

TANZANIA / JUDGMENT

mbeya cement co ltd vs philemon mwalusamba and 9 others 2020 tzhc 2295 31 august 2020

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA
(LABOUR DIVISION) AT MBEYA CONSOLIDATED LABOUR REVISION NO. 11 & 16 OF 2017
(Originate from Complaint No. CMA/MBY/149/2014) MBEYA CEMENT CO.
LTD..... APPLICANT VERSUS PHILEMON MWALUSAMBA & 9
OTHERS..... RESPONDENTS

JUDGMENT

Date of last order: 30/06/2020 Date of Judgment: 31/08/2020 NPUNGURU, J, This is judgment from the consolidated Application for Revision No. 11 of 2017 and 16 of 2017. Both revisions named above arises from the CMA arbitral award dated 12th May, 2017 from the Labour Dispute No. CMA/MBY/149/2014. " Both application being of the same nature are brought under Sections 91 (1) (a) & (b) and (c) 91 (4) (a) & (b) and 94 (1) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004 (as amended), Rule 24 (1), 24 (2) (a), (b), (c), (d), (e) and (f), 24 (3) (a), (b), (c) and (d) and Rule 28 (1) (a), (b) and (e) of the Labour Court Rules, 2007 (G.N No. 106 of 2007). Both the applications are brought by Notice of Application and Chamber summons supported with the affidavit. The two applications pray for among others the following orders:

- (a) The honourable court be pleased to call for and examined and revise and set aside the arbitral award dated 12th May, 2017 in the Labour Dispute No. CMA/MBY/149/2017.
- (b) Any other order that this court may deem fit and just to grant. In the application No. 11 of 2017 the applicant is Mbeya Cement Company Limited (The employer and Philemon Mwalusamba and 9 others respondents (The employees). While in the application No. 16 of 2017 the vice versa. Before going to the gist of these application I find it important to give historical back ground though, albeit, on what brought about the two applications to this court. That Philemon Mwalusamba and 9 others were employees of Mbeya Cement Company Limited working at different capacities. They worked for a number of years up to when they reached the retirement age and some retired voluntarily dispute before the Commission Mediation and Arbitration Complaint No. CMA/MBY/149/2014 claiming for

unlawful taxation in their retirement benefits by the Taxing Authority that is Tanzania Revenue Authority (TRA). They alleged that the employer (Mbeya Cement Company Limited) misled the TRA thus caused over assessment of tax from their retirement packages. The complaints also claimed for underpaid repatriation package. That the complaints did not concur with the Taxation of their terminal benefits and the repatriation package offered. Thus opted to challenge the same in the CMA. Upon trial, the CMA was satisfied with the evidence of the complaints and awarded them to be paid 30% of the retained benefits for Taxation and also denied them what they claimed to be the underpaid repatriation. Neither was pleased with the award of the CMA, thus each filed application for revision to this court. In the application for revision No. 11 of 2017, the applicant (Mbeya Cement Company Limited) the grounds for revision are set forth in the accompanying affidavit. Paragraph 12 of the affidavit provides for the following grounds:

- (a) That the arbitrator erred in law and facts in holding the applicant responsible of paying the respondents 30% of their retirement benefits while the applicant is statutorily required to remit the same to Tanzania Revenue Authority.
- (b) That the arbitrator erred in law and in fact in holding that the applicant is responsible for paying the respondents 30% deducted from their retirement benefits as it failed to involve the respondents in the tax assessment deducted by TRA.
- (c) That the arbitrator erred in law and in fact in holding that the applicant failed to bring the documents from TRA which show how the tax assessment was conducted.
- (d) That the arbitrator erred in law and facts by adjudicating the dispute without considering the Commission had no jurisdiction to entertain as the same was a tax dispute. While in the application for revision No. 16 of 2017 where Mbeya Cement Co. Ltd. is the respondent the legal issue is found at paragraph 11 of the affidavit which is:
 - (a) Whether the applicants were entitled to repatriation costs as claimed. Before me, the employer (Mbeya Cement Company Limited) enjoyed the service of Mr. Ndanu Emmanuel learned advocate while the employees were represented by Mr. Benedict Sahwi learned advocate. The applications for revisions were disposed by way of written submissions following the prayers of the counsels. Submitting for the applicant in the Application No. 11 of 2017, challenging the award of 30% of the benefits to be paid to the respondents, Mr. Ndanu Emmanuel was of the contention; the employer (the applicant) made payment of 30% of the accrued benefits of the Respondents to Tanzania Revenue Authority. He further submitted that according to Section 7 (2) (d) and (e) of the Income Tax Act, Cap 332 (Revised Edition 2002) the employer is bound to remit to the Authority the employee's gains arising from payment agreement be it retirement benefits or termination benefits. Mr. Ndanu was of the submission further, that the applicant furnished the relevant documents to TRA regarding the respondents for tax assessment, then the assessment was delivered to the applicant for remitting the deductions to the Authority. He further said, when discomfort arose on the assessment the officials from TRA advised the respondents to lodge their

complaint to the Authority, but still the arbitrator ordered erroneously the applicant to pay the respondents 30% of their terminal benefits which was wrong. The counsel contended further that the award itself is not clear on how much out of 30% remitted to TRA is supposed to pay the respondent. The same was not stated by the respondents during the hearing of the complaint. On the second ground, Mr. Ndanu Emmanuel was of the submission that the respondents were involved in the assessment process through their representative TUICO. He said it is TUICO which wrote to the Authority (TRA) on the clarification of the assessment. Further the TRA made elaborations on the assessment. The counsel submitted to the effect that the role of the employer was to acknowledge to the employees how Tax deduction was done, the duty was the applicant did. It was the duty of the respondents to enquire to TRA on deductions and if dissatisfied, had the right to lodge complain within 30 days from the date of deductions. On the issue that the applicant failed to collect the documents from TRA which shows the way deductions was done, the counsel submitted that once the documents were supplied to TRA became the Public documents the respondents had like any other interest part go to the Authority to look for. The counsel further submitted that, the fact that the matter being typically a tax matter the CMA had no jurisdiction to entertain it. He said there are specific organs dealing with tax disputes. He counsel referred this court to the case of Rose Lyimo & Others vs. Price Water House Coppers Consultants Ltd. [2002] T.L.R 1, Shyme Thank & Others vs. New Palace Hotel [1971] HCD No. 92 and that of Fanuel M. Mgunda, Civil Appeal No. 08 of 1995 (unreported). All these cases are on the question of jurisdiction. He concluded by submitting that being the tax matter, the CMA had no jurisdiction to entertain it. Responding to the above submissions Mr. Benedict Sahwi was of the contention that there is no law which requires the applicant to pay the respondents 70% of their terminal benefits and retain 30% of it for taxation. The respondents were required to be paid 100% of their retirement benefits, that is why the arbitrator was right to award the respondent to be paid 30% of their retained benefit. Further, the counsel was of the argument that the respondents was not given the TRA receipts on deductions that was not unfair and illegal. On the question of jurisdiction, Mr. Sahwi was of the contention that, the counsel for the applicant had failed to interpret the prayers of the respondents (employees) before the CMA. He said the complaint before CMA was unlawful taxation in the retirement benefits and repatriation costs, which originated from the signed contract signed by the applicant and the respondents. Thus the cause of action was the retirement benefit which the CMA jurisdiction to entertain the matter. Mr. Sahwi ended by submitting that the case cited by the counsel for the applicant are distinguishable and irrelevant. The point of determination before me is whether the application has merit. I will resolve the issue by basing on the evidence on record and in the light of submissions of submissions of the counsel. In the light of the evidence on record and the submissions made by the counsels it is clear that the terminal benefits of the respondents are not in dispute perse. It is that respondents are not complaining on what they were paid as terminal benefits. The question is the taxation of 30% of their terminal benefits. According to the counsel for the respondents, the respondents were entitled to 100% of their terminal benefit. The important question to ponder is whether the terminal

benefits of the respondents were taxable. Though this question was not directly and specifically been delt with by CMA, the evidence of DW1, the officer from TRA is to the effect that the benefits are taxable. That tax is calculated from basing on report issued by employer in relation to the lumpsum payment payable to the employees. It is further the evidence on record that the TRA having received information from the employer (Mbeya Cement Company Limited) made assessment by the two Authority assessors the same was approved by DW1 who was a Chief Valuer, the approximations were sent to the employer, then TUICO on behalf of the employees lodged a complaint on the assessment which made the Authority to do re-assessment. From the above piece of evidence available, it cannot be said that there was no communication between the applicant (employer) and respondents (employees) and the TRA on the Taxation. Thus the allegation that the respondents were not communicated on the taxation are baseless. Being satisfied that the benefits were taxable. The question is who is the rightful person to remit the deduction to TRA. As submitted by the counsel for applicant, it is the position that an employer is the agent of the Authority in collecting revenue/tax from the employees. This is provided under Section 81 (1) and (2) of the Income Tax Act, Cap 332 of 1973 (as amended). Thus what the applicant did was to comply with the statutory requirement. The respondents by virtue of their taking employment had impliedly consented to the deductions. I am of the view that, the amount deducted from the respondents benefits is nonetheless part of the income of the respondents received and which from the evidence of DW1 is chargeable to tax. I am unable to see for this purpose distinction between the payment by the employer on behalf of the employees and if he employees would have been given to pay tax by themselves. In each case it is the tax out of the income of the respondents which is regarded as having been received, and unless such payment is not deductible under the income tax law. See Charles Herbert Withers Brothers - Payne vs. The Commissioner of Income Tax (1968) EACA 1. As submitted by the counsel for the respondents (page 3) that the complaints in CMA was unlawful taxation in respondents retirement benefits, I am of the firm position that the proper forum on the matter as TRA and its adjudicatory organs established by the law not the CMA. This is on the ground that the matter before CMA was not a typical labour dispute but Taxation dispute. In the premise I find the award of 30% retirement benefits taxed by TRA has no basis. The CMA had no jurisdiction to entertain it. In the case of Rose Lyimo and Others vs. Price Water House Copper Consultants Ltd., (2002) T.L.R at page 1 the court held: "... where there is a court specifically created to cater for specific type of cases, the ordinary civil court, should desist from entertaining such suits unless there are exceptional circumstances so to do." The same position was articulated in the case of Shym Thanki and Others vs. New Palace Hotel (1971) HCD No. 92 and Fanuel Mantiri Ng'unda vs. Herman M. Ngunda, Civil Appeal No. 08 of 1995 (unreported) Court of Appeal of Tanzania. In the later case the court held: "T/ye jurisdiction of any court is a basic, it goes to the very root of the authority of the court to adjudicate upon cases of different naturethe question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial. It is risky and unsafe for the court to proceed on the assumption that the court has jurisdiction to adjudicate upon the case." I accordingly quash

it. On the repatriation package. There is ample evidence on record that the employees (Applicants in Application for Revision No. 16/2017) were paid Tshs. 450 per kilometre per tonnage. That the payment was in accordance with the collective bargaining agreement bound the applicants. I am not at one with the counsel for the applicants (employees) on his argument that they were entitled to be paid according to Government Circular G.N No. 5 of 2008. My point of departure from his position is that the said circular (G.N No 5 of 2008) is very specific and applicable to Public Servants. In our case the applicants were not public servants within the meaning provided under Public Service Act No. 08 of 2002. Section 3 of the Act defines Public Servant "to mean a person holding or acting in a public service office" and Public Service office is defined as:

- (a) "a paid public office in the United Republic charged with the formulation of the Government Policy and delivery of Public Service other than: (i) (H) (Hi) (iv) (v)
- (b) Any office declared by or under any other written law to be a public service office. That being guided by the law cited above, I hold that the applicants in Application No. 16 of 2017 (Philemon Mwalusamba and 9 Others) were not Public Servants thus could not enjoy the fruits of G.N No. 5 of 2008. I therefore agree with the honourable arbitrator that the claim of the alleged underpaid repatriation package are not founded. I thus hold that the applicants were not entitled to the repatriation package which they were claiming for. The honourable arbitrator was right to deny it. This being the labour matter I make no order as to the costs. I so hold, and according ordered. D. B. NDUNGURU JUDGE 31/08/2020 Date: 31/08/2020 Coram: D. B. Ndunguru, J Applicant: Absent For the Applicant: Respondent: Present For the Respondent: B/C: M. Mihayo Court: Judgment is delivered in the presence of the Respondents in persons and the absence of the Applicant Right of Appeal explained.

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