IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION NO 47 OF 2016

(Originate from CMA/ARS/ARB/01/2013)

BETWEEN

BANK OF TANZANIA ..... APPLICANT

VERSUS

ZUHURA H. MBULU ..... RESPONDENT

RULING

MWENEMPAZI, J.

The application for revision has been brought by way of notice and chamber summons under the provisions of section 91 (1) (b), and 91 (2) (b), 91 (4) (a), (b) and section 94 (1) (b), (i) of the Employment and Labour Relations Act, 2004 and Rule 24 (1), 24 (2) (a) , (b), (c), (d) (e), (f) and 24 (3) (a), (b),(c) , (d) and 28 (1) (a), (b) (c), (d) and (e) of the Labour Court Rules, G.N. No. 106 of 2007. The applicant is applying to this court for the order calling the record of the CMA, revise the same and set aside the award and ruling in dispute no. CMA/ARS/ARB/01/2013 dated 20th June 2016 and 13th January 2015. This application is supported by the affidavit affirmed by Karim Rashid Kambagha, Legal Counsel of the Applicant.

In his reply the respondent, Zuhura H. Mbulu filed counter-affidavit opposing the application.

Briefly, the facts of the case are that, the respondent was the employee of the applicant. On 8th September 2013 the respondent and 9 others were charged in the District Magistrate Court of Arusha in a Criminal Case No. 295 of 1993 due to the loss of Tshs 237,514,325.00 occurred in the cause of their employment. On 28th February they were found guilty and sentenced to (7) years imprisonment. They appealed and High Court of Tanzania acquitted them on 11th April 2003.

The DPP was dissatisfied and appealed to the Court of Appeal where on 14th November 2011 they nullified all the lower court proceedings. Following the acquittal, the respondent and the other employees sought to be reinstated to their employment but the applicant opted to terminate their employment on the grounds that they were out of the office for 18 years. Aggrieved by such decision the respondent referred the matter at the CMA where it was decided in favour of the respondent. Dissatisfied by such decision the applicant filed this revision.

When the matter was called for hearing Mr. Karim Rashid appeared for the applicant while Mr. Shadrack Mofulu appeared for the respondent. The Court granted leave to dispose of the matter by way of written submission.

The applicant raised ten (10) grounds as they can be seen from page 6 numbers 24 up to page 9 of the Applicant's legal counsel's affidavit. In his submission he decided to discuss those grounds based on two grounds as follow;-

1. Whether the Commission did have the jurisdiction to set aside dismissal order dated 28th February 2014 taking into account the reasons stated under the notice lodged by the Respondent, preliminary objection raised by the applicant and appropriateness of the application which resulted into a ruling dated 13th January 2015.
2. Whether the award by the Commission was properly procured taking into account the reason for termination of respondent's employment service, procedure followed and relief awarded by the Commission.

In answering the first ground the applicant submitted that, the notice to set aside dismissal order was filled out of time, it was filed three and a half months from the date of the order. The applicant herein raised an objection regarding the same but the Arbitrator did not address it in his ruling. The application was improper before the Commission for the omission of relevant rules by the respondent. They cited Rule 29 (1) (c) instead of Rule 29 (1) (c), 3, 4 and 9 of the Labour Institutions (Mediation & Arbitration) Rules, 2007(G.N. No. 64 of 2007).

The reasons given by the respondent to set aside the dismissal order was not sufficient as the counsel for the respondent (at the Commission) claimed to be on safari at Mwanza to attend his sick brother without any proof. The Honourable Arbitrator set aside that dismissal order without having jurisdiction to do so. They pray for the ruling to be set aside.

On the 2nd ground the applicant stated that, the applicant has sufficient reasons for termination of the employment such as radiation of technology,

work ethics and education qualification on the part of the respondent. She lacks competence after her long suspension almost 18 years. The respondent was entitled to terminal benefits only as the termination was substantively and procedurally fair, and they did give her One-month salary in lieu of notice,

The respondent in her CMA form No 1 prayed to be compensated 12 months' salary but the Hon. Arbitrator awarded her 48 months' salary without any justification for doing so. Basing on those reasons they pray for the ruling and award to be set aside.

In replying the 1st ground, the respondent's counsel submitted that, the respondent became aware of the dismissal order on 6th June 2014. She was not informed that there was a dismissal order contrary to the law as it was held in a case of **Cosmas Construction Co. Ltd v. Arrow Garments ltd** (1992) TLR 127. They filed it 7 days from the day when it came into her knowledge and the application was brought timely.

The applicant challenged the application by citing the wrong provision of Rule 29 (1) (c), 2 and 4 of G.N. No. 64 of 2007, while she was supposed to use Rule 29 (5) (a) (b) of the same law (G.N. No. 64 of 2007). The Hon. Arbitrator did consider their preliminary objection by clarifying how it was supposed to be presented and commented that it did not defeat the application.

As per section 88 (4) (a) and (b) of Employment Labour Relations Act, No. 6 of 2004, Hon. Arbitrator was required to deal with disputes quickly and fairly with less legal formalities. That was what was done by the Hon.

Arbitrator. The reasons adduced to set aside dismissal order were sufficient and justifiable by law. Hon. Arbitrator was correct to set aside the order with the power vested to him under section 88 (4) of No. 6 of 2004, as they had jurisdiction to do so.

Arguing the 2nd ground, the respondent submitted that the award was properly procured and the employer when terminating the employee is bound by section 37 (1) of the ELRA. The employer failed to prove the procedure used in terminating the respondent as required by the law which leads to the respondent's termination.

The award given by the Hon. Arbitrator was correct as per section 40 (1) of ELRA. He even had powers to grant the claims which were not claimed in CMA Form No 1 depending on the nature of the case and further to that, in Labour practice. Therefore the Hon. Arbitrator on awarding tortious damages considering the physiological injuries for arraigning in court for 18 years on the offences that had not been justified on the respondent, as in relation to what the law requires. Her economy was grossly affected as she was suspected of theft. They prayed for the application to be struck out.

In rejoinder, the applicant's counsel added that, the respondent did not mention who informed her and her advocate about the dismissal order. Before jumping on filing an application to set aside dismissal order they were supposed to file an application to be granted extension of time to file their application of setting aside dismissal order.

The Hon Arbitrator did not deliver any ruling regarding his preliminary objection contrary to the law. He was supposed to deal with preliminary

objection before jumping into the main application. Rule 29 (5) of G.N. No. 64 of 2007 provides for the mode of opposing an application not how to raise a preliminary objection.

Section 88 of ELRA does not allow the Arbitrator to Jump the vital stages like assessing the correctness of the application. The non-citation goes to the root of the matter and the Arbitrator was supposed to deal with it first. Section 37 (1) of ELRA does not relate in this matter as the commission misdirected itself without a factual and legal justification. They maintain their prayer for this court to allow their application by setting aside the award and ruling of CMA/ARB/ARS/01/2013.

I have gone through both parties' submission as well as court record and I found that the applicant herein challenged both the ruling (CMA/ARS/ARB/01/2013) setting aside the ex-parte order which was delivered on 23.01.2015 together with the Award delivered on 20th June 2016.

I have taken time to peruse the Ruling (CMA/ARS/ARB/01/2013). I find that the applicant was present during the hearing of the matter and Mr. Godfrey Siriwa, Learned Counsel appeared on behalf of him. And he raised Preliminary objection which he is alleging that the Hon. Arbitrator did not rule out those objections and jumped to rule on the application.

Now the question is whether combinations of applications is allowed under our labour laws? The concept of uniting applications was once entertained in a case of ***Tanzania Knitwear Ltd v Shamshu Esmail*** [**1989] TLR 48** where Mapigano J, (as he then was) held that;-

"in my opinion the combination of two applications is not bad in law. I know of no law that forbids such a course. Court of law abhors multiplicity of proceedings. Court of law encourages the opposite".

The same was also decided in a case of **Mic Tanzania Limited v. Minister for Labour and Youth Development & Another** Civil Appeal No. 103 of 2004(Unreported) where the Court of Appeal had this to say;-

"... *unless there is a specific law barring the combination of more than one prayer in one chamber summons, the court should encourage this procedure rather than thwart it for fanciful reasons. We wish to emphasize, all the same, that each case must be decided on the basis of its own peculiar facts*".

In the present case the applicant combined two applications though he did not mention the number of the ruling which set aside dismissal order. But he cited their delivered dates. This aspect of combination will not be acceptable in this application as the revision on the ruling which set aside dismissal order was time barred and the applicant did not apply for extension of time before filing the same.

In the case of ***China Communications Construction Company Limited v Simon Manfred***, Lab. Div, MBY, Revision No 8 of 2014, Nyerere J, held that; -

"*In our instant case the applicant has combined two applications to wit; application for revision of the ruling of the CMA which declined to set aside an ex-parte award, and application for revision of the ex-*

parte award. In my view this combination is not acceptable due to the following reasons: - a) Application for revision of the ex-parte award is time barred; b) procedural irregularity in filing such application."

This Court is empowered under section 91(1) (a) of the ELRA to revise the CMA award which is filled within six weeks from the date the CMA award was delivered. In the case at hand the ruling to set aside dismissal order was delivered on 13.01.2015 and revision for application was filed on 4th July 2016 which is almost 17 months has lapsed which is contrary to section 91 (1) of Act No. 6 of 2004.

Having said that, this court lacks jurisdiction to entertain this application because the applicant never bothered to seek leave of this Court to file revision out of time.

For the foregoing reasons, I find this application with no merit and I dismiss it. CMA decision is hereby confirmed.

It is ordered.

T. MWENEMPAZI

JUDGE

28.11.2019