IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 143 OF 2019

BETWEEN

COSEKE TANZANIA LIMITED.....PLAINTIFF

Versus

THE BOARD OF TRUSTEES OF THE PUBLIC

SERVICE SOCIAL SECURITY FUND.....DEFENDANT

Last Order: 4th March, 2021

Date of Ruling: 22nd April, 2021

RULING

FIKIRINI, J.

The defendant, in this suit, apart from filing written statement of defence as required in law, also filed a notice of preliminary point of objection to the effect that:

"*That the plaintiff's amended plaint is incompetent before this honorable court for contravening the provision of section 6(3) & (4) of the Government Proceedings Act, Cap 5 as amended by the written laws (Miscellaneous Amendment) Act, 2020 in regard to joining the Attorney General as a necessary party.*"

Parties were ordered to file written submissions. The filling schedule was as follows: The applicant to file their written submissions by or on 18th March 2021, reply written submissions by or on 1st April 2021, and rejoinder if any by or on 8th April 2021. This was to be followed with a ruling set for 22nd April 2021.

During the hearing Mr. Steven Thomas Biko learned counsel appeared for the defendant while the plaintiff enjoyed the legal service of Mr. Fredrick Mbise.

Mr. Biko urged the Court to strike out the amended plaint from the Court records with costs for failing to join the Attorney General as a party. Assigning the reason on why it was mandatory to join the Attorney General as a necessary party, the counsel made reference to section 6 (3) & (4) of the Government Proceedings Act, Cap 5 of 2021 (the Government Proceedings Act) which required that:

> (3) *"All suits against the governments shall, upon the expiry of the notice period, be brought against the government, Ministry, Government department, local authority, executive agency, public corporation, parastatal organization or public company that is alleged to have committed the civil wrong on which the civil suit is based, and the attorney General shall be joined as a necessary party."*

(4) *"Non- joinder of the Attorney General as prescribed under Subsection (3) shall vitiate the proceedings of any suit."*

It was his submission that, the defendant being a public organization the procedure for commencing a civil suit against it required for the Attorney General to be mandatorily joined as a necessary party in the suit or else the proceedings and the suit would be vitiated. To strengthen his position, he cited the case of **Wambura Maswe Karera & 5 Others v The Village Council of Mori & Another, High Court, Civil Case No. 5 of 2020 (unreported) at p. 4 & 5,** in which the Court stated that:

> *"All suits against the government authority are now governed by the Government Proceedings Act. This Act supersedes other legislations when it comes to the procedures of instituting the suit against the government including the local Government Authority."*

Mr. Biko as well referred this Court to the case of **Abdallah Omary Ndogondogo & 6 Others v Soap and Allied Industry & 2 Others Land Case No. 78 of 2020, High Court, Land Division at DSM (unreported) at p. 6 & 7,** in which the Court held that:

> *"Proceedings filed against the local government authority without joining the Attorney General be vitiated. The foresaid reasons, the present suit was vitiated due to non-joinder of the Attorney General. Since the suit is*

incompetent. This court cannot make an order for amending the plaint and joining the Attorney General as requested.....The law is settled that an incompetent proceeding cannot be amended, withdrawn or adjourned."

Even though the amended plaint was filed on 29th November, 2019, three months before the enactment of the contravened section 6(3) & (4) of the Written Laws (Miscellaneous Amendment) Act 2020 (the Written Laws), still the position may have been that, such law would not have operated where the suit was instituted before the enactment of the referred law, argued Mr. Biko. However, it was important to know the intention of the Parliament as was amplified in the case of **Wambura Maswe** (supra), that without joining the Attorney General in all proceedings against the Government, the suit must be vitiated because such proceedings denied the Attorney General the right to defend the interests of the Government. The defendant falls within the ambit which would require joining of the Attorney General as a necessary party.

The purpose of the Government Proceedings Act, as amended by the Written Laws stated that:

"it is an act to provide for the rights and liabilities of the Government in civil matters for the procedure in civil proceedings by or against the government and for related matters."

Submitting on whether the provision can be retrospective, it was Mr. Biko's submission that on civil suits, as matter of procedure the provision does operate retrospectively to the extent that the plaintiff was required to join the Attorney General. This was regardless of whether the suit was instituted three months before the enactment of the above referred amended law, he argued. Fortifying his position he cited the case of **City Council v Generosa Gasper Chambi, High Court Labour Division, Revision No. 584 of 2018 at p. 8** in which it was held that:

> *"The procedural amendment will operate retrospectively, as the law requires; in the case at hand it is matter of procedure. The amendment created by written laws (Miscellaneous Amendments) No. 3 of 2016, ought to act retrospective."*

Winding up his submission, Mr. Biko submission that, even though the plaintiff's suit was filed before the enactment of the Proceedings Act as amended its existence in the Court records was of no use and the remedy was striking out of those records.

Opposing the objection, it was Mr. Mbise's submission that, the defendant has relied on provisions of the law which was published through Government Gazette No. 8 Vol. 101 dated 21st February, 2020 where the present Commercial Case No. 143 of 2019 was filed in 29th

November, 2019, almost three months prior to commencement of the above cited law.

Mr. Mbise went on making reference to section 24 of the Written Laws that it required to be read as one with the Principal Act. Under the Principal Act of the Government Proceedings Act, and specifically pursuant to section 22 of the Act, the amendment was stated not to affect the already instituted suits prior to coming into effect of it. That can be easily gathered from the provision which provided that:

> *"Except as otherwise in this Act expressly provided, the provision of this Act shall not affect proceedings which have been instituted before the commencement of this Act."*

Expanding his submission, Mr. Mbise submitted that, the intention of legislature when enacting the Government Proceedings Act was not to disrupt the proceedings which have already commenced. On top of that, it was a general rule that Supplementary laws did not override the Principal Act and that the amendment must be read together with the Principal Act, argued Mr. Mbise. It was thus his submission that, the cited provision did not apply to the proceedings which commenced before its enactment. Mr. Mbise fortified his stance by relaying in the book written by **A.B Katitiya** bearing the title **"Interpretation of the**

Statute" 2008 Edition, University Law Publishing Co, New Delhi-India at p. 237, which discussing on interpretation of Statutes stated that:

> *"All procedural laws are retrospective, unless the legislature says they are not."*

With that in mind, he concluded that the amendments made did not affect Commercial Case No. 143 of 2019 which was filed prior to commencement of the Amendments. In additional to that, he submitted that the defendant in this suit was the Board of Trustees of Public Social Security Fund Act, 2018 which was established under section 8 of the Public Social Security Fund Act, with perpetual succession and common seal and its corporate name and which was capable of suing and be sued.

Arguing from a different angle, he discussed on the Board of Trustees of the Fund, and the board members. It was his submission that the law officer representing the Attorney General was among of them as per item 1 (1) (e) the First Schedule of the Act, therefore, the Attorney General was already part of the Board of Trustees of the Fund. And that the 90 days' notice dated 3rd April 2019, already served to the defendant included the Attorney General who was among the members of the

Board of Trustees of the Fund, as reflected in annexure CTL-18 collectively.

Maintaining his submission, Mr. Mbise contended that the legislature did not intend to double join the Attorney General, hence the requirement of joining the Attorney General in this case as a necessary party was not the necessary, as he was already party of the Board of the Trustees of the fund which was the legal person being sued in this case.

Disputing the case of **Wambura Maswe** (supra) cited by the defendant, he submitted that, the said decision was dated 18th November 2020 and the Case was No. 5 of 2020, although the decision does not state when the case was filed it was obvious that the case bearing 2020, was possibly filed after the commencement of the amendment of section 22, while the present suit was filed prior and thus was inapplicable.

Contesting the decision in **Dar es salaam City Council** (supra) cited by the defendant counsel it was Mr. Mbise's submission that, the precedent cited was different from the case at hand due to the fact that, the decision relied on was that section 26 of the Written Laws (Miscellaneous Amendment) No. 3 of 2016 which amended section 32A of the Public Service Act, Cap 298, was to operate retrospectively, which was not the case in the present situation.

Relating the remarks in the book by **Katatiya** to his submission, it was Mr. Mbise's submission that section 22 of the Government Proceedings Act provided to the contrary when it stated that the provision of the Act shall not affect the proceedings which have been instituted before the commencement of the Amendment.

Steadfast to his position Mr. Mbise concluded his submission by restating that the Amendment did not affect Commercial Case No. 143 of 2019 which was filed prior to the commencement of the Amendment. Furthermore, the Attorney General whom was sought to be joined as a necessary party to the suit was already a party comprising of the Board of Trustees as provided under section 8 (1) item 1 (1) (e) of the Public Services Social Security Fund Act. On the strength of his submission he prayed the preliminary point of objection raised by the defendant counsel be dismissed with costs.

Rebutting the opposing submission Mr. Biko maintained that the amended plaint was incompetent for contravening section 6(3) & (4) of the Government Proceedings Act, for failure to join the Attorney General as a necessary party. He went on submitting that the plaintiff has failed to interpret the provision of section 22 when read together with section 6 (1) of the Government Proceedings Act which provided that:

"Notwithstanding any other provision of this Act, Civil Proceedings may be instituted against the government subject to the provision of this section."

The word "notwithstanding" and the phrase "subject" to the provision of this section" in his opinion referred section 6 superseded any other provision in the Act including section 22 cited and relied by the plaintiff. Likewise, the use of the word:

".....except as otherwise in this Act expressly provided...."

Meant that section 22 accepted the supersession of the section 6 of the Act, Mr. Biko argued.

Disputing the assertion that Attorney General was a part of the composition of the Board of Trustees of the defendant, it was the Mr. Biko's submission that, the cited provision was misconceived; as it did not provide procedure to institute the suit against the defendant rather it provided for the composition of the Board of Trustees of the defendant. Mr. Biko reiterated his earlier submission that the plaint was incompetent before this Court and must be struck out with costs.

Having closely examined the submissions by the counsels for the parties, the sole issue for determination is **whether the preliminary point of objection raised is meritorious or not.**

Before proceeding, it is well noted that, the following facts are not in dispute at all. **One**, the provisions of section 6 (3) & (4) of the Government Proceedings Act is amended by the Written laws (Miscellaneous Amendment) Act on 21st February, 2020. **Two,** the said amendment placed the mandatory rule of joining the Attorney General as a necessary party to all suit against the Government. **Three,** amended plaint in Commercial Case No. 143 of 2019 was filed on 29th November 2019, almost three months before the commencement of the amendment. **Four,** going by the book by **Katatiya**, all procedural laws operate retrospectively unless the legislature provided otherwise.

The real question for determination under the circumstances is whether joining of the Attorney General as a necessary party should *first and foremost* occur and *secondly*, if the answer is yes, whether the procedure can operate retrospectively.

For obvious reasons as well as settled legal position that Court cannot conduct its business without rules of procedure in place, otherwise the whole rationale of having procedure in place would be meaningless. These rules of procedure are handmaids of justice but should not be used to defeat justice. **See: General Marketing Co Ltd v A. A. Shariff [1980] T.L.R 61.**

Close scrutiny of the Government Proceedings Act, and in particularly section 6 (3), the provision provides for the general rule that, the Attorney General shall be joined as a necessary party in all suit against the Government upon the expiry of the notice period. Failure to do so, as per sub section (4) of the same Government Proceedings Act, vitiates the whole proceedings or suit instituted before the Court.

Also, I have carefully read section 6 (1) of the Act, which provides for civil proceedings against the Government, meaning the government can be sued. This, can however only occur when a proper procedure is followed. Therefore, despite existence of section 22 which strictly prohibit the Act to operate retrospectively on one hand, but on the other sections 6(3) and (4) the same Act has specifically provided that in all suits against the Government the Attorney General must feature, as a necessary party.

I am live to the fact that the word "*may*" used in the provision of section 6 (1) and the word "*shall*" used under the provision of section 22 of the Act, when looked at according to the laws of Interpretation Act, Cap. 1 R.E. 2002 the word "*shall*" means mandatory obligation while with the use of the word "*may*" that is not the case. Despite this conundrum, this Court finds itself in agreement with Mr. Biko that the essence of having

in place the Government Proceedings Act, as Amended by the Written Laws (Miscellaneous Amendment) Act, 2020 is to regulate any proceedings by and/or against the Government, especially making sure the Attorney General is joined as a necessary party when it calls for that. The decision in the case of **Wambura** cited (supra) has a persuasive effect only and not binding upon this Court, it being coming from the Court with concurrent jurisdiction to this one. In addition, and as argued by Mr. Mbise, the argument I fully concur with, that chances are the suit in **Wambura** case (supra) was instituted after coming into force of the Amendment, which made the Judge rightly conclude that without joining the Attorney General as a necessary party vitiated the proceedings. This is completely different with the situation in the present suit.

As for the case of **Dar es Salaam City Council** (supra), Mr. Mbise's assertion, that the cases are different, holds water. In the cited case the trial Judge relied on section 26 of the Written Laws (Miscellaneous Amendments) No. 3 of 2016 which amended section 32A of the Public Services Act, Cap. 298, and in the amended provision, there was no specific provision limiting its application. This is different with what is provided under section 22 of the Government Proceedings Act, that matters instituted prior to the amendment there will not be affected.

be no consequences. This formation is certainly correct if the provision is read in isolation to the other provisions such as sections 6 (1), (3) and (4) of the Act, which set out limitation. My interpretation that the provision should not to be read in isolation is derived from the wording of section 22 saying:

"Except as otherwise in this Act expressly provided....."

To me it means if in the Government Proceedings Act, there is a provision providing for specific procedure to be followed, it then connotes there is a limitation in application of section 22. In short since instituting a suit is a procedural issue therefore all procedural laws operate retrospective, unless the legislature expressly says they are not. While appreciating this principle, Mr. Mbise has however, contested it by submitting that section 22 of the Government Proceedings Act, has clearly expressed that proceedings instituted prior to commencement of the Amendment are not to be affected. I would have agreed to Mr. Mbise's assertion had I not reminded myself that in some cases provisions should be read together and not in isolation in order to get the correct meaning and/or the intention of the Parliament. This is one of those situations whereby the provisions need to be read together to

properly get what is the meaning and interpretation to be able to apply the provision in question.

Furthermore, section 24 of the Amendment has clearly illustrated that the Amendments to be read as one with the Principal Act, which is the Government Proceedings Act. Section 22 which is the subject of contention reads as follows:

> *"**Except as is otherwise in this Act expressly provided**, the provisions of this Act shall not affect proceedings which have been instituted before the commencement of this Act."* [Emphasis mine]

The wording "***Except as is otherwise in this Act expressly provided***" to me connotes as I pointed out earlier on in this ruling that in the same Act, there might be other provisions also catering for the same subject and therefore once there is such provision, is obvious it cannot be read in isolation. In this situation section 22 has to be read together with sections 6 (1), (3) and (4) of the Government Proceedings Act to get the actual and would be applicable procedure. My stance has as well been clearly stated under section 6 (1) of the Government Proceedings Act, which I consider to be the backbone of the whole Act. The provision is reproduced below for ease of reference:

*"**Notwithstanding** any other provision of this Act, civil proceedings may be instituted against the Government **subject to the provisions of this section.**"*

Having opined so, I thus without any doubt find that, joining of the Attorney General as a necessary party, is governed and provided for by the provisions in the Act. But even without that, I still find it would not have prejudiced the plaintiff if the Attorney General is joined as a necessary party. My position is cemented on the belief that the relationship between the rules of practice and justice to be attained are geared towards that of facilitating rather than hindering, the cause of justice to take place. **See: Re Collies Raven Shear Arbitration [1970] KB 1.**

In the present matter I find it appropriate to have the rectification be done sooner rather than later for the following reasons: **One,** even if the Attorney General will not be added now, the provision of section 6A (1) give her the right to intervene in any suit against Government. So if the rationale that parties bring their dispute to Court, in order for their controversy to be resolved once and for all, then joining the Attorney General cannot be escaped. **Two,** without joining the Attorney General no decree can possibly be executed against the Government. It is

therefore vital for such a necessary party to be joined from the institution of the suit. **Three**, right to be heard before any adverse decision is passed, is right of every party to the suit, including the Attorney General. In the case of **Abbas Sherally & Another v Abdul Fazalboy, Civil Application No. 33 of 2002**, the Court Of Appeal has this to say on the right to be heard:

"The right of the party to be heard before adverse action or decision is taken against such party has been stated an emphasized by the court in numerous decisions. That the right is so basic, that the decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard, because the violation is considered to be breach of natural justice."

Therefore by allowing the Attorney General to be added, the right to be heard will be exercised. And considering that, the Court in carrying out its task has to make sure that parties are fairly and justice treated, joining the Attorney General at this stage is not only important but equally indispensable.

The assertion by the plaintiff counsel that, The Attorney General being a member of the Board of Trustees of the Fund as per item 1 (e) of the First Schedule of the Act is misplaced and has no any legal basis due to

the fact that being a member of the Board of Trustees of Fund does not necessarily mean that you have automatic right to sue or being sued.

I have also taken liberty to read annexure CTL-18 submitted by the plaintiff counsel as 90 days notice of the intention to commence the suit and found that the notice was neither addressed to the Defendant nor the Attorney General rather the notice was addressed to the Director General of the Public Service Social Security Fund which is a wrong party and non-existing entity in the sense that it cannot be sued or sue. Going by what transpired it is apparent that no notice has ever been issued to the Attorney General.

In the case of **Abdallah Omary Ndogondogo** (supra) the Court held that:

> *".....The foresaid reasons, the present suit was vitiated due to non-joinder of the Attorney General. Since the suit is incompetent. This court cannot make an order for amending the plaint and joining the Attorney General as requested.....The law is settled that an incompetent proceeding cannot be amended, withdrawn or adjourned."*

In agreement that the present suit like the one in the above cited case has been vitiated due to non-joinder of the Attorney General and hence making the suit incompetent and thus deserving being struck out.

I, nevertheless have refrained from ordering so for the following reasons that *firstly,* pursuant to Rule 24 (1) of the High Court (Commercial Division) Procedure Rules (the Rules) amendment of pleadings is allowed of course at the instance of a party. *Secondly*, with the advent of the principle of Overriding Objective brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 (Act No. 8 of 2018) which now requires the courts to deal with cases justly, and to have regard to substantive justice, the High Court (Commercial Division) Procedure Rules, 2019 (GN. No. 107 of 2019), which amended the High Court (Commercial Division) Procedure Rules, 2012 (the Rules), amended Rule 4 to give effect to the overriding objective as stipulated for under sections 3A and 3B of the Civil Procedure Code, Cap. 33 R. E. 2019. Under the circumstances, I find allowing amendment of the plaint as justly remedy rather than striking it out. This has been considered in light of filing fees which are slightly high.

Therefore in the light of the above and for the interest of justice, while sustaining the preliminary point of objection raised but instead of striking

out the plaint as urged by Mr. Biko counsel for the defendant, I allow amendment of the plaint with costs to follow event. It is so ordered.

P. S. FIKIRINI

JUDGE

22nd APRIL 2021