IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: NDIKA, J.A., RUMANYIKA, J.A. And MURUKE, J.A.)

CIVIL APPEAL NO. 300 OF 2022

MBEYA URBAN WATER AND SEWERAGE AUTHORITY ..... APPELLANT

VERSUS

LILIAN SIFAEL ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mbeya)

(Karayemaha, J.)

dated the 1st day of November, 2021

in

Labour Revision No. 11 of 2020

.....

JUDGMENT OF THE COURT

16th & 20th February, 2024

NDIKA, J.A.:

This appeal arises from the judgment of the High Court of Tanzania at Mbeya (Karayemaha, J.) dated 1st November, 2021 partly granting an application for revision instituted by the respondent, Lilian Sifael, against the appellant, Mbeya Urban Water and Sewerage Authority. The revision originated from the respondent's claim instituted in the Commission for Mediation and Arbitration ("the CMA") for payment of unsettled

remuneration and damages arising from alleged breach of contract of employment.

The essential facts of the case, as succinctly summarised by the learned judge in his judgment, go as follows: on 24th October, 2015, the appellant invited applications for the post of Financial Manager. The respondent was one of the applicants that were interviewed on 13th February, 2016 for the position, as unveiled by the minutes of the interview panel (Exhibit N1). She was ranked second overall, and, as a result, the post was offered to the top ranked applicant. Instead, the appellant's Board of Directors ("the Board") offered her a lower position of Senior Revenue Officer in the Commercial Department vide a letter dated 25th February, 2016 (Exhibit N2). The appellant sought written acceptance of the offer along with an indication of the date on which the respondent would report for work. The respondent gladly accepted the offer through her letter of acceptance dated 29th February, 2016 (Exhibit N3) and intimated that she would start the job on 9th March, 2016. On that day, she appeared and reported at work, but was told to wait. After thirty-six days or so, she was served with a letter

dated 14th April, 2016 (Exhibit N5) purportedly revoking the offer of employment. Pertinently, the letter stated thus:

> *"Despite your acceptance, I regret to inform you that, following the receipt of negative recommendations from your former employer [Coca Cola Kwanza Limited – Mbeya], the Board of Directors has revoked [the] offer."*

The reference from Coca Cola Kwanza Limited – Mbeya dated 11th April, 2016 was admitted in evidence as Exhibit N4.

Troubled by the revocation, the respondent instituted a claim in the CMA alleging breach of contract of employment, seeking payment of outstanding remuneration and damages. The arbitrator made the following main findings: one, that even though the respondent had accepted the offer of employment, there was no contract of employment between the parties because they had not signed one yet. Consequently, there was no breach of contract by the appellant. Two, that the revocation of the offer of employment by the appellant was an egregious violation of section 5 (2) of the Law of Contract Act, Cap. 345 ("the LCA") barring revocation of an offer after it has been accepted. Three, that while the offer of employment was

made by the Board, there was no proof that it sat and resolved to revoke the offer, implying that the purported revocation was *ultra vires* as it was made by the appellant's Managing Director unilaterally.

In conclusion, the arbitrator, acting on the Latin legal maxim – *ubi jus ibi remedium* – encapsulating the principle that when a legal right is violated, the law provides a corresponding remedy or relief to the aggrieved party, awarded the respondent TZS. 20,000,000.00 as compensation for the abhorrent revocation of the offer of employment.

Discontented, the respondent sought a revisal of the award in the High Court on four grounds.

As mentioned earlier, the High Court partly granted the application for revision. Beginning with the main issue whether there was an employment contract between the parties, the court vacated the arbitrator's finding and held as follows:

> *"... I am certain that the respondent [the appellant herein] contemplated the offer and acceptance as a valid and binding agreement. The applicant's [the respondent's herein] acceptance caused the respondent [the appellant herein] to proceed with*

other employment formalities and therefore, the employer-employee relationship was created at that time. [A] valid contract came into existence."

As to whether the appellant lawfully revoked the offer of employment vide Exhibit N5, the court reasoned and found thus:

*"... **once an acceptance has been made and communicated, it amounts to a binding contract.** In view thereof, the Managing Director of the respondent [the appellant herein] wrongly applied the principles of revoking the offer. Section 5 (1) of the Law of Contract Act provides that an offer may be revoked at any time before the communication of its acceptance as against the proposer but not afterwards. Revoking it a month or so after it has been accepted and the applicant [the respondent herein] had reported at workplace was indeed a violation of the law. However, the respondent was not curtailed from breaking the contract. While authorised by law to do so, she had to observe all procedures of terminating the employment contract. **In addition, the law did not allow the Managing Director to revoke the offer. It was the Board of Directors with that***

mandate. He, therefore, acted ultra vires. *What ... this [means]: the revocation was void ab initio."*
[Emphasis added]

Turning to reliefs, the court maintained the award of TZS. 20,000,000.00 by the arbitrator as general damages on the ground that it was not contested by the appellant. In addition, the court ordered the appellant to pay the respondent as follows: one, TZS. 50,000,000.00 as compensation for the breach of the employment contract; two, TZS. 5,770,000.00 being outstanding remuneration for March and April, 2016; three, TZS. 577,000 as unpaid housing allowance for March and April, 2016; and finally, TZS. 360,000.00 being unsettled transport allowance for March and April, 2016.

Mr. Deodatus Nyoni, learned Principal State Attorney, teamed up with Messrs. Joseph Tibaijuka and Boaz Msoffe, learned State Attorneys, to prosecute the appeal for the appellant. On the adversary side, Mr. Isaya Mwanri, stoutly opposed the appeal.

Mr. Nyoni primarily prosecuted the appeal on two grounds. While the first was raised and argued as an additional ground with leave of the Court in terms of rule 113 (1) of the Tanzania Court of Appeal Rules, 2009, the

second ground was the only ground left in the memorandum of appeal after the rest of the grounds were abandoned. For clarity we extract the two grounds thus:

1. *That the High Court erred in law for proceeding to partly set aside the CMA's award in a matter that the CMA had no jurisdiction to entertain the claim before it.*
2. *That the High Court erred in law in finding that there was execution of the employment contract.*

Submitting on the first ground, Mr. Nyoni's essential argument is that since the respondent's alleged employment with the appellant was less than six months, in terms of section 35 of the Employment and Labour Relations Act, Cap. 366 ("the ELRA"), the respondent was barred from instituting her claim in the CMA. For clarity, the aforesaid provision stipulates a qualifying period of a minimum of six months for an employee to avail himself of the protections against unfair termination under Sub-Part E of the ELRA:

> *"**35**. The provisions of this Sub-Part shall not apply to an employee with less than 6 months' employment with the same employer, whether under one or more contracts."*

Before we go any further, we wish to acknowledge the correctness of Mr. Nyoni's exposition of the law, whose cornerstone is **Daudi Jeremiah Magezi v. Sinohydro Corporation Limited**, Civil Appeal No. 309 of 2022 [2023] TZCA 17333 [13 June 2023; TanzLII], citing **Serenity on the Lake Limited v. Dorcus Martin Nyanda**, Civil Appeal No. 33 of 2018 [2019] TZCA 64 [11 April 2019; TanzLII], that an employee with less than six months employment cannot institute in the CMA an unfair termination claim. Mr. Mwanri concedes that much.

Mr. Nyoni's argument goes further that in defiance to the above settled position, the respondent, with less than six months' employment, lodged an unfair termination claim in the CMA. To hoodwink everybody, the claim was stated in the referral form (CMA Form No. 1) as "breach of contract", but in essence her action was an unfair termination claim moving the CMA to award her typical unfair termination remedies. To solidify his contention, he referred us to a passage at page 15 of the typed decision of the Court in **Stella Lyimo v. CFAO Motors Tanzania Limited**, Civil Appeal No. 378 of 2019 [2022] TZCA 742 [24 November 2022; TanzLII]:

> *"It is trite, we think, that unfair termination is one and the same as a breach of contract by termination other than what is regarded as fair termination under section 36 (a) (i) of the [ELRA]. Obviously, there could be various forms of breaches of an employment contract not necessarily based on unfair termination. However, the assertion that there was a breach of contract as the appellant did before the CMA attracting compensation of two years' salaries and damages falls squarely on a complaint that the respondent terminated the contract unfairly since the appellant considered herself to have been an employee of the respondent."*

The learned State Counsel urges us, in conclusion, to hold that the CMA acted without jurisdiction in the matter. Consequently, he moves us to nullify the CMA's proceedings and the decision thereon and proceed to quash the assailed judgment of the High Court.

In rebuttal, Mr. Mwanri counters that the respondent's action before the CMA was purely breach of contract upon which reliefs prayed were payment of outstanding remuneration and damages for loss arising from her legitimate expectation of earning money from the employment. On that

basis, he posits that **Stella Lyimo** (*supra*) is distinguishable. It is his further contention that the CMA is under section 88 (1) (b) (ii) of the ELRA clothed with jurisdiction over, among others, an action for breach of contract of employment.

We have dispassionately considered the contending submissions of the learned counsel for the parties. To begin with, while recalling the settled position, as hinted earlier, that in terms of section 35 of the ELRA an employee with less than six months employment cannot institute in the CMA an unfair termination claim, we do not think that the dispute resolution scheme under the ELRA locks out any employee with less than six months service from accessing the CMA even where the cause of action is purely founded on breach of the employment contract. We agree with Mr. Mwanri that section 88 (1) (b) (ii) of the ELRA allays any lingering doubt over the CMA's jurisdiction as it provides so expressly thus:

> *"**88**.-(1) For the purposes of this section, a dispute means—*
>
> *(a) a dispute of interest if the parties to the dispute are engaged in an essential service;*
>
> *(b) a complaint over-*

(i) the fairness or lawfulness of an employee's termination of employment;

(ii) any other contravention of this Act or any other labour law or ***breach of contract*** *or any employment or labour matter falling under common law, tortious liability and vicarious liability;*

(iii) any dispute referred to arbitration by the Labour Court under section 94(3)(a)(ii).

(2) Where the parties fail to resolve a dispute referred to mediation under section 86, the Commission shall—

(a) appoint an arbitrator to decide the dispute;

(b) determine the time, date and place of the arbitration hearing; and

(c) advise the parties to the dispute of the details stipulated in paragraph(a) or (b)." [Emphasis added]

With respect, we are unable to agree with Mr. Nyoni that the respondent's claim was sprinkled with elements of an unfair termination claim, which she was barred to bring up. For it is evident from the referral form (CMA Form No. 1) and its annexure of schedule of claims, at pages 4

through 11 of the record of appeal, that she framed her claim as entirely being founded on breach of the alleged employment contract for which she sought payment of outstanding remuneration for the months of March and April, 2016 along with damages in the following breakdown:

1. Salaries	TZS. 5,770,000.00
2. Housing allowance	TZS. 577,000.00
3. Transport allowance	TZS. 360,000.00
4. Airtime allowance	TZS. 200,000.00
5. Responsibility allowance	TZS. 461,000.00
6. Damages for breach of contract	TZS. 100,000,000.00

It is on record, at page 271, that the High Court was also alert that the nature of the dispute was purely breach of contract, not unfair termination of employment. On that basis, the court held that section 40 of the ELRA regulating reliefs for unfair termination was inapplicable.

Given the facts of the instant case, we uphold Mr. Mwanri's submission that **Stella Lyimo** (*supra*) is incomparable with this matter. For in that case, the Court, most crucially, reasoned that:

> *"It is beyond peradventure that her case before the CMA was breach of contract of employment* ***by unfair termination****. That was regardless of the fact that the respondent denied that the appellant had never been her employee as no contract of employment came into existence following the revocation of the offer.* ***Whatever the merits in the appellant's case, in so far as it was founded on unfair termination, it was expressly barred by section 35 of the [ELRA]."*** [Emphasis added]

It is, therefore, ineluctable that the first ground of appeal is bereft of merit. We dismiss it.

Turning to the second ground of appeal, it is Mr. Nyoni's argument that the respondent failed to prove that she performed her part of the bargain under the employment contract. He elaborates that the respondent had, in terms of section 60 (2) (b) of the Labour Institutions Act, Cap. 300, the burden to prove that she assumed and executed the duties of her new office after she reported for work, but she failed dismally to discharge that burden. In the circumstances, the learned State Counsel urges us to restore the arbitrator's finding in the award, shown at page 112 of the record of appeal in Kiswahili, thus:

"Mlalamikaji kwenye ushahidi wake alieleza kwamba alienda kazini na kusaini daftari na baadaye akaenda kwa Mkurugenzi na kuambiwa arudi kesho yake. Shahidi alieleza kuwa aliendelea kuripoti kazini na kupangiwa majukumu hadi pale alipoambiwa na Mkurugenzi aende nyumbani na ataitwa. Kwa kuwa mlalamikaji hajaleta ushahidi wowote mbele ya Tume kuthibitisha kwamba alifanya kazi kwa miezi miwili, mfano kitabu cha mahudhurio (attendance register), hivyo madai yake ya mishahara yamekataliwa."

Briefly, the above extract shows that the arbitrator was not satisfied by the respondent's testimony that after she reported at work, signed the attendance register and met the appellant's Managing Director, she went on discharging certain assigned duties until when she was directed to stay home until further notice. The arbitrator took the view that the respondent ought to have furnished cogent evidence, such as attendance register, to substantiate her claim. On that basis, the arbitrator refused her claim for unpaid remuneration.

In rounding off his submission, Mr. Nyoni submits that given the respondent's failure to prove her performance of duties, she was neither

entitled to any claimed outstanding remuneration nor was she deserving to be paid any kind of damages. Focusing on the award of TZS. 50,000,000.00 as damages by the High Court, he contends that the said sum was a genus of special damages that ought to have been specifically pleaded and strictly proved. To bolster his submission, he relies on **Puma Energy Tanzania Limited v. Ruby Roadways (T) Ltd.,** Civil Appeal No. 287 of 2020 [2022] TZCA 204 [21 April 2022; TanzLII], which discussed in detail the principles governing remedies for breach of contract, notably special damages. As regards the allowances for housing and transportation, Mr. Nyoni says the rates thereof were not proven, implying that the awarded amounts were plucked from the air.

Mr. Mwanri stoutly disagrees with his learned friend. He argues that the reliefs granted by the High Court as well as the respondent's performance of duty under the employment contract are uncontested matters in the instant appeal. Moreover, he asserts that the High Court not only considered it proven that the respondent assumed and executed her duties as she testified, but also that she had legitimate expectation and waited for more than a month to be called to perform her duties. The court, therefore,

concluded that she was entitled to payment of the outstanding salaries, housing allowance and transport allowance for March and April, 2016.

We should begin our deliberations on the issue at hand by remarking that the appellant has not, in the instant case, impeached two key findings of fact made by the High Court: one, that the parties herein entered into an employment contract upon the respondent's acceptance of the offer of employment made by the appellant. The respondent, therefore, became an employee of the appellant as defined by section 3 of the ELRA upon accepting the offer on 29th February, 2016. Two, that the act of the Managing Director of the appellant revoking the offer of employment on 14th April, 2016 was ineffectual because, first and foremost, it was unauthorised by section 5 (1) of the LCA and, secondly, that, in the absence of the Board's fiat, it was *ultra vires*.

Nevertheless, we think that, whether or not the respondent had fully assumed her new office and started executing its duties as she asserted, the purported revocation by the appellant constituted repudiation of the contract of employment – see **Stella Lyimo** (*supra*). What is crucial and unassailable in the evidence is that the respondent reported for work and placed her

personal service at the disposal of the employer until when she was instructed by the Managing Director to stay home until further notice. On this basis, we respectfully disagree with Mr. Nyoni that she did not fulfil her part of the bargain before the contract was repudiated.

In the circumstances of the instant appeal, we think that the justiciability of the reliefs awarded by the High Court is a sub-issue flowing from the ground of appeal under consideration. Contrary to Mr. Mwanri's submission, we take it as our solemn duty to interrogate and determine the matter since we have heard both parties on it.

To begin with, we find, as did the High Court, that since the respondent placed her services at the appellant's disposal for two months and that the appellant unjustifiably reneged on his undertaking under the contract to pay remuneration agreed in consideration for her services for that period, the respondent deserves to be paid salaries for March and April, 2016 amounting to TZS. 5,770,000.00 as per the letter of offer of employment (Exhibit N2). So far as the allowances for housing and transportation are concerned, we agree with Mr. Nyoni that no evidence was led as to the rates at which the

allowances were to be paid monthly as Exhibit N2 is silent. Accordingly, we set aside the sums awarded in their respect.

We recall, so far as damages are concerned, that apart from the High Court leaving the award of TZS. 20,000,000.00 as general damages by the arbitrator undisturbed, it endowed the respondent with a further amount of TZS. 50,000,000.00 as compensation for breach of contract. We can easily understand why the latter figure drew the ire of the appellant. Mr. Nyoni is right that if the said sum of TZS. 50,000,000.00 was not general damages, it then was a kind of special damages that ought to have been specifically stated on the referral form (CMA Form No. 1) and strictly proved – see, for instance, **Puma Energy Tanzania Limited** (*supra*); **Zuberi Augustino v. Anicet Mugabe** [1992] T.L.R. 137; and **Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited**, Civil Appeal 21 of 2001 [2006] TZCA 7 [3 August 2006; TanzLII].

What is vivid from that form is that the respondent claimed TZS. 100,000,000.00 as "damages", without specifying its genus – whether it was special damages or general damages. That was an inadvertent omission. As mentioned earlier, the High Court slashed the said claim by half and

proceeded to award the respondent TZS. 50,000,000.00 as "compensation for breach of contract." This amount was on top of the award of TZS. 20,000,000.00 made by the arbitrator as "general damages" for revocation of the offer of employment, which the High Court sustained on the ground that it was not contested by the appellant.

In our considered opinion, the High Court slipped into error in its determination of the sub-issue at hand. First and foremost, since the respondent neither provided any specifics or details of her claim for TZS. 100,000,000.00 nor attempted to prove it strictly, we hold the view, for all intents and purposes, that the said unspecified head of claim was for general damages, not special damages. Secondly, bearing in mind that the High Court had left undisturbed the arbitrator's award of general damages, we find no justification for the High Court's award of TZS. 50,000,000.00, it not being a special compensation that was specifically pleaded and strictly proved. On that basis, we set aside the said award.

We now advert to the award of TZS. 20,000,000.00 as general damages that the High Court sustained. We wish to remark, at first, that we appreciate that general damages are in the discretion of the court or tribunal

of first instance and that an appellate court will rarely interfere with it. However, we think in the instant case the sum awarded is plainly on the higher side given that the parties were in an employment relationship for a short period of thirty-six days. On that basis, we find justification to intervene and reduce the awarded quantum to TZS. 10,000,000.00.

Before we take leave of the matter, we wish to make one observation for future guidance of the CMA's arbitrators. The record of appeal reveals that the arbitrator proceeded with the action before her by applying the procedure for unfair termination claims in terms of section 39 of the ELRA, placing the burden of proof on the employer to prove fairness of termination of employment. It is our view that in an action like the instant case, the aforesaid provisions do not apply. Thus, the burden of proof would lie on the party who alleges breach of contract to establish such claim against the other party. It means, therefore, that, barring exceptional circumstances, the claimant will have the right to begin, by presenting his or her case before the opposite party defends himself or herself.

We are cognizant that in terms of rule 19 (1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007, Government Notice No.

67 of 2007 ("the Mediation and Arbitration Rules"), an arbitrator, in the first place, has the power to determine how the arbitration should be conducted. Nonetheless, the position we have stated above is reflected by rule 24 of the Mediation and Arbitration Rules regulating the sequence of opening statements and presentation of cases. For clarity, we extract the relevant part of that rule thus:

> *"**24**.-(1). Each party to the dispute shall provide a concise opening statement containing the following:*
>
> *(a) a statement of the issue or issues in dispute;*
>
> *(b) a brief outline of the dispute; and*
>
> *(c) an indication of the outcome that party will seek at the conclusion of the arbitration.*
>
> *(2) [Not applicable]*
>
> *(3) **The first party to make an opening statement shall present its case first throughout the proceedings.** If the parties do not agree about who shall start, the Arbitrator shall be required to make a ruling in this regard.*
>
> ***Provided that, in a dispute over an alleged unfair termination of employment, the employer will be required to start as it has to***

prove that the termination was fair." [Emphasis added]

In our opinion, sub-rule (3) above indicates that the party on whom the burden of proof lies must present his or her opening statement as well as his or her case first. In any event, if the claim is over unfair termination of employment the employer must start.

In the present case, the record of appeal does not show that an issue arose before the arbitrator, as to who was to start, for him to make a ruling as required by the law. Be that as it may, we are satisfied that the procedural infraction pointed out above did not offend the interests of justice given that each party was afforded a full opportunity to present evidence and be heard on all the issues framed for determination. Besides, we have also considered that this dispute has clocked eight years since it started in April 2016. By any measure, it is an old case. Nullifying the arbitral proceedings and remitting the matter for hearing *de novo* will not be in the interests of any of the parties. In pursuance of the overriding objective as set forth by sections 3A, 3B and 3C of the Appellate Jurisdiction Act, Cap. 141, we have decided to ignore the infraction.

For the reasons given above, we partly find merit in the second ground of appeal. In consequence, we allow the appeal to the extent stated above. This being a labour dispute, we order each party to bear its own costs.

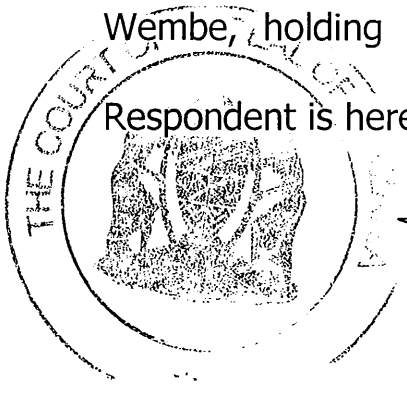
DATED at **MBEYA** this 19th day of February, 2024.

G. A. M. NDIKA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

Judgment delivered this 20th day of February, 2024 in the presence of Ms. Edina Mwamlima, learned State Attorney for the Appellant, Mr. Seiph Wembe, holding brief for Mr. Isaya Mwanri, learned counsel for the Respondent is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL