

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION NO. 445 OF 2015

BETWEEN

LUCKY SPIN LTD. (PREMIER CASINO) LTD..... APPLICANT

VERSUS

THOMAS ALCORN & JOAN ALCORN.....RESPONDENTS

(ORIGINAL/CMA/DSM/ILA/R. 422. 15/768)

R U L I N G

10/05/2016 & 27/05/2016

Mipawa, J.

Before the hearing of this revision application filed by the Applicant Lucky Spin Ltd. (Premier Casino) Ltd.¹ against Thomas Alcorn and Joan Alcorn Respondents, it was confronted with a fierce preliminary objection on point of law filed by the respondent that:-

...The applicant has pre-maturely applied for revision at this Honourable Court on an interlocutory matter...which does not dispose the suit permanently...

Following the notice of preliminary objection the hearing of the revision had to wait for the determination of the raised preliminary point of law objection as a matter of law and practice.

¹ Application for revision initiated by a notice of application made under the provisions of the Employment and Labour Relations Act 2004 to wit S. 91 (1) (a) 91 (2) (c) and 94 (1) (b) (c) and the Labour Court Rules 24 (1) (2) (3) and 24 (11) and 28 (1) (c) (d) and (e) GN. No. 106 of 2007

The hearing of the preliminary objection was *viva voce* (by live voice). The applicant was represented by M/S Angelista Learned Counsel and the respondents enjoyed the service of Mr. Magambo, Learned Counsel.

Submitting in support of the preliminary objection Mr. Magambo submitted to the effect that the present revision has been brought prematurely in this Court, because it is an interlocutory matter and the provisions of Rule 50 of the Labour Court Rules prohibit matters of interlocutory nature to re-surface in this Court².

He argued further that the CMA³, had issued a ruling on the preliminary objection that was raised by the applicant and it ruled in favour of the respondents. The applicant was aggrieved and hence filed a revision in this Court. He continued to argue that the matter has not been decided in the Commission; hence it is still an interlocutory matter. He referred to this Court the case of **Mohamed Enterprises (T) Ltd. V. Peter Magesa and 5 others**⁴, in which this Court underscored the kind of matter ought not be brought before the Court, one of it being an interlocutory matter.

In response the Learned Counsel for the applicant controverted that the matter in Court is not an interlocutory kind of, she called upon this

² Government Notice No. 106 of 2007 the Rules

³ CMA refers to Commission for Mediation and Arbitration established under Section 12 of the Labour Institutions Act No. 7 of 2004 Cap 300 RE. 2009

⁴ Revision No. 343 of 2015 HCLD (unreported) per Nyerere, J.

Court to read Rule 10 (1) of GN. No. 66 of the Rules i.e. Code of Conduct for Mediators and Arbitrators⁵.

The Learned Counsel submitted that this is a revision on a matter that was raised before the arbitrator on their jurisdiction to entertain a matter between the parties. She argued that a matter on jurisdiction is first and foremost important in entertaining any suit or complaint and therefore if an institution or court is not vested with jurisdiction to entertain a suit or complaint and if it decided to proceed their proceedings are a nullity.

The applicant's counsel further argued that there was a jurisdiction error that was pointed out in the CMA⁶, that the arbitrator did not have jurisdiction because there was no contract of employment before them (parties) to be arbitrated.

She called upon this Court to decide as it were in **Rock City Tours Limited V. Andy**⁷ (copy not provided by counsel) where according to the applicant's counsel this Court ruled that revisions of this kind are not interlocutory matters, because the ruling at CMA had the effect of finally determining the matter because it forced the respondent, now the applicant, in this revision to enter into proceeding which they ought not have entered.

⁵ Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrators) Government Notice (GN) No. 66 of 2007

⁶ *op. cit* note 2

⁷ Rev. No. 69 of 2013 HCLD at Mwanza (unreported)

In conclusion the applicant's counsel submitted that their application is made under Section 94 (1) (b) (i) of the Act 2004 (the Employment and Labour Relations Act)⁸, and therefore the decision of the Commission (CMA) was an **AWARD** because it awarded the complainant the award to proceed on termination of employment.

According to her (counsel for applicant) our Courts have not defined what is an AWARD however she picked the definition of an **Award** in Black Law Dictionary as to mean "...a final judgment or decision especially by an arbitrator..." that the **Ruling** in the CMA was a decision and therefore revisable under Section 94 (1) (b) (i) of the Employment and Labour Relations Act No. 6 of 2004⁹.

In rejoinder submission Mr. Magambo Counsel for the Respondent rejoined that Section 94 (1) (b) (i) of the Employment and Labour Relations Act¹⁰, is for revision of the arbitrator's **award**, the arbitrator has issued a **ruling** and not an **award** that nothing was argued before the CMA¹¹ on the contents of the contract. The arbitrator determined in the ruling that the Commission had jurisdiction to entertain the dispute.

I have duly considered the submissions of both parties on the preliminary objection on the point of law *in ex-abundant cautela* (with extreme caution or eye of caution) and three nagging questions which

⁸ Act No. 6 of 2004 Cap 366 RE. 2009 the Employment and Labour Relations Act

⁹ *ibid*

¹⁰ *ibid*

¹¹ *op. cit* note 2

"crop" need to be answered, they are:-

- (i) *Whether the applicant has prematurely applied for revision in this Court on the "interlocutory matter" which does not dispose the suit permanently.*
- (ii) *Whether the **ruling** of the Commission (CMA) is revisable like an **award**.*
- (iii) *What is the difference between the **ruling** of the Commission and the **Award** of the Commission (CMA).*

In answering the first issue, it should be reckoned that the essence and gist of the matter is the hearing and determination of the preliminary objection in the Commission that was raised by the applicant on the issue of jurisdiction of the CMA, that the CMA did not have jurisdiction to entertain trade dispute no. CMA/DSM/ILA/R. 422-15/768¹² between the parties. The learned arbitrator ruled that:-

...It has carefully (the CMA) considered the respondent's arguments on the first arm of the P.O. (Preliminary Objection) on the premise that it has no jurisdiction and came to the agree (sic) with the counter arguments by the Learned Advocate Magambo that the P.O. did not address itself sufficiently to enable the other party to prepare himself on which premises the jurisdiction was hinged upon, whether territorial or on limitation of time or elsewhere. I therefore see it fit that the P.O. was pleaded wrongly and hence lacking

¹² Thomas Alcorn and another V. Lucky Spin Ltd. (Premier Casino)

enough points of law to dispose the complaint...¹³

(emphasis mine)

It is clear from the above excerpt that the learned arbitrator did not dispose of the matter he was dealing with. In fact the Commission had decided that it has jurisdiction to entertain or proceed with the hearing of the matter inter-parties and as the last words show, the matter was not disposed of "*...lacking enough points of law to dispose this complaint...*" therefore in my view it was an interlocutory matter which did not finally determine the complaint or case. In **Managing Director Souza Motors V. Riaz Gulamali and Another**¹⁴ [quoted by Nyerere, J. in the case of **Mohamed Enterprises (T) Ltd. V. Peter Magesa and 5 Others**]¹⁵, the Court Bwana, J. held that:-

*...A decision or order of preliminary or interlocutory nature is not appealed unless it has the effects of final determining the suit...*¹⁶

Admittedly the Commission could have proceeded with the hearing of the matter had it not been the present revision filed by the applicant. In that vein the matter was not finally determined. Rule 50 of the Labour Court Rules¹⁷, prohibits matters not finally determined upon a preliminary

¹³ Ruling of the Commission on the Preliminary Objection in CMA/DSM/ILA/R. 422-15/768 between Thomas Alcorn and another V. Lucky Spin Ltd. (Premier Casino) Tibenda Esq. Arbitrator at p. 3

¹⁴ TLR 2001 at p. 405

¹⁵ Revision No. 343 of 2015 HCLD unreported

¹⁶ *ibid* at p. 4

¹⁷ Government Notice (GN) No. 106 of 2007 the Rules

objection, to be referred to this Court as an appeal, review, or revision thus it reads:-

50 ...No appeal review, or revision shall lie on interlocutory or incidental decision or orders, unless such decision had the effects of finally determining the dispute...¹⁸

I therefore rightly think that the present revision is on an interlocutory matter which does not finally determine or dispose of the matter and as correctly pointed out by Mr. Magambo Learned Counsel for the respondent; such matters are not allowed to re-surface in this Court.

I come now to the second question on whether the **ruling** of the Commission is revisable like an **award** of the Commission. I will answer also the third question on what is the difference between the **ruling** of the Commission and the **award** of the Commission. This Court has decided and provided the definition of a **ruling** in the case of **Suresh Ramaya V. Asha Migoko Juma**¹⁹ in the following words, quoting Du Toit²⁰ et al "Labour Relations Law, A Comprehensive Guide", 6th Edition 2015 at p. 164 that:-

...A ruling is a decision on a limited issue, usually made at the conclusion of interlocutory proceedings. A ruling may be made before arbitration commences or during the course of it, examples include a decision on

¹⁸ *ibid* Rule 50

¹⁹ Revision No. 207 of 2015 HCLD (unreported) Judgment of 09/05/2016 Mipawa, J. from original CMA/DSM/ILA/R. 78/14

²⁰ Du Toit Darcy (Managing Editor) BA, LLB (VCT) LLD (Leiden) Emeritus Professor of Law, Senior Arbitrator Attorneys Consultant

*condonation rescission of an award and a decision on a request for recusal by the arbitrator...*²¹

Equally on the same footing as the above excerpt from distinguished author and professor of law, the ruling made on a preliminary point of objection on the point of law falls squarely in the same quagmire.

I agree with the counsel for the applicant in her submission that a **ruling** in the CMA is a decision, but it will be revisable only when it finally determines the matter. The ruling that was made by the Commission in the instant revision was made before arbitration had commenced and since it could not dispose of the matter completely, it was an interlocutory order made at the conclusion of interlocutory proceedings. Hence it cannot re-surface to this Court on revision as per Section 50 of the Labour Court Rules²².

The **award** of the Commission as rightly pointed out by the learned counsel for the applicant is "...a final judgment or decision especially by an arbitrator..." and therefore revisable as per law. However a **ruling** is distinguished from an **award**, (in that) (to borrow the wisdom of the Labour Court of South Africa in the case of **Kwazulu Transport (Pty) Ltd. V. Mnguni**²³ (South Africa Labour Laws are in parimateria with our

²¹ Du Toit et al Labour Relations Law, A Comprehensive Guide 6th Ed. 2015 at p. 154

²² *op. cit* note 2

²³ [2001] BLLR 770 (LC) as quoted by Steenkamp Judge of the Labour Court of South Africa in his article titled "Dispute Resolutions" in Du Toit et al Labour Relations Law, A Comprehensive Guide 6th Ed. 2005 Lexis Nexis Durban

laws and actually heavily borrowed from) **Ruling:-**

*...Is distinguished from an award in that an **award** finally determines the substantive dispute and is issued at the conclusion of arbitration proceedings. A **ruling** could however have the effect of concluding the proceedings in certain circumstances for example by refusing condonation of late referral of a dispute...*²⁴

It is therefore clear from the above highly persuasive case law that a ruling of the CMA on an interlocutory matter where proceedings were of an interlocutory style and which had not finally disposed the matter cannot be subject of being revised in this Court. See also Rule 50 of the Labour Court Rules quoted in this judgment.

It has been therefore a practice of the Court that **rulings** order (s) or incomplete proceedings cannot be appealed reviewed or revised while the substantive proceedings are still in progress in the Court **a quo** or the Commission. However **notebien** (it should carefully be noted) that the High Court may intervene in interlocutory proceedings, ruling or orders:-

*...Where justice may not by other means be obtained or where a **gross irregularity** has occurred or where **grave injustice** may result, it has been held that the Labour Court may intervene in incomplete proceedings...*²⁵

²⁴ *ibid* p. 164

²⁵ See Du Toit et al *ibid* at p. 164

The above position was reached by the Labour Appeal Court of South Africa in **Booyesen V. Minister of Safety and Security** (2011)²⁶. I entirely and respectfully agree and subscribe to the above highly persuasive decision of the Highest Court on Labour Matters in South Africa. Now trekking on the same route in the instant case this court cannot intervene in the incomplete proceedings/interlocutory proceedings, ruling or order of the Commission (CMA) because²⁷:-

- (i) *It cannot be said that justice may not by other means be obtained.*
- (ii) *There is no grave injustice resulted from the interlocutory proceedings ruling or orders.*
- (iii) *There is no gross irregularity that had occurred as the result of the interlocutory ruling, orders or proceedings.*

In the event of the foregone I rightly think that the preliminary objection raised by the respondent is meritorious (i.e. has merit) it follows therefore that the present revision is dismissed ***in toto***²⁸.

It is ordered that the incomplete proceedings to continue before the Commission for Mediation and Arbitration as it were and therefore the

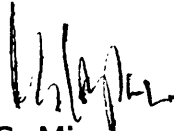
²⁶ [2001] 1 BLLR 83 Labour Appeal Court of South Africa as quoted by Judge Steenkamp "Dispute Resolutions" in Du Toit et al

²⁷ Without prejudice to Rule 50 of the Labour Court Rules GN. 106 OF 2007

²⁸ ***in toto***: lat totally, as a whole, see Longman Dictionary of Contemporary English

record of the Commission be remitted back for quick disposal of the dispute²⁹.

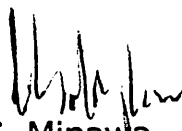
It is so ordered.


I.S. Mipawa
JUDGE
27/05/2016

Appearance:-

1. Applicant: M/S Anjelisa Nashon, Advocate
2. Respondent: Mr. George Magambo, Advocate

Court: Ruling has been read today in the presence of the parties as shown in the appearance above.


I.S. Mipawa
JUDGE
27/05/2016

²⁹ Thomas Alcorn and another (complainants) V. Lucky Spin Ltd. (Premier Casino) Respondent CMA/DSM/ILA/R, 422.15/768 before Tibenda, Esq. Arbitrator