison of due of respondent's employees for the month of April 2021 and May 2021. That evidence is

Labour Court-Tz.

supported by exhibit P6. Considering evidence of the parties in totality, I find that there is no contradiction in that aspect. Even in her evidence, DW1 admitted that there is a typing error in her witness statement by stating that on 21st February 2023 there was no salary review but she intended to write May 2021. I cannot tie just a witness for the complainant for a typing error and not apply the same to the witness for the respondent.

From what I have discussed hereinabove, I hold that respondent adjusted salaries of some employees without consulting the complaint hence she breached clause 9.4 of the collective bargain agreement (exhibit P5). Again, complainant proved that, in adjusting salaries to some employees, respondent discriminated or sidelines other employees. In addition to that, there was discrimination and that clause 8.1.2 of the collective bargain agreement was breached. But the issue is when did that occur and whether it is covered by the complainant's pleadings as discussed hereunder.

It was submitted by counsel for the respondent that evidence of the complainant is at variance with her pleadings. It was strongly submitted on behalf of the respondent that complainant cannot be allowed to depart from her pleadings. I have carefully examined the complaint the complaint that was filed by the complainant before this court and find

Labour Court-Tz.

that complainant alleges that respondent breached the collective bargain agreement (exhibit P5) on 21st February 2022. In fact, at paragraph 3 of the complaint, complainant stated: -

> *"3. That, **on 21st February 2022** the respondent herein breached that agreement by unlawfully adjusted(sic) remuneration some employees without proper consultation to the Trade Union as well as TUICO."* (Emphasis mine)

In the same complaint, on reliefs, complainant stated in paragraph (a) as hereunder: -

> *(a) That, the court order the Respondent to include the sidelined employees in the adjustment of remuneration which took place on **21 Feb, 2022** and arrears be paid accordingly."* (Emphasis is mine)

As pointed hereinabove, evidence that was adduced on behalf of the complainant is that breach of the collective bargain agreement that is to say, salary adjustment without consulting complainant and discrimination of some employee by the respondent **occurred in April and May 2021**. In her pleading, did not mention April 2021 or May 2021 as timeframe within which respondent breached the said collective bargain agreement. Since, pleading of the complainant is that breach of the terms of the said collective bargain agreement (exhibit P5) **occurred in February 2022,** complainant was supposed to bring evidence confining to that period. In alternative, complainant was

Labour Court-Tz.

supposed to amend her pleading to align with evidence she intended to adduce. In the matter at hand, complainant did not amend her pleadings as a result her pleadings shows that the breach of the said collective bargain agreement by adjusting salaries of some employees while discriminating others occurred on 21st February 2022. Those pleading pleadings are at variance with evidence adduced in favour of the complainant. I therefore agree with submissions by counsel for the respondent that complainant departed from her pleadings. There is a litany of case laws that parties are bound by their pleadings and they are not allowed to depart. See the case of *Barclays Bank T. Ltd vs Jacob Muro* (Civil Appeal 357 of 2019) [2020] TZCA 1875-Tanzlii, *Registered Trustees of Islamic Propagation Center (IPC) vs The Registered Islamic Center (TIC) of Thaaqib Trustees* (Civil Appeal 2 of 2020) [2021] TZCA 342-Tanzlii, *Yara Tanzania Limited V. Ikuwo General Enterprises Ltd*, Civil Appeal No. 309 of 2019,CAT(unreported), *Ernest Sebastian Mbele vs Sebastian Sebastian Mbele & Others* (Civil Appeal 66 of 2019) [2021] TZCA 168, *Salim Said Mtomekela vs Mohamed Abdallah Mohamed* (Civil Appeal 149 of 2019) [2023] TZCA 15 and *Charles Richard Kombe T/a Building vs Evarani Mtungi & Others* (Civil Appeal 38

Labour Court-Tz.

of 2012) [2017] TZCA 153 to mention but a few. In the *IPC's case*, supra, the Court of Appeal held that: -

> *"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 no 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".*

In *Yara Tanzania Limited case* (supra) the Court of Appeal quoted its earlier decision in *Barclays Bank T. Ltd vs Jacob Muro,* Civil Appeal No. 357 of 2019 [2020] TZCA 1875 that:-

> *"We feel compelled, at this point, to restate the time-honored principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored- See* ***James Funke Ngwagilo v. Attorney General*** *[2004]T.L.R. 161. See also* ***Lawrence Surumbu Tara v. Hon.Attorney General and 2 Others,*** *Civil Appeal No.56 of 2012; and* ***Charles Richard Kombe t/a Building v. Evarani Mtungi and 3 Others,*** *Civil Appeal No. 38 of 2012 (both unreported)".*

Since complainant vacated from her own pleadings, all evidence adduced in relation to breach that occurred in May 2021 cannot be acted upon to grant reliefs prayed in this dispute. In other words, that evidence is good as nothing. That said, I hereby hold that applicant

Labour Court-Tz

failed to prove that on 21st February 2022, respondent breached terms of the collective bargain agreement. Complainant failed also to prove that on 21st February 2022, respondent discriminated some of her employees. For the foregoing, I hereby dismiss the complaint for want of merit.

Dated at Dar es Salaam on this 29th May 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on 29th May 2023 in chambers in the presence of Jamal Ngowo for the Complainant and Erick Denga, Advocate for the Respondent.

B. E. K. Mganga
JUDGE

Court-Tz.