IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CIVIL APPEAL NO. 51 OF 2016

TRADE UNION CONGRESS OF TANZANIA (TUCTA) ..... APPELLANT

VERSUS

1. ENGINEERING SYSTEMS CONSULTANTS LTD
2. BEDA J. AMULI t/a AMULI ARCHITECS ..... **RESPONDENTS**
3. CONSTRUCTION MANAGEMENT SERVICES LTD

(Appeal from the Judgment and Decree of the High Court of Tanzania (Dar Es Salaam Registry) at Dar es Salaam)

(Teemba, J.)

Dated the 31st day of October, 2014
in
Civil Case No. 317 of 2002

JUDGMENT OF THE COURT

29th April & 26th May, 2020

KITUSI, J.A.:

This is an otherwise simple matter arising out of contract, but for the identity of one of the parties to that contract, and its legal capacity which are the sore areas of controversy. The background facts are more telling.

The contract in question named as Consultancy Engagement Agreement, was entered into on 30th September, 1996 between one Beda Jonathan Amuli t/a Amuli Architect, the second respondent, and Tanzania Federation of Trade Unions (TFTU). In that contract TFTU procured the

services of the second respondent requiring him to carry out '*Design and supervision of Architectural, civil, structural, mechanical and electrical works and Quantity Surveying Services'.* These services were meant for a proposed TFTU Office Building to be erected at the corner of Nyerere Road and Chang'ombe Road, in Dar es Salaam. On its part, TFTU was to pay for the consultancy services according to percentages stipulated under the contract. There is, apparently, no dispute that the services were rendered by the second respondent jointly with two others, who were the first and third respondents, but payments were not "fully" made to them by TFTU. After several written demands for payment which were responded to by making small part payments, the second respondent decided to sue.

When the suit was instituted, initially in August 2001 and subsequently by an Amended Plaint in December 2013, a lot of water had gone under the bridge, so that TFTU had ceased to exist and was not in the picture. Instead it was the appellant, Trade Unions Congress of Tanzania (TUCTA), that was sued in the Amended Plaint. The basis for suing TUCTA appears under paragraph 4 of the Amended Plaint, to wit;

> *"4. THAT, the defendant is a body corporate established and operating under the law in force in Tanzania and successor in title of the TANZANIA FEDERATION OF FREE TRADE*

UNIONS (TFTU) (hereinafter referred to its acronym (TFTU) having its principal place of business, in Dar es Salaam Tanzania and its address for purposes of services under this suit is in the care of....."

In the Amended Written Statement of Defence the defendant raised two points of Preliminary Objection regarding the capacity of the defendant and the competence of the suit. These are;

1. *The suit has been preferred in the name of a wrong party, i.e Trade Union Congress of Tanzania who also does not have legal personality and does not own any property pursuant to Section 52 of the Trade Union Act, Cap 244 RE 2002.*

2. *The defendant is not the successor in tittle of TFTU in respect of property which is the basis of the agreement in dispute, i.e Plot No. 1B2, Chang'ombe Industrial Area, Temeke Municipality, Dar es Salaam, under CT No 136068/38, the said property belongs to Workers Garments Manufacturers Limited, as per Annexure TUCTA-1 as such the latter is the successor in title in respect of the property."*

The High Court entered judgment for the second respondent, taking the view that there was a binding contract between him and TFTU and that the appellant was the successor of OTTU which, in turn was the successor of TFTU. As already intimated, this issue regarding the appellant's succession

of TFTU is still the prominent ground of appeal. The Appellant is challenging that finding, so it has raised an issue that it has no legal personality, therefore it is not capable of being sued.

First things first. We have resolved to deal with the competency of the appellant first, which has been raised in two forms; One, that TUCTA was not the successor in title of TFTU (raised in ground 4 and 5). Two, that TUCTA does not have legal personality (raised in ground 2 of appeal). We note that these grounds are essentially the same as the preliminary points of objection that had earlier been raised by the appellant at the pleading stage. In order to sequent the story in a chronological manner, we shall deal with grounds 4 and 5 of appeal first.

In relation to ground 4 and 5 of appeal, the second respondent has maintained that TUCTA was the successor in title of TFTU. Beda Jonathan Amuli (PW1) was the lone witness for the Plaintiffs, now respondents. He was, no doubt, a renowned architect with a shiny track record some of which he referred to in his testimony. On 30th September 1996 he signed a Consultancy Engagement Agreement (Exhibit P1) with TFTU in relation to an office building and workers Garments Factory to be erected along Chang'ombe Road in Dar es Salaam.

The second Respondent jointly with two engineering companies which were originally parties to the suit, performed their part of the contract by preparing; *"Architectural working drawings, structural drawings with details, services drawings (plumbing and electrical drawings) and Bill of quantities".* All these documents were collectively admitted and marked Exhibit P3. On 23/9/1999 the second respondent submitted a letter of claims addressed to the Secretary General TFTU, followed by a demand notice that was drawn by the respondents' lawyer on 25/11/1999 (Exhibit P4). Upon receipt of these demands, the appellant intimated its willingness to pay but proposed a scheme of part payments to begin with one third (1/3) of the total amount. However, the respondents insisted payment of 50% upfront.

According to PW1, these correspondences on payments were hitherto between him and OTTU. Advance payments of Shs 4,852,305/= were made to the respondents and it is significant to note that the payment vouchers, exhibits P5 and P6 were drawn by OTTU as the payer. The defendant/appellant adduced evidence of two witnesses, Abdallah Yusuf Kundecha (DW1) who was working with TUCTA and Josephat Mfanando (DW2) who was working with Workers Development Corporation (T) Ltd, the owner of the Workers Garments Manufacturers.

The two witnesses seemed to agree that TUCTA took over from OTTU but that it only took over ownership of assets that had been listed down. They disowned the respondent's claims by deposing that the asset for which TFTU had contracted the respondents, that is, the Workers Garments Manufacturers, was not on the list.

The trial High Court dealt with the competing contentions under the second issue, which was; *"...whether the defendants are successors in title of the said Tanzania Federation of Trade Unions (TFTU) and therefore liable under the said contract".* The High Court dismissed as irrelevant the then defendant's contention that it did not own the asset in question. Instead, it addressed the question of who had actually stepped into the shoes of TFTU. On the basis of the evidence before it, including the payment vouchers (Exhibits P5 and P6), the trial High Court concluded that OTTU succeeded TFTU and the former was succeeded by TUCTA.

That is the finding the appellant is attacking under grounds 4 and 5 of appeal. When the appeal was placed before us for hearing, Ms. Ritha Odunga Chihoma, learned advocate, stood for the second respondent and also held brief of Mr. Nzowa, learned Advocate, for the appellant. The first and third respondents did not enter appearance and we quickly noted that these two were long out of the race right from the trial. They never turned up at the

trial to prosecute their claims and the trial High Court Judge dismissed the claims as far as they related to them. This appeal is only in relation to that part of the judgement that awarded the claims to the second respondent. Invariably, whenever we refer to the respondent in this appeal we should be taken as referring only to the second respondent.

However, even the second respondent was reported to have died, and no application to join his legal representative as a party had been made in terms of Rule 105 of the Tanzania Court of Appeal Rules R.E 2019, for over three years since July 2016 when the said second respondent died. Ms. Chihoma conceded to our probing that the said application ought to have been made, but was not made, within twelve months of the respondent's death. She conceded that in the circumstances, sub rule (2) of Rule 105 of the Rules would be brought into play. The said Rule provides;

> *"105 (1) An appeal shall not abate on the death of the appellant or the respondent but the Court shall, on the application of any interested person, cause the legal representative of the deceased to be made a party in place of the deceased.*
>
> *(2) Where an application under sub rule (1) is not made within twelve (12) months, the appeal shall, if the deceased person is the appellant, abate and if the*

deceased person is the respondent, proceed in the absence of the respondent".

The appeal would have proceeded in the absence of the respondent in terms of the above sub rule. However, we noted that there were written submissions that had been filed by both sides as per rule 106 (12) of the Rules. Under that rule where one or both of the parties do not appear but written submissions have been filed, hearing of an appeal and consideration thereof may proceed on the basis of those written submissions. We drew the attention of Ms. Chihoma to this position of the law and she readily agreed that we should proceed under that scheme. We shall hence forth consider the written submissions.

In relation to grounds 4 and 5 the appellant's counsel submitted by tracing the history of Trade Unions from the pre-colonial era to 1998 when the Trade Union Act No. 10 of 1998 [Cap 244 R.E 2002] herein referred to as the Act, was enacted. The Act repealed the Trade Unions Ordinance Cap 381 and the Organization of Tanzania Trade Unions Act No 20 of 1991. It is argued that since under section 52 of the Act the assets of the defunct OTTU were placed under the Registered Trustees of TUCTA, the suit ought to have been preferred against such entity, that is, the Registered Trustees of TUCTA. It has further been submitted that the Act is silent as to succession

of OTTU's liability, and it being a matter of law, should not be presumed whether by implication or admission.

In response to these submissions, counsel for the respondent submitted that the referred section 52 of the Act is irrelevant because this case seeks enforcement of contractual terms and has nothing to do with TFTU's assets. Citing section 51 of Cap 244 the learned Counsel submitted that a registered trade union may sue or be sued on the basis of that provision. Reference has been made to previous submissions made by the appellant, at page 157 of the record of appeal, in which they admitted to have the capacity to sue and be sued.

The above submissions though relevant in determining the second ground of appeal have also been used by the respondent in response to grounds 4 and 5 of the appeal. Counsel also submitted that in his evidence DW2 admitted at page 307 that *"TUCTA took over from TFTU, OTTU, JUWATA and NUTA".*

In resolving the issues raised in grounds 4 and 5 of appeal it has become necessary for us to trace the appellant's family tree, just as counsel did in their submissions. It goes like this; During the one-party policy in this country for a good number of years after independence, trade unions were

part of the ruling party. It started with Tanganyika Federation of Labour (TFL) up to 1964 when National Union of Tanganyika Workers (NUTA) came in, to be replaced by Jumuiya ya Wafanyakazi Tanzania (JUWATA) when CCM came as a result of the merger between TANU and Afro Shirazi Party.

The introduction of the Bill of Rights in our Constitution in 1984 and later the coming of political pluralism in the early 1990s gave trade unionism in Tanzania a shot in the arm, to make them independent. In 1991 the Parliament enacted the Organization of Tanzania Trade Unions (OTTU), Act No 20 of 1991 which replaced JUWATA, the party-controlled trade union. In 1995 the Federation of Free Trade Unions (TFTU) was formed by 11 trade unions affiliated to OTTU but it was not registered. As a result, TFTU, though a federation of eleven Trade Unions, it did not have powers of negotiation with employers, but could only do so through OTTU.

In 1998, Act No 20 of 1991 that had established OTTU was repealed and replaced by the Trade Unions Act No 10 of 1998, the Act. This Act which dissolved OTTU came into force on 1st July 2000. The original eleven trade Unions that had formed TFTU were re-registered and established the Trade Union Congress of Tanzania (TUCTA). See (*http://jabashadrack.blogspot.com/2012/07/trade-unionism-and-freedom-of-html.)* The learned author concludes that TFTU and OTTU co- existed as

two sides of the same coin and that OTTU was the official name under the Act while TFTU was the unofficial name for OTTU. The same information is available on TUCTA website; *https//www.tucta or tz/post/history-of-TUCTA,* part of which reads;

> *"The life of TFTU was very short. First it was created under the OTTU legislation No 20 of 1991. This means TFTU had no legislation of its own to lean on. So, the dissolution of OTTU automatically meant the dissolution of TFTU although it continued to exist for some time after its creation".*

What we deduce from the foregoing is that while OTTU was a creature of the statute, Act No 20 of 1991, TFTU was not. We also conclude from the cited information that OTTU and TFTU co-existed in a rather unofficial arrangement. Then, since OTTU's death also spelt the death of TFTU, the former could not have inherited from the latter but the two were one and the same thing. We are also aware that for two years there was no trade union in Tanzania. This is because when the OTTU Act was repealed by Act No 10 of 1998, that Act came into force in 2000. Even then, it was not until April 2001 when TUCTA was established. During this spell, the affairs of OTTU were under the Administrator General.

According to DW2, the workers Development Corporation for which he worked, was an economy wing of TUCTA. As rightly submitted by the counsel for the respondent, DW2 stated the following at page 307 of the record when he was being cross examined by the counsel for the respondent;

> *"It started as an economy wing of NUTA, JUWATA, OTTU, TFTU and TUCTA, Workers Development Corporation is affiliated to Workers Garment Manufacturers."*

On further cross examinations, DW2 stated;

> *"It is true TUCTA took over from TFTU, OTTU, JUWATA and NUTA. TFTU is no longer existing. OTTU is also not there. I do not know how the activities of our union were carried over after deregistration of the predecessor".*

The other witness for the appellant was Abdallah Yusuf Kuchecha, (DW1) who was the Chief Accountant of TUCTA. He testified that when OTTU died in 1998 its assets were handed over to the Administrator General to wait for the National Congress. He then proceeded to state;

> *"Trade Union Congress of Tanzania (TUCTA) was formed in 2001 and registered on 18/5/2001. It started the process to inherit the properties formerly owned by OTTU and which were under the Administrator General. The process took a long time from 2001 to 2006 when it was agreed to take over the*

property owned by OTTU. The handing over was officially done".

There is in the testimonies of DW1 and DW2 sufficient material for us to hold that the affairs of TFTU, which was part of OTTU were inherited by TUCTA through the Administrator General. We find that evidence to be consistent with the information found in the two websites that we have referred to above. In our considered view, the submissions by the appellant's counsel proposing the contrary, is no more than a statement from the bar which has no evidential value. After all, it is trite law that written submissions are not evidence. See, **The Registered Trustees of the Archdiocese of Dar Es Salaam v. The Chairman Bunju Village Government and 4 Others**, Civil Appeal No 147 of 2007 (unreported). We are conclusively of the view that the trial judge's finding that TUCTA inherited the affairs of TFTU was well reasoned and we cannot fault it.

We shall now address ground two of appeal challenging the competence of the suit against the appellant on the basis that the said appellant had no legal capacity. There is evidence from DW1 on this aspect and it is better, once again, to reproduce the relevant parts;

"There is a list of properties which was signed by the Administrator General and Trustees of TUCTA. Among the

properties handed over to TUCTA, the present claim was not listed. The Trustees of TUCTA are the owners of properties. The properties of OTTU were handed over to Trustees of TUCTA".

When DW1 was responding to cross examinations by the counsel for the respondents, he stated;

"TUCTA cannot pay a claim which was not handed over to it. (shown Exh P5) This is a copy of a cheque No. 009206416 of 4/10/1996. Amour Architects was paid Tshs 4,852,305/=. The cheque was issued by OTTU. If the debt is presented to TUCTA then TUCTA will pay the balance".

The learned counsel for the appellant submitted quite passionately on this point, referring to provisions of the Act, in particular section 52 which provides: -

"52. Property of trade union to vest in trustees

(1) All ***movable and immovable property*** *belonging to any trade union shall be vested in the trustees for the time being of the trade union for the use and benefit of that trade union and the members and be under the control of the trustees, and upon the death or removal of any trustees the same shall vest in the succeeding trustees for the same estate and interest as the former trustees had and subject to the same trust without any conveyance or assignment.*

(2) In all actions or suits or prosecution before any court touching or ***concerning any property referred to in subsection (1),*** *that property shall be stated to be the property of the person or persons for the time being holding the said office of trustee in their proper names as trustees of the trade union without any further description.*

(3) The trustees shall deal with any property held by them for or on behalf of a trade union in any manner which the executive committee shall order.

(4) No disposal shall be made unless the trustees are satisfied that the committee has acted lawfully and in accordance with the rules of the trade union." (emphasis ours).

On the other hand, the respondent has submitted that the provision that has been relied upon by the appellant relates to property, and that it has nothing to do with the present suit which is based on contract. The learned counsel cited the provisions of section 51 of the same Act. That provision reads: -

"(1) A registered trade union may sue, be sued and be prosecuted under its registered name.

(2) An unregistered trade union may sue, be sued or prosecuted under the name by which it has been operating or is generally known.

(3) A trade union whose registration has been cancelled may sue, be sued or prosecuted under the name by which it was registered.

(4) Execution for any money recovered from a trade union in civil proceedings may issue against any property belonging to or held in trust for the trade union other than the benevolent fund of a registered trade union.

(5) Any fine ordered to be paid by a trade union may be recovered by distress and sale of any property belonging to or held in trust for that trade union in accordance with the provision of the Criminal Procedure Act.

(6) Notwithstanding subsection (5) no distress shall be levied on any provident or benevolent fund kept apart by the union unless the Court so orders."

In our view, while the issue is essentially one of law, there are evidential aspects of it which are of considerable significance. We shall first deal with the legal aspect of the issue, and we propose to do so by giving our interpretation of the two cited provisions. The appellant's argument seems to be that the suit was incompetent for not being preferred against the registered trustees of TUCTA, as provided by section 52 of the Act. Our reading of that provision however, gives us one plain meaning that the trusteeship was created to deal with property only. Sub section (2) of section

52 of the Act is explicit that suits or prosecution that touch or involve any property shall indicate the trustees as the owners of that property. If it had been intended for the provision to cover all suits and prosecution, the legislature would not have crafted the provision in the manner it is, especially having enacted the provisions of section 51 which is wider in scope. The provision was intended to cover suits or prosecution involving property, that is why the present debt was not listed in the handing over to trustees, because the trusteeship was created only to hold property belonging to trade unions.

On the other hand, section 51 of the Act provides for the general powers of trade unions to sue or to be sued, and it is very liberal. It provides for powers even to unregistered trade unions to sue or be sued. We do not think it was the intention of the legislature to be so liberal under section 51 then be so restrictive under section 52 of the same Act. If anything, section 51 of the Act provides the general rule, while section 52 of the Act provides for a specific situation involving property. We are aware of rules of statutory interpretation, one of which being that, one provision of a statute cannot defeat another provision of the same statute. See the case of **The Director of Public Prosecutions v. Li Ling Ling,** Criminal Appeal No. 508 of 2015

(unreported). In that case the Court reproduced the following paragraph from a book titled Principles of Statutory Interpretation;

> *"The provision of one section of a statute cannot be used to defeat those of another 'unless it is impossible to effect reconciliation between them'. The same rule applies to sub – sections of section".*

This principle applies not only in relation to sections 51 and 52 above, but also in relation to sections 9 (2) and 17 (1) and (2) (a) of the Act, which open wider the door to suits or prosecution involving trade unions.

Turning to the evidential consideration of this issue, it is simply that the appellant's capacity to be sued in this case flows from its position as the successor of NUTA, JUWATA, TFTU and OTTU, as testified to by DW1 and DW2. There is also evidence of PW1, which is uncontroverted, that OTTU initially negotiated a scheme of part payment and had started to make some payments to the respondent in fulfilment of TFTU's contractual obligation. Can the appellant now be heard disowning the very debt that its predecessor had started paying? We think it cannot, because the common law rule of estoppel, will not sanction that. In an Article by Shreya Dave, titled; The Doctrine of Promissory Estoppel, the learned author writes the following: -

> *"The true principle of promissory estoppel is where one party has by his words or conduct made to the other a clear and*

unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact acted upon by the other party the promise would be binding on the party making it and he would not be entitled to go back upon it".

Under the Evidence Act, Cap 6, RE 2019, there is a provision relevant to the above doctrine, and that is section 123 which provides;

"123. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing".

We find compelling persuasion in the decision of the High Court of Kenya in the case of **Nairobi County Government v. Kenya Power and Lighting Company Limited** [2018] eKLR. In that case having considered the doctrine, the court held;

"Upon applying the law to the facts of this case, I find that in the circumstances of this case, the doctrine of estoppel applies against the Petitioner. The Petitioner is estopped by the said doctrine from turning around and reneging on what it had agreed and committed itself into and even performed its part

of the agreement. The Respondent in reliance to the agreement and commitment not only agreed to the arrangement and acted in reliance of the same".

We are similarly of the view that the overt conduct and expressions of the appellant's predecessors during the signing of the contract and during the respondent's claims for payment, are binding on it. In view of the position we have taken, we find no merit in grounds 2, 4 and part of ground 5 of appeal. We shall explain later. That is to say, it is our conclusion that the appellant was the successor in title of TFTU and it has the capacity to sue or be sued in actions which do not involve property that belong to trade unions, as the present.

We turn to the first and third grounds of appeal which we shall also dispose of simultaneously, as they both allege the suit to have been incompetent. In the first ground of appeal the incompetence is associated with time limitation, while in the third ground of appeal it relates to an alleged lack of authority on the part of the respondents to enter into the disputed contract. These issues had earlier been raised at the trial, to no success.

The appellant is submitting that the agreement in question had a clause that any dispute between the parties would first be referred to an

arbitrator and it is further submitted that the respondent should have resorted to the arbitrator not later than 5th December, 2000. The appellant's argument therefore is that this suit filed in 2001 was time barred. In response to that argument, counsel for the respondent submitted that when there is an option to refer a matter to an arbitrator such clause does not act as an ouster of jurisdiction of the court. The court may at best, only stay proceedings but again that cannot be done when a defence has been filed. Counsel cited section 6 of the Arbitration Act Cap 15 R.E 2002 and a decision of the Court of Appeal of Kenya in **Maluki v. Oriental Fire & General INSCE** [1973] E.A 162

In deciding the issue raised in ground one of appeal the learned Judge of the High Court was of the view that the clause providing an option to arbitration was not relevant after the defendant/appellant denied the existence of the contract. We agree with both the learned Judge and the respondent's counsel in that after filing the written statement of defence the appellant lost the right to refer the matter to an arbitrator because that signified the preparedness to resort to court. The fact that the appellant denied the existence of the contract worsened matters, because it removed the very basis for going to an arbitrator. We cannot fault the trial court on that finding so we find no merit in ground one of appeal.

Ground three of appeal is, we think, misconceived and it should not hold us. This is a complaint that the first and third plaintiffs at the trial had not obtained authority from their Board of Directors to institute the suit. We have already indicated in the early pages that these parties never turned up to prosecute their respective claims and consequently the learned trial Judge dismissed those claims as far as they concerned them. We wonder how would that finding aggrieve the appellant, let alone the reasons. There is, to cut the long story short, no merit in this complaint, so we dismiss it.

Before we deal with the last two issues involving reliefs, we have to address one more issue which the parties addressed in their written submissions. It should be recalled that we have made a finding that trade unions may be sued in their own names except on matters involving property as stipulated under section 52 of the Act. Now the issue for our immediate consideration is whether the appellant can be sued in contract. The appellant's counsel has submitted that it cannot be sued because section 49 of the Act bars such suits against a trade union. Section 49 of the Act provides: -

"(1) Every trade union shall not be so liable on any contract entered into by it or by an agent acting on its behalf.

(2) Notwithstanding subsection (1), a trade union shall not be so liable on any contract which is void or unenforceable in law.

(3) Nothing in this Act shall enable any court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements: -

(a) an agreement between members of a trade union as such, concerning the conditions on which any members for the time being of the union shall or shall not sell their goods, transact business, employ or be employed;

(b) any agreement for the payment by any person of any subscription or penalty to a trade union;

(c) any agreement for the application of the funds of a trade union:-

(i) to provide benefits to members, other than a benefit under a contributor provident fund or pensions scheme; or

(ii) to furnish contributions to any employer or employee not a member of the trade union, in consideration of the employer or employee acting in conformity with the rules or resolutions of the trade union; or

(iii) to discharge any fine imposed upon any person by sentence of a court of law;

(d) any agreement made between one trade union and another;

(e) any bond to secure the performance of any of the above-mentioned agreements."

In response to these submissions, the learned counsel for the respondent has submitted that the provision of section 49 of the Act does not apply in this case, and he said no more.

When the learned arguments are considered, we are certain that the appellant's point has not been surmounted. The law is very clear that no trade union may be sued on contract, which is the basis of the suit that gave rise to the instant appeal. In the end we find merit in the appellant's contention that the suit was unmaintainable because it was based on contract, which cannot be a basis of any suit against a trade union. Incidentally this point is part of ground 5 of appeal which we have partly dismissed. We are of the view that the appellant is a successor in title of TFTU but it could not be sued in contract. Thus, part of ground 5 of appeal is allowed for being meritorious.

There is a question that still lingers. Do we just flag off a person who rendered service under a contract which is otherwise legal, merely because the beneficiary of those services cannot be sued in contract? This is a dilemma which may have led Samatta JK (as he then was) to say in

Vidyadhar Girdharal Chavda v. The Director of Immigration and Others, [1995] T.L.R 125;

> *"If the law were as contended by the learned Senior State Attorney, justice would have been wearing a bandage over her eyes as she could not bear to see some of the decisions made in her name in that branch of the law".*

We have resolved that we are not going to let anything of that sort happen in this case because, as we once stated in **Thomas Peter @ Chacha Marwa v. Republic,** Criminal Appeal No. 322 of 2013 (unreported), where there is a right, there is a remedy. We are also aware that the law frowns at unjust enrichment, therefore trade unions cannot be an exception. In **Nand Kumar v. The Bihar State Electricity Board and 3 Others**, High Court of Judicature at Patna, LPA 356 of 2010, we find this persuasive statement of principle quoted from the decision of the Supreme Court of India in **Shiv Shanker Dal Mills v. State of Haryana**, AIR 1980 SC 1037;

> *"There is no law of limitation, especially for public bodies, on the virtue of returning what was wrongly recovered to whom it belongs...since the root principle of law married to justice, is* ***ubi jus ibi remedium****".*

Therefore, under the above equitable principles, the appellant being the ultimate successor of TFTU and the beneficiary of the respondent's services, cannot avoid liability. We hold on to the appellant to pay for the services that may have been wrongly procured by TFTU, its predecessor. But what are those payments? This takes us to grounds six and seven of appeal.

In ground six of appeal, the trial High Court is being faulted for ordering payment of Tshs 32, 947, 695 /= plus Tshs 30,000,000/= as general damages. In the submissions the learned counsel for the appellant did not point out the reason for us taking a different view from that of the trial court, and we see none. The law is settled that special damages must be specifically pleaded and proved. See **Zuberi Augustino v. Anicet Mugabe** [1992] T.L.R 137. In the impugned judgment the learned Judge deliberated on the evidence before she came to the conclusion that the respondent had proved special damages of Tshs 37, 800,000/= from which Tshs 4, 852 305/= that had been earlier paid as advance, was deducted. The conclusion of the Judge was justified therefore this complaint has no merit.

The law also requires the court to assign reasons for awarding general damages. In **Alfred Fundi v. Geled Mango and Two Others**, Civil Appeal No. 49 of 2017 (unreported), we said the following on general damages;

"The law is settled that general damages are awarded by the trial court after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in awarding general damages although the judge has to assign reasons in awarding the same".

In this case the learned trial judge did not assign reasons, but we being the first appeal with powers to re-evaluate the evidence step into the shoes of the trial court. There was clear evidence of breach of contract in this case, and that was sufficient to justify grant of general damages. Thus, we uphold the finding of the trial court but for a different ground. Consequently, we find the whole of the sixth ground to be devoid of merit and we dismiss it.

Ground seven of appeal attacks the trial court's award of compounded interest. For the appellant it has been submitted that there was no justification for awarding compounded interest which turned out to be bigger than the amount that had been pleaded. The respondent's counsel defended the award as judicious in the circumstances of the case. Our conclusion on this point is that the trial judge did not assign any reasons for awarding compounded interest. Having awarded simple interest, we think it was incumbent on the learned Judge to rationalize the award of compounded interest. We find merit on this ground and allow the appeal to that extent. Therefore, we quash the award of compounded interest.

In our conclusion, this appeal is dismissed with costs for want of merit, except for the variation on the interest.

Order accordingly

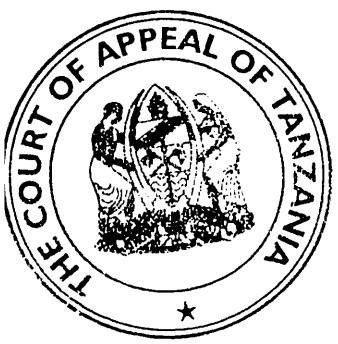
DATED at **DAR ES SALAAM** this 20th day of May, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

Judgment delivered this 26th day of May, 2020 in the presence of Mr. Charles Lugaila, learned counsel for the Appellant and Mr. Shaban Mwaita holding brief of Ms. Rita Chihoma, learned counsel for the 2nd Respondent, the 1st and 3rd Respondents are absent, is hereby certified as a true copy of the original.



B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL