IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., LEVIRA, J.A., And MWAMPASHI, J.A.)

CIVIL APPLICATION NO. 385/01 OF 2020

MANTRA TANZANIA LIMITED .... APPLICANT

VERSUS

JOAQUIM P. BONAVENTURE .... RESPONDENT

(Application for review of the decision of the Court of Appeal of Tanzania at Dar es salaam)

(Mwarija, Mwambegele And Kerefu, JJ.A.)

Dated the 17th day of July, 2020
in
Civil Appeal No. 145 of 2018

....

RULING OF THE COURT

12th July, & 3rd August 2021

LEVIRA, J.A.:

This is an application for review of the decision of the Court in Civil Appeal No. 145 of 2018 delivered on 17th July, 2020. It is brought by way of notice of motion made under the provisions of section 4(4) of the Appellate Jurisdiction Act Cap. 141 R.E. 2019 (the AJA) and Rule 66 (1) (a) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). The notice of motion is supported by the affidavit of Audax Kahendanguza Vedasto, counsel for the applicant. The application is strongly opposed by the respondent who also filed affidavit in reply.

Briefly, the background of this application can be traced from the relationship which existed between the parties herein. The respondent was employed by the applicant on 15th June, 2007 as a Finance and Administration Manager. However, his employment did not last long as on 30th November, 2013 he was terminated from the employment as he was found guilty of two disciplinary charges relating to misappropriation of company's funds by the applicant's Disciplinary Committee. Aggrieved by the applicant's decision, he filed a labour complaint with the Commission for Mediation and Arbitration (the CMA) praying for reinstatement, payment of terminal benefits and other legal benefits including allowances. Having heard the parties, the CMA decided that the termination of the respondent was substantially fair but procedurally unfair. As a result, he was awarded terminal benefits including compensation, repatriation expenses and subsistence allowance.

Aggrieved by that decision, the applicant applied for revision before the High Court (Labour Division) (Nyerere, J.) vide Revision No. 137 of 2017. She challenged the CMA finding that the respondent was unfairly terminated and the consequential award. On his part, the respondent was also dissatisfied by the decision of the CMA that he was substantially terminated fairly, and thus lodged Revision No. 151 of 2017 to challenge

the same. During hearing, the High Court consolidated both applications (No. 137 and 151 of 2017). In its judgment, the High Court found that the respondent was unfairly terminated both, substantially and procedurally. Therefore, it confirmed the decision of the CMA in regard to the procedure used to terminated the respondent that it was unfair and also partly reversed it having found that termination was as well substantially unfair. The applicant was therefore ordered to pay the respondent Tshs. 113,520,000/= (12 months salaries) being compensation for unfair termination; Tshs. 9,460,000/= one month salary in lieu of notice; Repatriation allowance Tshs. 19,800,000/= and subsistence expenses of Tshs. 270,000,000/= making the total of 412,780,000/=.

The applicant was aggrieved again by the decision of the High Court and thus she appealed to the Court vide Civil Appeal No. 145 of 2018. However, her appeal to the Court met an obstacle as the Court found that the High Court did not consider the respondent's prayer for reinstatement which was one of the reliefs sought in CMA Form No. 1 and that the omission vitiated the impugned decision. The Court quashed that judgment and remitted the case to the High Court for it to render a decision after having considered the reliefs sought by the respondent. The applicant was not satisfied by that decision and thus it has come before

the Court moving us to review our decision on the ground of manifest error on the face of the record resulting in the miscarriage of justice against the applicant committed in the following ways:-

(a) *That towards making an order to "quash... (the) (sic) judgment and remit the case to the High Court for it to render a decision, this Honourable Court overlooked the fact that it was only part of the relief part on that judgment of the High Court which it had found defective;*

(b) *That towards faulting the High Court for not considering the relief of reinstatement in its judgment, this Honourable Court overlooked the fact that such relief was not among the reliefs requested by the Respondent in the Revision filed by the Respondent in the High Court to remedy;*

(c) *That towards directing the case to be remitted to the High Court on account of the High Court's omission to rule on the relief of reinstatement was coming into play only if and after the court found that the termination of employment of the Respondent by the Applicant was unfair, this Honourable Court overlooked the fact that fairness or unfairness of the termination was being questioned in the appeal before it and had not, was not, and has not been, determined.*

At the hearing of this review, the applicant was represented by Mr. Audax Kahendaguza Vedasto learned advocate assisted by Ms. Dua Mbapila Rwehumbiza also learned advocate; whereas the respondent had the services of Mr. Richard Rweyongeza learned advocate who was assisted by Mr. Rahim Mbwambo, also learned advocate.

Mr. Vedasto commenced his submission in support of the application by adopting the notice of motion, supporting affidavit and the applicant's written submissions filed in Court on 12th November, 2020 to be part of his oral submission. Having done so, he proceeded to argue the above three reproduced grounds.

Regarding the first ground, Mr. Vedasto submitted that the Court made an error in the judgment because its conclusion was contrary to the reasoning. According to him, the error was based on the finding of the High Court that the respondent was unfairly terminated both procedurally and substantially. Therefore, the Court quashed that judgment and remitted the case to the High Court for it to render a decision after having considered the reliefs sought by the respondent as it can be seen at page 110 of the record of the application. In the written submissions, the applicant lamented that there was an error on the face of the record because the Court was not justified to quash everything even the part of

judgment which had nothing to do with that relief. In so doing, he said, the Court did not exercise its full mind to the effect of the order it made and be satisfied with its outcome. He thus argued that the order should be varied to remove extraneous materials and focus on reinstatement or specify the part which is to be quashed. He amplified further that the High Court should have been directed on what to do. In support of his argument, he cited the case of **Tanganyika Land Agency Limited and 7 Others v. Manohar Lal Aggrwal,** Civil Application No. 17 of 2008 (unreported). Therefore, he urged us to find that the first ground raised is an apparent error on the face of record.

As regards the second ground of review, Mr. Vedasto argued that the Court in its decision overlooked the fact that the prayer for reinstatement was not made before the High Court. The same, he said, was prayed before the CMA but it was refused. Therefore, the High Court could not be justified to deal with it since it was rejected in the first instance. Bolstering his argument, he cited the case of as **Eshie Mossy Mbaruku v. Bi Kungwa Rajab,** Civil Appeal No. 58 of 2013 (unreported).

Submitting on the third ground of review, Mr. Vedasto argued that reinstatement is a consequential relief after determination of whether or

not the termination was fair, a question which was not determined by the Court. Therefore, it was an error on the face of record for the Court to order the High Court to consider reinstatement. He argued further that the law is settled that no decision is to be set aside by this Court without satisfying itself that the error affects the merits of the case. To back up his argument he cited Rule 115 of the Rules. He added that the Court missed the above clear provision of the law when it quashed the decision of the High Court for not deciding the issue of reinstatement before satisfying itself whether or not that issue has any effect on the merit of the case. He concluded that this is a reviewable error.

In reply, Mr. Rweyongoza gave a general overview of what is provided under Rule 66 (1) (a) of the Rules upon which the current application is based. He as well stated that having gone through the entire record of the application he could not find a manifest error on the face of record. According to him, it seems the applicant was not satisfied with the decision of the Court. In addition, he said, the applicant did not explain on how the alleged error leads to the miscarriage of justice. As for him, the decision of the Court was a result of parties presentations on section 40 of the Employment and Labour Relations Act, Cap 366 R.E. 2019 (the ELRA). He insisted that the High Court did not consider

reinstatement, and the current application is nothing but an appeal through the back door (an appeal in disguise).

Responding on the applicability of Rule 115 cited by Mr. Vedasto, he submitted that the said Rule is on errors which do not go to the root of the case, and thus reliefs do not fall under that provision. As for him that provision was cited out of context and the application at hand is a delaying tactics for the respondent to enjoy his rights.

Adding to what was submitted by Mr. Rweyongeza, Mr. Mbwambo stated that the respondent resists this application on the ground that the applicant failed to meet the requirements under Rule 66 of the Rules.

He adopted respondent's written submissions to form part of his oral submission and continued to argue the application. He stated that for an error to be considered apparent on the face of record, it must be obvious and patent to the extent of not requiring any elaborate opinion or two opinions. He cited the case of **Tanganyika Land Agency** (*supra*) and **Chandrakant Joshubhai Patel v. R.** [2004] T.L.R. 218 to support his position.

Mr. Mbwambo went on stating that, in the application before us there is no apparent error shown in the grounds and when looked at

closely, they form more than one opinion. He said for instance, the argument on the act of the Court quashing the High Court judgment and ordering it to consider reinstatement, two or more opinion may arise. **One**, whether the Court has powers to quash only part of the judgment, if yes, is it proper for the Court to have two judgments to stand. So he said, this ground of review does not fall under Rule 66 (1) (a) of the Rules.

As for the second ground of review, Mr. Mbwambo argued this is a pure ground of appeal. He added, the prayer for reinstatement was made at page 53 of the record of the application. However, he said, even if it was not there, the High Court could have determined on it as it was bound to determine the reliefs prayed before the CMA as the same is statutory regardless whether or not they were prayed for.

Submitting on the applicant's argument that the Court could have determined the appeal first on whether or not the termination was fair before ordering the High Court to consider reinstatement, Mr. Mbwambo stated that the Court could not proceed with the incomplete judgment. Either, the Court could not quash part of the judgment, even if it was only part of it having problems. The whole judgment is to be quashed, he

insisted. He concluded by stating that the present application is unmerited and frivolous and therefore, it should be dismissed with costs.

Mr. Vedasto made a brief rejoinder by first conceding that the aspect of "injustice" as provided under Rule 66 (1) (a) of the Rules has not been discussed by the applicant. On the second ground of application, he said that reinstatement was not considered in the High Court as the applicant did not pray for it, so it will be unjust for the employer (applicant) to be ordered in that aspect despite the fact that section 40 of the ELRA provides for the same. He insisted that, the High Court is not required to consider what was pleaded in the CMA.

Regarding the issue that the applicant has not been able to show an apparent error on the face of record, Mr. Vedasto stated that Rule 66 (1) of the Rules does not go deep to mention errors. Therefore, he said, the applicant has been able to show the errors at page 34 of the record by showing that the Court made a conclusion beyond its reasoning.

In relation to the third ground of review he said, that the Court failed to consider what is provided under Rule 115 of the Rules.

He was of the firm view that having discovered that the High Court did not consider the relief of reinstatement it could have returned the

judgment for the High Court to correct the error and return it back to the Court to determine the appeal.

As far as costs are concerned, he stated that the application is not frivolous as the applicant has tried to show the error committed and was able to cite law and decided cases. He emphasized that Rule 115 is relevant to the current application as the Court is required to correct the error that can affect the other part of the decision. However, he said, the Court did not decide on whether the termination was fair. Finally, he urged us to grant the application.

We have dispassionately considered the notice of motion, supporting affidavit, the affidavit in reply and submissions by counsel for parties. The question for our determination is whether there is an apparent error on the face of the decision of the Court leading to miscarriage of justice in terms of Rule 66 (1) (a) of the Rules under which this application is brought. For ease of reference the said Rule provides as follows:

> *"66 (1) The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds - (a) the decision was based on a manifest error on the*

face of the record resulting in the miscarriage of justice".

Claiming under the above provision of the law, the applicant contended in the first ground of review that the decision of the Court nullifying the whole judgment of the High Court was based on a manifest error on the face of it. In his argument as it can be seen above, the counsel for the applicant went further to insist that the Court ought to have remitted the case file to the High Court and directed the latter court to consider that remedy and send it back to the Court to determine whether or not the termination was fair both procedurally and substantially as decided by the High Court. This argument was vehemently opposed by the counsel for the respondent on account that the Court could not work on incomplete judgment and quash part of it as the applicant would wish.

We wish to state right away that this ground of review is misconceived. With respect, it is our considered view that the applicant is trying to challenge the decision of the Court instead of indicating the purported error forgetting that this is a review and not an appeal. It is interesting to note that apart from making a bare claim that the decision of the Court was based on apparent error, the applicant failed to establish how the purported error resulted in miscarriage of justice as conceded by

Mr. Vedasto while rejoining to the submission by the counsel for the respondent.

We need to emphasize here that it is not just enough to claim that the decision of the Court is based on a manifest error on the face of the record resulting in the miscarriage of justice; but it is the duty of the one who claims so to point to the said error and submit on how it occasioned miscarriage of justice on his part.

The law is settled that any error complained of must be obvious and patent mistake and not something which can be established by a long-drawn process of reasoning or arguing on points which there may conceivably be two opinions – See **Tanganyika Land Agency** (supra).

At page 106 of the record of this application the Court made the following observation:

> *"From the record and the submissions of the counsel for the parties, there is no dispute that in his CMA Form no. 1, the respondent complained that he was unfairly terminated and* ***sought, among other reliefs, an order reinstating him to his employment****".*

The Court went on observing that:

"There is no dispute that although in its decision, apart from upholding the CMA's finding that the respondent's termination was procedurally unfair, the High Court found also that the termination was substantially unfair because the CMA erred in finding him guilty of the disciplinary charges leveled against him. Despite that finding, the High Court did not consider the respondent's prayer for reinstatement which was one of the reliefs sought in CMA Form No. 1 under section 40 (1) of the ELRA ." [Emphasis added]

Having so observed, the Court was of the view that the omission to consider whether or not to grant the relief sought by the respondent vitiated the impugned decision because it left that crucial issue undetermined. The Court was guided by the principle established in **Truck Freight (T) Ltd v. CRDB Ltd**, Civil Application No. 157 of 2007 (unreported) where it was stated that when an issue which is relevant in resolving the parties' dispute is not decided, an appellate court cannot step into the shoes of the lower court and assume that duty but it has to remit the case to that court for it to consider and determine the matter. Therefore, the Court quashed that judgment and remitted the case to the

High Court for it to render a decision after having considered the reliefs sought by the respondent.

As demonstrated above, we have perused carefully the decision of the Court, however we could not trace any apparent error on the face of it warranting us to exercise our power for review. Without taking much of our time, the second ground of review is as well unfounded. The purported error claimed by the applicant is that the respondent did not claim for reinstatement before the High Court. The record of review is very clear at page 43 that in his chamber summons, the respondent prayed for the High Court to grant the following orders:

> "*1. That the honourable court be pleased to revise part of the award with reference* ***No. CMA/DSM/ILALA/R860/13/1081 before*** *ALFRED MASSAY dated 17th February, 2017.*
>
> *2. That consequently after the revision the honourable court grants* ***all claims*** *as requested by the applicant.*
>
> *3. Any other order fit to grant".*
>
> [Emphasis added]

The High Court was dealing with the decision of the CMA as indicated above. The respondent prayed for all the claims which he sought before the CMA. In the circumstances, it cannot be said with

certainty that the issue of reinstatement was not among the reliefs to be considered by the High Court. At page 106 of the record of application quoted above the Court observed that, the respondent complained before the CMA that he was unfairly terminated and sought for an order for reinstatement. It is also on record that the CMA found that the respondent's termination was only unfair procedurally but, substantially fair. The respondent was aggrieved by that finding and thus appealed to the High Court claiming for all orders he sought before the CMA. We agree with the counsel for the respondent that there is no apparent error in the decision of the Court by its order of remitting the case to the High Court to consider reinstatement of the respondent. The second ground is as well unfounded.

In the third ground, what actually the applicant is trying to do is nothing but to direct the Court on how it ought to have decided. The applicant is claiming that since the fairness or otherwise of the respondent's termination was yet to be determined, the Court misdirected itself in remitting the case to the High Court for it to decide on the relief of reinstatement. We have already indicated that the High Court held that the termination of the respondent was unfair both procedurally and substantially - See page 79 of the record of review. However, it did not consider the relief prayed by the respondent in Form No. 1 before the

CMA. Now whether the Court was right or wrong to remit the case to the High Court, which we say was not, in law that is not a fit ground for review - See **Chandrakant Joshubhai Patel v. Republic** [2004] TLR – 218.

Let it be noted that, it is not upon the litigants and/or their counsel to direct the court on what and how to decide the matters presented before it, but the court is obliged to decide matters presented to it in accordance with the law on the prevailing circumstances of each case. In the current Application the Court having considered that the High Court did not resolve the respondent's issue of reinstatement in its judgment, it quashed it and remitted the case to the High Court for it to render a decision after having reconsidered the reliefs sought by the respondent. By so doing the Court was guided by the settled principle of the law in **Truck Freight case** (supra). We do not find any apparent error on the face of the judgment of the Court in relation to the third ground of review.

Having observed as it appears above, the next question is whether or not we should dismiss the application with costs. We think, since the applicant has tried to argue and cite authorities, the application cannot be

said with certainty, to be frivolous as contended by the counsel for the respondent in which case we cannot grant costs.

For the reasons stated above, we find that this application is devoid of merits. Consequently, we dismiss it with no order as to costs.

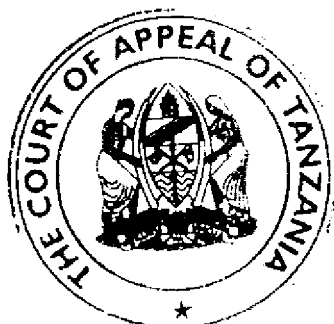
DATED at **DAR ES SALAAM** this 29th day of July, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 3rd day of August, 2021 in the presence of Mr. Pascal Mshanga, counsel for the Applicant and Mr. Rahim Mmbwambo and Ms. Jacquiline Rweyongeza, counsel for the Respondent is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL