IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MWARIJA, J.A., GALEBA, J.A. And KENTE, J.A.)

CIVIL APPEAL NO. 42 OF 2020

GEITA GOLD MINING LIMITED.....APPELLANT

VERSUS

ANTHONY KARANGWA.....RESPONDENT

(Appeal from the Ruling and Order of the High Court of Tanzania, Labour Division at Mwanza)

(Rumanyika, J.)

Dated the 22nd day of October, 2019
In
Labour Revision No. 19 of 2019

JUDGMENT OF THE COURT

13th & 20th February, 2023

KENTE, J.A.:

The facts giving rise to this appeal are mostly not in dispute. Both parties are at one with each other that, the respondent Anthony Karangwa was employed as a technician by the appellant Company Geita Gold Mining Limited with effect from 28th May, 2007. However, on 15th February, 2017 he was terminated from service following the allegations of dishonesty and breach of trust in the performance of his duties. Dissatisfied, he successfully referred his grievances to the Commission for Mediation and Arbitration (hereinafter the CMA) which, after hearing the

parties, it held that, in all the circumstances of the case, the termination of the respondent's contract of service was both procedurally and substantively unfair. The respondent was, at the end of the day, awarded among other reliefs, monetary compensation equal to twenty two months remuneration. That decision was handed down by the CMA on 17th October, 2018.

As expected, the appellant was aggrieved by the decision of the CMA and, in terms of section 91 (1) of the Employment and Labour Relations Act, Chapter 366 of the Revised Laws (the ELRA), she preferred an application for revision to the Labour Court insisting that, the respondent's contract of service was fairly terminated both substantively and procedurally.

The appellant's application for revision was inadvertently registered in the District Registry of the High Court at Mwanza as Revision Application No. 92 of 2018 instead of the Labour Court. This prompted the respondent to raise a preliminary objection contending ***inter alia*** that, the said application was incompetent for being filed in the wrong register and, in broad sense, in a wrong court. In its decision of the preliminary objection which was not contested by the appellants, the High Court (Mdemu, J) sustained the preliminary objection and ruled in the following terms:

"As the applicant's counsel has conceded to the preliminary objections, the present application is hereby struck out with leave to refile. Laws relating to limitation must be observed. No order as to costs made. It is so ordered".

In view of the course that we have taken in this matter, it is important to note that, the above decision by Mdemu, J was delivered on 22nd February, 2019.

Following the above decision of the High Court and, still aggrieved by the award by the CMA in favour of the respondent, the appellant promptly preferred another application for revision which was registered as Labour Revision No. 19 of 2019. For the sake of exactitude, the said application was filed on 6th March, 2019.

However, going by the respondent's reckoning, this new application was time barred and, pursuant to that stance, a preliminary point of the objection to that effect was raised. The ground alleged by the respondent in support of the preliminary objection for which the learned High Court Judge seems to have fallen hook line and sinker, is that, contrary to section 91 (1) of the ELRA which prescribes the period of 42 days within which an aggrieved party may lodge an application for revision to the High

Court to challenge the decision of the CMA, a total of 150 days had already elapsed since the date of delivery of the impugned CMA award. On behalf of the respondent, it was argued that, the order by Mdemu, J was not accompanied with an unqualified liberty to bring a fresh application at any time as the learned Judge of the High Court had contemplated the limitation period provided for under section 91 (1) of the ELRA hence his unequivocal direction that, the law of limitation ought to be observed in bringing a fresh application.

Despite the appellant's gallant efforts of putting up stiff resistance to the respondent's preliminary points of objection, the learned Judge of the first appellate court was convinced that, the subsequent application for revision was indeed time barred. Predicating his decision on section 91 (1) (a) of the ELRA, the learned High Court Judge reasoned and finally concluded thus:

> *"It was not disputed that section 91 (1) (a) of the ELRA gives only 42 days. The central issue is whether the application was time barred. Whereas on record, the impugned award was issued on 17/10/2018, the instant application was lodged on 16/5/2019, i.e seven (7) months later (168 days far) by simple mathematics, with liberty to refile, this court having struck out the applicant's application No. 92 of 2018 on 22/2/2019.*

Like Mr. Lutehanga rightly argued, nothing remained. With greatest respect to Mr. Lugaila learned counsel, the limitation period available for refiling the application should not have accrued from the 22/2/2019 but from the very date of the award i.e 17/10/2018".

On the above premise, the learned Judge sustained the preliminary objection and dismissed the subsequent application filed by the appellant for being time barred.

Dissatisfied with the decision of the High Court, the appellant has come to this Court with a one-point memorandum of appeal. He is faulting the High Court Judge for holding that the fresh application which was filed after the first application was struck out, was barred by limitation.

In these proceedings, whereas Mr. Gregory Lugaila learned advocate appeared for the appellant, the respondent was represented by Mr. Kassim Gilla who was holding the brief of Mr. Erick Lutehanga but with leave to proceed. To get the work done, Mr. Gilla was assisted by Mr. Joseph Madukwa also learned advocate.

Submitting in support of the appeal, and having adopted the written submissions which he had earlier on filed in terms of rule 106 (1) of the Tanzania Court of Appeal Rules, 2009, Mr. Lugaila ardently contended

that, the second application for revision was not barred by limitation. He faulted the learned Judge of the first appellate court for not taking into account the provisions of section 21 (2) of the Law of Limitation Act, Chapter 89 of Revised Laws (the LLA) which provides for exclusion of the time during which the applicant has been prosecuting, with due diligence, another proceedings, whether in a court of first instance or in a court of appeal, when computing the period of limitation for any application, if such proceeding was prosecuted in good faith, in a court which, from the defect of jurisdiction as it were in the instant case, or other cause of a similar nature, is unable to entertain it.

According to Mr. Lugaila, and this was not seriously contested by Mr. Gilla, the appellant had no bad faith in prosecuting the first application which was struck out for being filed in a wrong court. Mr. Lugaila further submitted that, if the whole period for which the appellant was prosecuting the first application is discounted as provided for under section 21 (2) of the LLA, it will be apparent that the second application was filed within the prescribed timeline. Viewed from that perspective, it was the learned counsel's request that we allow the appeal, quash and set aside the ruling of the first appellate court and, in lieau thereof, he

urged us to remit the matter to the Labour Court for the application for revision to be heard and determined on merit.

Locking horns with Mr. Lugaila, Mr. Gilla submitted in the first place that, while striking out the first application, Mdemu, J had clearly and unambiguously stated that, the appellant was at liberty to file a fresh application but subject to the law of limitation. Accordingly, Mr. Gilla went on arguing that, it was not open for the appellant to file a fresh application without applying for extension of time which, according to the learned counsel, was the first and foremost step in the appellant's push towards his rights. The learned counsel was at pains to argue that, since the appellant had intended to challenge the award by the CMA and not the decision by Mdemu J, striking out the first application, the time within which to apply for revision must be reckoned from the date of the award and not the date when the first application was struck out. In support of his position, the learned counsel invited us to seek inspiration from the decision of the High Court (Ndunguru, J) in the case of **William Barton Mwakalile Vs. Director Vocational Education and Training Authority (VETA),** Misc. Labour Application No. 16 of 2019 (unreported) in which the learned High Court Judge relied on the decision of this Court in **East African Mines Limited Vs. Christopher Kadeo**, Civil Appeal

No. 53 of 2005 (unreported) to underscore the point that, for purposes of limitation, the prescribed period must be reckoned from the date of the complained decision.

With regard to section 21 (2) of the (LLA), Mr. Gilla submitted that, the above-cited law does not provide for automatic exclusion of the period spent by the intending applicant in prosecuting another proceeding either in the court of first instance or in the appellate court when computing the period of limitation for any application. In other words, according to Mr. Gilla, section 21 (2) of the LLA was not intended to give **carte blanche** to litigants to do as they liked without regard to the most respected laws of limitation. The learned counsel strongly contended that, the above-cited law required the appellant to apply for extension of time citing the period he had spent in court while prosecuting the application which was eventually struck out, as a cause of delay to apply for revision of the award by the CMA.

We have closely and anxiously given due consideration to the rival submissions made by the learned counsel. We will straight away deal with the sole issue in this case which is whether or not the fresh application for revision which was filed in the Labour Court twelve days after the first application was struck out, was time barred.

On this, it must unhesitatingly be said that, we are in agreement with Mr. Lugaila that, in view of the provisions of section 21 (2) of the LLA, the fresh application which was filed by the appellant, was filed within time. It is to be observed that, section 21 (2) of the LLA whose substance we have already paraphrased, is brought into play by section 46 of the same Act which provides thus:

> *"Where a period of limitation for any proceeding is prescribed by any other written law, then, unless the contrary intention appears in such written law, and subject to the provisions of section 43, the provisions of this Act shall apply as if such period of limitation had been prescribed by this Act".*

The above-cited provision takes us back to section 21 (2) of the same Act which, as opposed to Mr. Gilla's argument, requires the court to automatically exclude the time spent by the applicant in prosecuting other proceedings against the same party for the same relief, other things being equal.

It goes without saying therefore, that section 21 (2) of the LLA does not require a party who intends to rely on it, to move the court by way of application for extension of time before he can have the time spent in prosecuting another proceeding against the same party excluded when

computing the period of limitation. That is the law which, though not fixed, is well settled.

The above being the position of the law which we have no reason to disturb then, since the first application lodged by the applicant lasted in court from 21st November, 2018 to 22nd February, 2019, a period which has to be excluded in terms of section 22 (2) of the LLA, and as such, they said application was lodged after 25 days following the date of delivery of the award by the CMA, and furthermore, since the second application was filed on 06th March, 2019 i.e 12 days following the day when the first application was struck out by Mdemu J, it follows in our judgment that, as correctly submitted by Mr. Lugaila, the fresh application having been filed after 37 days after delivery of the award by the CMA, was filed within the timeline (42 days) prescribed by law.

In view of the course that we have taken, it is obvious that, in the circumstances of this matter, the learned Judge of the High Court had, with respect, misapprehended the applicable law. We entirely agree with the appellant in the sole ground of appeal that indeed, the learned High Court Judge erred in law in holding that the fresh application for revision which, by operation of section 21 (2) of the LLA, was filed by the appellant 37 days after the award by the CMA, was time barred.

With the above finding, we allow the appeal by setting aside the ruling and order of the High Court, and instead, we remit the matter to the Labour Court for the application for revision of the award by the CMA to be heard and determined on merit. This being a labour dispute, we make no order as to costs.

DATED at **MWANZA** this 18th day of February, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 20th February, 2023 in the presence of Mr. Ally Zaid holding brief for Mr. Gregory Lugaila, learned Counsel for the Appellant and Mr. Ally Zaid holding brief for Mr. Joseph Maduka, learned Counsel for the Respondent, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL