IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: LILA, J.A., LEVIRA, J.A. And MURUKE, J.A.)

CIVIL APPEAL NO. 622 OF 2022

SOUTHERN SUN HOTELS TANZANIA LIMITED..... APPELLANT

VERSUS

THE LABOUR COMMISSIONER.....RESPONDENT

(Appeal from Judgment and Decree of the High Court of Tanzania, (Dodoma District Registry), at Dodoma)

(Kagomba, J.)

dated the 10th day of December, 2021
in
Labour Appeal No. 1 of 2021

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JUDGMENT OF THE COURT

11th & 28th December, 2023

LEVIRA, J.A.:

The appellant, Southern Sun Hotel (T) Limited was not satisfied with the decision of the High Court of Tanzania at Dodoma (the High Court) in Labour Appeal No. 1 of 2021. The said decision dismissed the appellant's appeal against the decision of the Acting Labour Commissioner, one Andrew H. Mwalwisi that confirmed the compliance order made by the Labour Officer one Amina Mmbaga to be lawful and binding upon the appellant. As a result, the appellant has preferred the current appeal against the said decision of the High Court.

On 14th day of January,2021 the appellant received a letter with reference No. 1/10/4/45/21/03 dated 13th January, 2021 from the Principal Labour Officer acting for Reginal Labour Officer, Dar es Salaam with a heading: *"ORDER TO APPER BEFORE A LABOUR OFFICER" made under Regulation 11".*

The said order required the appellant to appear to the labour office located along Bibi Titi Mohamed Road, on 20th January, 2021 at 08:30am for questioning or explanation regarding compliance with labour laws or complaint lodged by the appellant's employee. It further required the appellant to appear with contract of service of that employee, payroll for month of March to December, 2020, as well as NSSF and WCF Returns for the month of march to December, 2020.

Moreover, on 2nd February, 2020 the said Principal Labour officer (the labour officer) issued the appellant with a compliance order with Reference No. DAR/U.10/4/2021/06 made under Regulation 10 (1) and the same was received by the appellant on the same date. The said labour officer indicated categorically that, she issued the said order in exercise of the powers conferred upon her by the provisions of section 45 of the Labour Institutions Act, Cap 300 R.E. 2019 (the LIA) requiring the appellant to pay unpaid remuneration (arrears) to twenty-six (26)

employees as prescribed on the attached sheet marked as "Annexure "A" within thirty (30) days from the date of receipt of the order. Dissatisfied with that order, the appellant on 25th February, 2021 lodged objection to compliance order to the Labour Commissioner on the grounds that: **One,** the appellant closed her business from the end of March, 2020 and had remained closed to the date of the objection due to the outbreak of COVID – 19 pandemic. Despite that she paid her employees 20 % of their salaries monthly and medical cover during this period yet no employee had to attend to work. **Two,** that the foreign tourists who were the backbone of the hotel business (the source of income) could not travel due to Covid – 19; as a result, the appellant could not gain the expected income. **Three,** that the COVID – 19 pandemic frustrated the Hotel's contracts with its employees. As a consequence of the frustration, the compliance order was plainly incapable of being implemented. **Four,** that there was a labour dispute pending in the Commission for Mediation and Arbitration (the CMA); namely, Labour Dispute No. CMA DSM/ILA/673/20 over the same claim for payment of full salaries filed by 56 employees of the appellant. Therefore, the implementation of the compliance order would adversely prejudice the proceedings; and **fifth** that, the appellant was under discussion of a mutual separate arrangement for payments as

liquidation of the Hotel was imminent and that would be the end of both the appellant and the employees.

The appellant's objection was considered by the Acting Labour Commissioner on ground that the compliance order was issued after the inspection by the Labour Commissioner of the appellant's organization on 2nd February, 2021; that the decision to close the hotel and let the employees stay home during COVID – 19 outbreak was not a decision based on mutual agreement between the employer and 26 employees; that it is not stated whether the 26 employees were among the 56 employees who filed complaint at the CMA; that it was not established in the stated submitted objection whether the compliance order was issued before or after the alleged filed Labour Dispute No. CMA/DSM/ILA/673/20; and that the appellant did not advance good reason for the said Acting Labour Commissioner to vary the compliance order issued by the Labour Officer. Eventually, having considered those grounds the Acting Labour Commissioner ordered the appellant to comply with the order of the Labour Officer with immediate effect within thirty (30) days of the date of receipt of that order, that is on 16th April, 2021. Again, the appellant was aggrieved by the decision of the Acting Labour Commissioner and thus unsuccessfully appealed to the High Court and hence, the current appeal as intimated above.

In the present appeal, the appellant has raised seven (7) grounds which for convenience purposes are paraphrased as follows:

1. That, the High Court Judge erred in law in holding that the issuance of the compliance order under a provision which does not give the Labour officer power to issue the same was a trivial error.

2. That, the High Court Judge having correctly held that section 45 of the LIA used by the Labour Officer to issue a compliance order to the appellant does not give such powers and regulation 10 (1) of the LIGR used to communicate the compliance order to the appellant does not conform with section 46 (1) of the LIA erred in holding that the compliance order was valid.

3. That the High Court Judge having correctly held that section 44 (1) of the LIA names office bearers to whom the Labour Commissioner can delegate powers, but the Acting Labour Commissioner is not among them, erred in holding that powers were lawfully delegated to the said Acting Labour Commissioner and his order confirming the compline order was valid and binding.

4. That the High Court Judge having agreed that impossibility of performance of contract excuses performance of legal obligations at least for duration of impossibility misdirected himself in law in holding that the law on suspending of the employment contracts was not observed.

5. That the High Court Judge failed to distinguish between impossibility of performance of contract and inability of employer to provide his hired employees with work thereby wrongly relying on procedures under section 38 (1) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] which are applicable in retrenchment.

6. That, as the compliance order was issued without being a complaint in writing from the 26 employees mentioned in the said order as mandatorily required by the laws, the High Court Judge misdirected himself in holding that both the compliance order and the order of the Acting Labour Commissioner confirming it were validly issued and were binding on the appellant.

7. That, the High Court Judge wrongly treated the case before him as a case of the High Court while it was a labour case of the Labour Division of the High Court.

At the hearing of the appeal, the appellant was represented by Mr. Waziri Mchome, learned advocate, whereas the respondent had the services of Ms. Jenipher Kaaya, learned Senior State Attorney assisted by Mses. Pauline Mdendemi and Lilian Machagge, together with Mr. Fred Nyaupumbwe, all learned State Attorneys. Both parties filed their written submissions for and against the appeal.

Mr. Mchome commenced his submission by adopting the appellant's written submissions filed in Court on 15th December, 2022 as part of his oral arguments in support of the appeal. Nevertheless, he highlighted and clarified few points starting with the respondent's argument at page 5 of the written submissions which opposed the appellant's complaint at paragraph 4.1.1 found at page 3 of her written submissions on account that, it was a new ground as the same was not raised and determined by the High Court. In that paragraph the appellant complained as follows:

> *"4.1.1. the appellant was summoned to the Labour Officer one, Amina Mmbaga through Form LAIF. 1 which is at page 1 of the record of*

appeal. Form LAIF.1 cites section 45 (1) of the Labour Institutions Act as the provision under which the appellant was summoned to the Labour Officer. Where an employer is summoned under that provision, the subsections thereto state the powers under that section including instituting proceedings in the Resident Magistrate's Court in respect of any contravention of labour law and appearing and prosecuting in the name of the Labour Officer under section 45 (1) (i) of the Labour Institution Act, [cap 300, RE 2019]."

Initially, Mr. Mchome argued that the above quoted ground was not new because the first ground of appeal before the High Court was that the Acting Labour Commissioner had no powers under the law to make the decisions/ orders he made. In the circumstances he argued, the said order was illegally issued. However, upon reflection, he admitted that the said ground under para 4.1.1 was a new ground but he urged us to consider it because it is a point of law.

He invited us to consider that the compliance order issued by the Labour Officer was given without written complaint from the employees. Therefore, he added, the question that follows is, in respect, which complaint did the Labour Officer issued the compliance

order? In support of his argument, he cited a persuasive decision of the High Court, Labour Division in **Labour Officer v. Operation Manager MMG Gold Ltd,** Execution No. 17 of 2020 (unreported), in which, while construing section 46 (1) of the ILA the High Court found that the contents of the said provision presuppose that for the Labour Officer to act, there should be a written complaint from the complainant. He thus argued that, in the instant appeal, there were no written complaints filed by the 26 employees to the Labour Officer which was supposed also to be served on the employer so as to enable her to give explanation. On the contrary, he said, the order to appear from the Labour Officer was the only document served on the appellant followed by the list of employees at page 3 of the record of appeal. Mr. Mchome was surprised, how did the Labour Officer arrive at the amount of money which the appellant was required to pay to the listed employees. He referred us to page 2 of the reply submissions by the respondent in which at paragraph 1.1 it is submitted that:

> *"The Principal Labour Officer after receiving complaints from employees of the appellant summoned the appellant for questioning at the offices of the respondent".*

Mr. Mchome argued further that the issue is which complaints? Also, he took us through paragraph 1.2 of the respondent's reply written submissions where it is stated:

> *"The said arears were calculated basing on the salary scale of each employee which totals Tshs. 170,980,800 which is 80 % of renumerations of Twenty – six (26) employees who were working in appellant's hotel in different positions from April, 2020 to January, 2021."*

He highlighted further that at paragraph 1.4 of the said reply written submissions, the respondent stated that:

> *"The law does not require the Labour Officer to disclose the source of information considering that the 26 employees were still working with the appellant. Disclosure of the source of information would have jeopardized the existing employment contracts of the said 26 employees to the extent of making the working condition difficulty and in some circumstances loss of their jobs".*

Mr. Mchome argued that the above response/ argument was defeated as the said Labour Officer ended up issuing a compliance order and listing the names of the appellant's employees. According to him,

under the circumstances, it was not proper to disclose them as the Labour Officer did. Finally, he urged us to allow the appeal and quash the decision of the High Court.

While responding to the question put on him by the Court, Mr. Mchome stated that, it is true that there were two forms in which the appellant's employees presented their complaints. The first one was by lodging their complaints before the CMA and the second by complaining to the Labour Commissioner.

He added that the appellant brought this fact to the attention of the Labour Officer but the response was that there was no proof that the same complaint was as well presented before the CMA. He argued that the response of Labour Officer was not proper because the matter was before the CMA and thus, she was not supposed to proceed with the matter/complaint presented before her. More so as the dispute before the MCA was of the year 2020 while the compliance order was made in 2021. Thus, the Labour Officer was not supposed to proceed with the matter before her because it was preceded by the matter before the CMA.

Mr. Mchome cemented his arguments by stating that neither the Labour Commissioner nor the Labour Officer did pay inspection visit to

the appellant's premises as alleged at paragraph (i) of the compliance order. He insisted that the Labour Officer only summoned the appellant as it appears in the record of appeal in respect of one employee. He thus questioned the validity of the compliance order. Basing on his submission, Mr. Mchome reiterated his prayer urging us to allow the appeal.

Responding to the appellant's counsel submission, Ms. Mdendemi first adopted the respondent's reply written submissions as part of her oral submission before the Court. She went on to argue that the appellant's claim that there was no written complaint submitted to the Labour Officer before issuance of compliance order is baseless. This, she said, is because under section 46 (1) of LIA, a Labour officer who has a reasonable ground to believe that an employer has not complied with the provision of the labour laws may issue a compliance order as it was the case in the present matter. According to her, the law does not require that there must be a written complaint as submitted by the counsel for the appellant, even an oral complaint from the employees is sufficient to move the Labour Officer to issue a compliance order as stated in the case of **Labour Officer** (supra) cited by the counsel for the appellant. She however submitted that since the said decision is of

the High Court, it does not bind the Court. Therefore, she urged us to dismiss this ground of appeal.

Regarding the validity of compliance order issued by Labour Officer, Ms. Mdendemi argued that although the confirmation of the said order by the Acting Labour Commissioner at page 11 of the record of appeal indicated that it was issued after the inspection visit by the Labour Commissioner at the appellant's organization, in reality, the Labour Officer received complaints orally and she summoned the appellant through Form LAIF 1. She added that, the record of appeal does not suggest that there was visitation of the Labour Commissioner or Officer to the appellant's hotel.

As regards the provision under which the compliance order was issued, Ms. Mdendemi agreed right away that the compliance order was issued under a wrong provision, as the same was supposed to be issued under section 46 of the LIA. However, she argued that what happened was a non-citation of a proper provision which in her understanding, did not make the compliance order unauthentic or genuine. According to her, this is because the Labour Officer had power to issue that order under the law. Therefore, she agreed with the High Court Judge that

the anomaly was curable under the overriding objective principle as she could not see how the appellant was prejudiced in the circumstances.

In addition, Ms. Kaaya submitted regarding the two forums under which the appellant's employees sought their rights. She admitted existence of the dispute at the CMA and the complaint presented before the Labour Officer. She went on to submit that the CMA Award found from page 119 through 229 of the record of appeal was tendered under affidavit before the High Court as additional evidence. Therefore, she urged us to consider it particularly at page 201 of the record of appeal where the names of those who complained at the CMA were mentioned. She compared those names with the 26 names of complainants mentioned by the Labour Officer and argued that none of them resembled those at the CMA. As a result, she said the present matter does not determine the rights of employees whose rights were determined at the CMA. She acknowledged the fact that the appellant's employees instituted a labour dispute before the CMA before complaining to the Labour Officer. She argued that the evidence of Award of the CMA shows that there was a complaint which made the Labour Officer to know that, there was a complaint from the employees apart from the ones presented by a single employee who communicated his complaint to her. However, she admitted that the document

required by the Labour Officer from the appellant was of one employee and not the employees.

She as well acknowledged that the Acting Labour Commissioner indicated in the confirmation of the compliance order that the Labour Commissioner paid a visit to the appellant's organization but she said, it was a typing error, as she meant the Labour Officer.

Regarding powers of the Labour Officer to issue compliance order, Ms. Kaaya submitted that it was proper for the Labour Officer to issue the compliance order to the appellant because she had authority to issue such orders under the law despite the fact that the same was issued under a wrong provision of the law. She urged us to hold that none citation of the proper provision of the law is not fatal under the circumstances of this matter. She concluded by praying that the appeal be dismissed for lacking in merit.

In rejoinder, Mr. Mchome reiterated his submission in chief and emphasized on three points, to wit, **first**, that the Labour Officer did not summon the appellant to submit the employment contracts of 25 out of 26 employees whom he was required to comply with the order of the Legal Officer. He was surprised how then the compliance order mentioned the names of 26 employees? **Second**, regarding existence

of two complaints before the CMA and the Labour Officer, Mr. Mchome clarified that the Labour Officer did not say that those are different people as alleged by the counsel for the respondent. **Third**, regarding visiting the appellant's organization by the Labour Commissioner, Mr. Mchome insisted that the compliance order was issued under section 45 (1) (b) of the LIA and it did not state that there was inspection visit. He challenged the learned State Attorney's assertion that it is possible that the Labour Commissioner visited the appellant's organization and submitted that the Court cannot act on assumptions. Finally, Mr. Mchome maintained his initial prayer that the appeal be allowed.

We have dispassionately considered the rival submissions by the parties' counsel before us, the ground of appeal, written submissions by the parties and the entire record of appeal. The appeal raises various issues which we do not intend to reproduce all of them herein except the issue regarding the validity of the compliance order which, in our view, is decisive; whether the compliance order issued to the appellant by the Labour Officer under section 45 of ILA on 2nd February, 2021 and confirmed by the Acting Labour Commissioner on 13th April, 2021 was valid. As we have indicated above, the parties to this appeal have varied arguments concerning the compliance order issued to the appellant by the Labour Officer. Their arguments are based on the

interpretation and applicability of section 45 of ILA under which the compliance order was issued.

We note that the said section does not confer powers to the Labour Officer to issue compliance order, but it provides for the general powers of the Labour Officer to order any person to appear before him at a specified date, time and place. This fact is partly admitted by the counsel for the respondent. However, she argued that although the compliance order was supposed to be issued under section 46 (1) and not 45 of the LIA, as correctly argued by the counsel for the appellant in our considered opinion, failure to cite the said section, she argued, did not prejudice the appellant taking into consideration that the Labour Officer had powers to issue that order. Section 46 (1) of the LIA provides that:

> *"A Labour Officer who has reasonable grounds to believe that an employer has not complied with a provision of the labour laws may issue a compliance order in the prescribed form."*

The counsel for the respondent supported the decision of the High Court in respect of this ground in the sense that the anomaly of not citing the proper provision conferring powers to the Labour Officer is curable under the overriding objective principle. We shall let the

relevant part of the High Court decision at page 365 of the record of appeal to speak for itself hereunder:

> *"The power to issue compliance order as correctly submitted by the appellant's advocate, is conferred to the Labour Officer under section 46 and not 45 as it was wrongly cited in the Compliance Order. None of the subsections under section 45 of LIA confers powers to the Labour Officer to issue compliance order.*

However, at page 369 of the record of appeal having considered the overriding objective principle, the High Court Judge deliberated the issue of wrong or none citation of the proper provision where he held that wrong citation of the provision of the proper Act, as is the case in the present matter, is not fatal for as long as the power to issue such a compliance order does exist in the law cited, which is the LIA. He therefore held that the compliance order signed by the Labour Officer was a valid order.

We wish to state that although the High Court Judge relied on overriding objective principle to hold that failure to cite proper provision conferring powers to the Labour Officer was not fatal, we think, he ought to have considered the fact that jurisdictional issues are not among the technicalities envisaged under Article 107 A (2) of the

Constitution of the United Republic of Tanzania, 19977 which he referred. We are of the settled view that a mere mentioning of the proper law as it was decided in the present matter, is not sufficient to confer powers to the Labour Officer to issue compliance order to the appellant, otherwise there would be no need of having mandatory provisions of the law. We say so because provisions of the law, particularly, those which confers powers on a particular person, as in the current matter, are not mere provision that can be treated any how because they go deep to the root of the matter under which those powers were exercised. In other words, they must be complied with. Much as we appreciate the flexibility brought by the overriding objective principle in rendering justice, we should as well, not forget that the said principle does not provide answers to every situation. In **Mandorosi Village Council and 2 Others v. Tanzania Breweries Limited and 4 Others,** Civil Appeal No. 66 of 2017 (unreported), the Court had this to say:

> *"Regarding the overriding objective principle were are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case. This can be gleaned from the objects and reasons of introducing the*

principle under section 3 of the Appellate Jurisdiction Act [cap 141 R.E 2002] as amended by the written laws (miscellaneous amendments) (No.3) Act No. 8 of 2018, which enjoins the courts to do away with technicalities and instead, should determine cases justly".

In the light of the above decision of the Court, we find and hold that it was necessary for Labour Officer to cite a proper provision of the law, that is section 46 (1) of LIA which gives her powers to issue compliance order, so as to make it valid, otherwise, the said order was null and void – see: **Hashimu Athumani and Another v. Republic,** Criminal Appeal no. 260 of 2017 (unreported).

Having made a finding that the order of the Labour Officer was invalid, the question that follows is whether the confirmation of the same made by the Acting Labour Commissioner can stand under the circumstance. In answering this issue, we need first to consider whether the Acting Labour Commissioner was lawfully delegated powers of the Labour Commissioner which enabled him to confirm the compliance order made by the Labour Officer and whether the said confirmed order was lawful and binding on the appellant. The provision of the law that gives the Labour Commissioner mandate to delegate his powers is section 44 (i) of the LIA. It reads:

"The Labour Commissioner may, in writing delegate to the Deputy Labour Commissioner, Assistant Labour Commissioner or any Labour Officer, any of the Commissioners' powers, functions and duties."

The above quoted provision clearly stipulates that the delegation of the powers of the Labour Commissioner may be done in writing to the persons mentioned therein. A closer reading of that provision does not provide plainly the Acting Labour Commissioner to be among those people. However, for the sake of argument, though is not what we are saying, the Acting Labour Commissioner falls in the category of "any Labour Officer" mentioned in that provision, still the delegation of the powers of the Labour Commission on him required to be in a writing which is not the case in the present matter. It follows therefore that since there was no written proof that the Acting Labour Commissioner was properly delegated the powers of the Labour Commissioner, in our considered view, legally he had no powers to confirm the compliance order made by the Labour Officer which however, we have already ruled out that it was invalid. In the circumstances, it means that the Acting Labour Commissioner acted on invalid compliance order of the labour officer while himself had no power to confirm the said order. Therefore, it is as good as there was no compliance order binding the appellant in

the instant appeal for her to act upon. In **John Bosco Kazinduki v. The Minister for Labour and Another,** Civil Appeal No. 29 of 2021 (unreported); when the Court was dealing with an akin scenario, it had this to say:

> *"If, as now appears to be the case, the person who decided the reference to the Minister was not the Minister responsible for labour matters or his delegate, then the purported decision was not the decision of the Minister. It was no decision at all on the reference. It was null and void".*

Likewise, in the present matter, the purported Acting Labour Commissioner was not duly delegated the powers of the Labour Commissioner. Therefore, it cannot be said with certainty that while confirming the compliance order of the Labour Officer, he was discharging the duties of the Labour Commissioner. We think this is sufficient to dispose of this appeal as we have already decided that there was no valid compliance order by the Labour Officer to be confirmed and the one who purported to confirm it was not duly delegated the powers of the Labour Commissioner to do so.

However, in passing, we find it apposite to make an observation on the appellant's objection to the compliance order regarding the fact

that there was a pending matter before the CMA involving the appellant's employees. Existence of the labour dispute instituted by the appellant's employees at the CMA was not disputed by the parties. The only dispute was on the employees who instituted the same, whether they were the same who also complained to the Labour Officer. It is on record that the dispute before the CMA was instituted in the year 2020 while the complaint to the Labour Officer was lodged in 2021.

As a good practice having so informed, the Labour Officer ought to have stayed the proceedings so as to investigate the matter. In our view, the Labour Officer's response that the appellant did not state whether the 26 employees were among the 56 employees who filed a complaint at the CMA and that even the date of filing was not stated while the dispute No. CMA/DSM/ILA/673/20 was provided, was not justified. All in all, it should be noted that, if the matter could have succeeded at the CMA and before the Labour Commissioner, there could be two awards/decrees to be executed against the appellant which would be a chaos. Having so observed, we do not see the need to deal with other grounds of appeal.

In the final analysis, the present appeal is merited as the compliance order issued by the Labour Officer to the appellant was

invalid it having been made without proper authority. The same was confirmed by the Acting Labour Commissioner who was not properly delegated the powers to do so on behalf of the Labour Commissioner.

We therefore, allow the appeal and quash the proceedings and decision of the High Court. Having considered circumstances of this labour matter, we make no order as to costs.

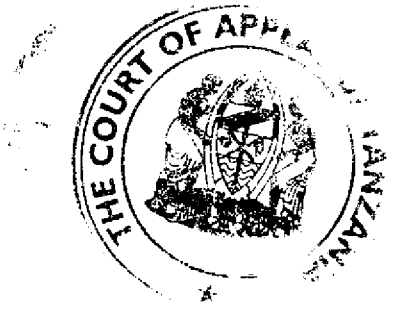
DATED at **DAR ES SALAAM** this 22nd day of December, 2023.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 28th day of December, 2023 in the presence of Mr. Francis Kamuzora, learned counsel for the Appellant and via virtual Court from High Court Dodoma, Ms. Agnes Makuba and Ms. Kumbukeni Kondo, both learned State Attorneys for the Respondent, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL