IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KWARIKO, J.A., GALEBA, J.A. And KHAMIS, J.A)

CIVIL APPLICATION NO. 17/02 OF 2019

TANZANIA GAME TRACKERS LIMITED.....APPLICANT

VERSUS

BRYAN PRIESTLEY.....RESPONDENT

(Application for Revision of the Judgment and Decree of the High Court of Tanzania (Labour Division) at Dar es Salaam)

(Gwae, J.)

dated the 11th day of July, 2019

in

Labour Revision No. 24 of 2017

RULING OF THE COURT

25th & 31st August 2023.

KHAMIS, J.A.:

This ruling relates to a notice of motion dated the 6th day of September, 2019 in which, Tanzania Game Trackers Limited, herein after to be referred to as the applicant, sought an order to revise, quash and set aside the judgment and decree of the High Court, Labour Division in Labour Revision No. 24 of 2017 on the grounds that in quashing the decision of the Commission for Mediation and Arbitration (the CMA), the High Court relied on sickness, negotiations and expiration

of work permit without weighing them against the time delayed which was almost one year; that sickness was not alleged as a ground of delay in the original application for condonation; that the High Court Judge failed to act judiciously by condoning delay based on sickness which had occurred in 2011 before the delay in question, and; that due to the irregularities shown, the decision arrived at was tainted with illegalities.

The application is premised on a relief that upon calling for and examining records of the High Court, the Court be pleased to quash and set aside the impugned decision and reinstate the ruling of the CMA in Labour Dispute No. CMA/ARS/MED/717/2016 which declined the respondent's application for condonation.

The notice of motion was made under section 4(3) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 (the AJA) and rule 65(1), (2) and (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and accompanied by an affidavit sworn by one Wilfred Mawalla, learned advocate, duly appointed by the applicant to represent it in this matter.

The background of this matter is that on 9th September, 2002, the respondent, was employed by the applicant as its Workshop and Support Services Manager for a two years' renewable contract. When the last contract expired on 31st July, 2015, the respondent reminded

the employer on the need of renewal and the applicant developed reasonable expectation that the contract will be renewed. As such, the respondent continued working without a formally written extended contract.

In October, 2015, the respondent was accessed with a written contract for execution which he noticed, had many errors and returned it for correction. The same was accordingly corrected but also backdated to be effective on 1st August, 2015 to 31st December, 2015. The abrupt change of terms of the contract surprised the respondent and raised his concern with the applicant's management.

As the respondent patiently waited for feedback, vide a letter dated 15th December, 2015, he was informed that his contract was to expire on 31st December, 2015, whereupon, he would be paid terminal benefits. From that moment on, he was engaged in protracted negotiations for renewal of the contract and payment of his terminal benefits which has not been effected to date hence a delay to present the dispute at the CMA.

Prior to that, the respondent had fallen ill. In 2011, he was examined at the Aga Khan University Hospital, Nairobi with results indicating suggestive tongue malignancy, possibly carcinoma, with left

node metastasis. The Hospital recommended further treatment in a Centre with multi-disciplinary Head and Neck Oncology team in the United Kingdom. He was accordingly treated in the United Kingdom and advised to attend clinic for checkups twice a year for five years consecutively.

According to the respondent, the applicant was fully aware of his health condition as through an email of 20th November, 2015, it undertook to cover his medical bills up to the end of June, 2016. On 28th May, 2015, James Cook University Hospital reminded the respondent to attend a checkup which he accordingly complied by travelling to the UK.

When the respondent relied on these reasons to apply for condonation at the CMA, the mediator was not amused and therefore dismissed the application. On revision in the High Court, Gwae J, was convinced that the respondent sufficiently proved his sickness by attaching medical chits. He concluded that the respondent had established sufficient reasons for the delay and thus, granted him thirty (30) days within which to file a dispute at the CMA.

In the affidavit in support of the notice of motion, Wilfred Mawala amplified the grounds of revision, thus: in proving delay to institute a

labour dispute, the respondent included correspondences which were not within the delayed time; the reasons for non-renewal of the contract and non-payment of terminal benefits defeated each other; reasons given in proving illness were outdated and irrelevant; unsigned medical appointment letter was relied on to prove illness; and despite being issued with two visa in March and September, 2016 whose validity expired in December, 2016, the respondent failed to give reasons for the delay to lodge a dispute at the CMA.

When the matter was brought before us for hearing, Messrs. Wilbard John Massawe and Harun Idd Msangi, learned advocates, appeared for the applicant and the respondent, respectively, and expressed their readiness to proceed with hearing of the matter. Having regard to the nature of the dispute, we directed parties to address us on competency of the application before us. On that account, the rival advocates made oral submissions each supporting his respective case.

Mr. Massawe urged us to exercise revisional powers in quashing the High Court decision on the ground that there was an erroneous evaluation of the evidence on record as the High Court Judge failed to abide by the applicable guidelines on how to exercise the court's discretion in applications for extension of time.

He submitted that this Court is fully vested with jurisdiction to grant the orders sought in view of Article 117 of the Constitution of the United Republic of Tanzania, 1977 (the constitution) which provides that a law enacted by the Parliament or by the House of Representatives of Zanzibar, may make provisions stipulating procedure for lodging appeals to this Court, the time and grounds for lodging such appeals and the manner in which such appeals shall be dealt with.

He contended that on the authority of that article, the Parliament enacted the Labour Institutions Act, Cap 300 R.E. 2019 (the LIA) which under section 57, permits disgruntled parties to proceedings in the High Court, Labour Division, to prefer appeals to this Court on a point of law only. He therefore contended that as the applicant is blocked to appeal on factual issues, the only remedy available to it is to challenge the High Court decision by way of revision.

In a bid to convince us that a party to the proceedings in the High Court may invoke the revisional jurisdiction of the Court in matters which are not appealable, the learned counsel relied on this Court's decisions in **Muhimbili National Hospital v. Constantine Victor John**, Civil Application No. 44 of 2013 (unreported) and **Halais Pro-Chemie v. Wella A.G** [1996] T.L.R. 269.

Mr. Massawe quoted the definition of *"facts"* from **Mitra's Legal & Commercial Dictionary**, Fifth Edition and **Oxford Dictionary of Law**, Seventh Edition, and implored us to accept that the term refers to an event or state of affairs known to have happened or existed. On that basis, he asserted that the applicant challenged the High Court decision on pure issues of facts and therefore its only avenue to this Court is through revision.

He drew our attention to page 21 of the judgment in **Patrick Magologozi Mongella v. The Board of Trustees of the Public Service Social Security Fund**, Civil Application No. 342/18 of 2019 which defined *"matter of fact"* to mean "which is to be ascertained by the senses, or by the testimony of witnesses describing what they have perceived".

The learned counsel for the applicant asserted that the grounds of revision in this case are similar to those in the case of **Muhimbili National Hospital** (supra) and to that end, averred that it was opportune for the Court to exercise its powers under section 4 (3) of the AJA and revise the decision of the High Court.

Mr. Massawe distinguished this case from the decisions made in **Patrick Magologozi Mongella** (supra) and **Regina Moshi v. The**

Board of Trustees of the National Social Security Fund (NSSF), Civil Application No. 457/18 of 2019 (unreported) alleging that in those two cases, the Court was called upon to re - assess and re - appreciate the evidence on record whereas in this matter, it is moved to see whether the reasons given by the respondent in the application for condonation were sufficient for extension of time.

Further, the learned counsel submitted that the Court decisions in **Patrick Magologozi Mongella** (supra) and **Regina Moshi** (supra), did not change its stance in **Muhimbili National Hospital** (supra). In his view, the two cases improved the Court's position in **Muhimbili National Hospital** (supra) which was decided earlier.

Mr. Massawe submitted that finding the two decisions to be a departure from the viewpoint established in **Muhimbili National Hospital** (supra), would be a direct violation of the decision in **Arcopar (O.M) S.A v. Harbert Marwa and Family Investments Co. Limited and 3 Others**, Civil Application No. 94 of 2013 (unreported).

On the other hand, Mr. Msangi, challenged competency of the application on the ground that it was wrongly brought by way of revision instead of appeal. He contended that the present case is distinguishable from the facts in **Muhimbili National Hospital** (supra) allegedly

because in extending time to the respondent, the High Court exercised its discretion judiciously and on purely factual issues.

The learned counsel for the respondent asserted that as a result of extending time to the respondent, the impugned decision of the High Court did not cause any miscarriage of justice to the applicant who has the right of appearing in the CMA and defend its position of terminating the respondent's employment.

In rejoinder, Mr. Massawe reiterated his earlier submissions and invited the Court to hold that it was vested with requisite jurisdiction to entertain the application.

Having heard the learned counsel for the rival parties, the question for determination is whether this Court is vested with revisional jurisdiction to entertain this application.

Jurisdiction is the authority or mandate which enables a court to decide a matter before it. It flows from the constitution, statute or both and is a fundamental issue to be addressed at the earliest opportunity. The powers of the Court in revision initiated by the parties are set out in section 4 (3) of the AJA which specifically provides that:

> *"4(3) Without prejudice to subsection (2), the Court of Appeal shall have the power, authority*

and jurisdiction to call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings of the High Court."

The manner for institution of revision is stated under rule 65 of the Rules. What is clear from the above provision of the AJA and the Rules is that the Court has wide powers in its exercise of revisional jurisdiction. However, there are some limiting factors in respect of those powers.

In **Transport Equipment Ltd V. Devram P. Valambhia** [1995] T.L.R. 161, it was held that the appellate jurisdiction and the revisional jurisdiction of the Court are, in most cases, mutually exclusive: if there is a right of appeal then that right has to be pursued, except for sufficient reason amounting to exceptional circumstances, there cannot be resort to revisional jurisdiction.

In **Felix Lendita v. Michael Longidu**, Civil Application No. 312 of 2017 (unreported), we referred to our earlier decisions in **Transport Equipment Ltd** (supra); **Moses J. Mwakibete v. The Editor-Uhuru, Shirika la Magazeti ya Chama & Another** [1995] T.L.R. 134; **Halais**

Pro-Chemie (supra), **M/S NBC Limited v. Salima Abdallah & Another**, Civil Application No. 83 of 2001 (unreported) and **Kezia Violet Mato v. National Bank of Commerce & 3 Others**, Civil Application No. 127 of 2005 (unreported), which addressed the jurisdiction of the Court on revision and concluded that:

> *"According to the law therefore, where there is a right of appeal the power of revision of this Court cannot be invoked. Such powers are exercised in exceptional circumstances. The question that follows is; has the applicant shown any exceptional circumstances to warrant this Court to exercise its revisional powers while he has a right of appeal?"*

Whereas the cases listed above addressed revisional jurisdiction of the Court generally, the dispute before us emanates from termination or expiration of the respondent's employment and therefore, it is a labour dispute. Section 57 of the LIA bars appeals to this Court from proceedings in the High Court, Labour Division except on a point of law only.

The issue before us largely depends on the interpretation of section 57 of the LIA which regulates the manner of challenging decisions of the High Court in labour matters. Luckily, the same is not a

virgin land as it has been traversed before and received judicial interpretation in several cases including **Chama Cha Walimu Tanzania v. Attorney General**, Civil Application No. 151 of 2008 (unreported), wherein the applicant filed a motion for revision of the decision of the High Court-Labour Division, which issued an injunction against a planned strike of teachers countrywide. The Court took the view that:

> *"It is settled law that except under exceptional circumstances a party to the proceedings in the High Court cannot invoke the revisional jurisdiction of this Court as an alternative to the appellate jurisdiction of the Court, unless it is shown that the appellate process had been blocked by judicial process."*

In **Muhimbili National Hospital** (supra), the applicant moved the Court to revise a decision of the High Court, Labour Division, on two factual grounds. Disposing of the matter based on counsel's submissions, the Court referred to its earlier decision in **Halais Pro-Chemie** (supra) and ruled that:

> *"Having considered the arguments made by the learned counsel for the applicant, we agree with Mr. Vedasto that since by virtue of the provisions of section 57 of the Act, the applicant is barred*

from appealing against the findings of the Labour Court on matters of fact, the available remedy for it was to invoke revisional powers of the Court...."

The decision in **Muhimbili National Hospital** (supra) was subsequently considered in **Patrick Magologozi Mongella** (supra) wherein at page 11 we emplaned that:

*"...this application for revision is not novel. We encountered an analogous matter in **Muhimbili National Hospital** (supra) where we took the view that an applicant who could not appeal on a finding of the Labour Court on matters of fact could apply for revision of the decision. **However, in that decision we did not specifically interrogate and determine whether it is within the ambit and parameters of the Court's revisional jurisdiction to re-assess or re-appreciate the evidence on record so as to come up with its own findings."** [Emphasis added)*

Having made that observation, we addressed ourselves on the ambit and parameters of the Court's revisional authority and concluded at page 20 of the typed ruling, that:

"In view of the foregoing, we are decidedly of the opinion that the Court's revisional authority

under section 4 (3) of the AJA cannot be invoked for the purpose of dealing with purely matters of fact, which were allegedly decided wrongly by the Labour Court. Revisional power is not for a fact –finding expedition leading to interference with the findings of fact recorded by the CMA or the Labour Court. That power is not and cannot be equated with the power of reconsideration of all questions of fact as a court of first instance."

In fine at page 21 of the typed decision in **Patrick Magologozi Mongella** (supra), we surmised that:

"Concluding on the first issue, we are satisfied that the Court has no authority under section 4 (3) of the AJA to consider and determine pure matters of fact which cannot be entertained in an appeal made under section 57 of the Act."

Our decision in the above stated case did not end up the journey on judicial interpretation of section 57 of the LIA. It simply turned the page. In **Regina Moshi** (supra), we were confronted with an application for revision of the decision of the High Court, Labour Division which confirmed the CMA decision that found the employee's termination to have been substantively and procedurally fair.

In that case, we entrained our decisions in **Muhimbili National Hospital** (supra) and **Patrick Magologozi Mongella** (supra) while declining the applicant's temptation enjoining the Court to re-assess and re-appreciate the evidence on record which among others, included a cheque that was allegedly handled negligently and or fraudulently.

In discerning the revisional powers of the Court, we adopted the mischief rule or intentionalist approach to establish the legislative intent and figured out the mischief and flaw that section 57 of the LIA intended to cure which is to limit the scope of appeals to this Court. We reasoned out that, labour disputes passes through three stages before landing in this Court at the fourth stage, namely: mediation and arbitration at the CMA and revision in the High Court, Labour Division. We also pointed out that the legislature could not have intended that section 57 of the LIA be circumvented by invoking the Court's revisional jurisdiction to re-assess the evidence.

It is clear from the above decision in **Regina Moshi** (supra) that, when an applicant moves the Court in the form of revision against decision of the High Court, Labour Division, his prayer would be to revise the orders that may appear factually inaccurate, incorrect or unjust. As can be seen from the chain of authorities referred to herein

above, the authority of the Court for matters arising from the Labour Division is to entertain only appeals and on points of law only.

In our view, preferring revision to this Court on a labour related matter decided by the Labour Division is tantamount to circumventing the clear provisions of section 57 of the LIA which intended to bar further re - opening of factual issues by the Court of Appeal as correctly held in **Regina Moshi** (supra).

We hasten to add that, pursuant to section 51 of the LIA and section 94 of the Employment and Labour Relations Act, Cap 366 R.E 2019 (the ELRA), the High Court, Labour Division, has unlimited and exclusive original and appellate jurisdiction over any employment or labour matter falling under the common law, tortious liability, vicarious liability or breach of contract. Being a specialized court established to determine disputes related to employment and labour relations, it is statutorily set to exhaust all factual issues which will end up at that court.

In the present matter, it is not disputed that the grounds upon which the Court is moved to call for and examine the records of the High Court in Labour Revision No. 24 of 2017 are pure matters of facts as can be gathered from the affidavit supporting the notice of motion. It was

submitted by the applicant's counsel that those grounds do not require re-assessment and re-appreciation of the evidence on record hence distinguishable from **Patrick Magologozi Mongella** (supra) and **Regina Moshi** (supra).

We think Mr. Massawe's assertion is out of context because, even assuming for purposes of discussion, that this Court was vested with revisional jurisdiction to entertain labour disputes, faced with questions of fact arising from the CMA and the Labour Division proceedings such as payment or non-payment of terminal benefits or reasons for condonation as in the instant case, it could not avoid to reflect in its decision, detailed analysis on the findings of the lower court supported by reasons, on all issues dealt with, as well as the contentions put forth and pressed by the parties during the hearing of such revisional proceedings. In so doing, the Court would be bound to re-examine, re-assess and re-appraise the evidence on record upon which the High Court allowed condonation. We therefore find that our decisions in **Patrick Magologozi Mongella** (supra) and **Regina Moshi** (supra) are applicable to the instant application.

This is to say that in all spheres, this application for revision on a labour related dispute cannot be entertained by this Court as it is not

vested with jurisdiction to do so. Against this backdrop, it should be noted that as it is for an appeal, the right of revision is neither natural nor inherently attached to the litigation. It is a statutory right regulated in accordance with the law in force at the relevant time and subject to judicial interpretation by superior courts.

Lastly, *albeit* in passing, we think it is opportune to address the applicant's counsel contention that declining to go along with the approach in **Muhimbili National Hospital** (supra) transgresses our stance in **Arcopar (O.M) S.A** (supra). We think this proposition is untenable and the opposite is true.

In that case, this Court was confronted with at least two parallel decisions on the same subject and addressed a question on what should it do when presented with conflicting decisions of its own on the same point. In a bid to anatomize the issue, the Court discussed the doctrine of precedent *(stare decisis)* by observing its importance in the administration of justice, cited local and foreign decisions on the subject and maintained that, where two or more decisions of this Court cannot be reconciled, the more recent and the more consistent with general principles ought to prevail. Justifying its standpoint, the Court pointed out that:

"...following the most recent decision, in our view, makes a lot of legal common sense, because it makes the law predictable and certain and the principle is timeless in the sense that, if, for instance, a full Bench departs from its previous recent decision that decision would prevail as the most recent. On that score, we agree with Mr. Kesaria, Mr. Peter and Mr. Shayo that, where the Court is faced with conflicting decisions of its own, the better practice is to follow the more recent of its conflicting decisions unless it can be shown that it should not be followed for any of the reasons discussed above..."

Applying the above stated guideline, we are enjoined to follow **Patrick Magologozi Mongella** (supra) and **Regina Moshi** (supra) over **Muhimbili National Hospital** (supra). Our choice is purely on principle, that the latter case was decided earlier than the other two cases and also on the strength that in the latter case, this Court did not specifically interrogate and determine whether it had the authority to entertain factual issues or matters of fact on a finding of the Labour Division of the High Court so as to come up with its own findings**.** The said issue was discussed exhaustively in **Patrick Magologozi Mongella** (supra) **and Regina Moshi** (supra).

On that note, and for the reasons stated above, we wrap up that the application is incompetent and deserves to be struck out, as we hereby do. Since the matter arises from a labour dispute, we desist from making an order for costs.

DATED at **ARUSHA** this 30th day of August, 2023.

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The ruling delivered this 31st day of August, 2023 in the presence of Wilbard Massawe, learned advocate for the applicant and Haruni Msangi, learned advocate for the respondent, is hereby certified as a true copy of the original.

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL