THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

LABOUR REVISION NO. 08 OF 2019

(Originating from the Complaint Ref. CMA/MBY/112/2015 of the Commission for Mediation and Arbitration for Mbeya at Mbeya)

LILIAN SIFAEL.....APPLICANT

VERSUS

COCACOLA KWANZA LTD.....RESPONDENT

JUDGEMENT

Date of Last Order: 30/04/2020
Date of Judgment: 29/07/2020

MONGELLA, J.

The Applicant is calling upon this Court to call for, examine and revise the proceedings, and Award of the Commission for Mediation and Arbitration in Labour dispute no. CMA/MBY/112/2015. The application is brought under section 91(1)(a), (2)(b) & (c), (4) (a) & (b) and 94 (1) (b) (i) of the Employment and Labour Relations Act, Act No. 6 of 2004 as amended; and Rule 24(1), 24(2)(a), (b), (c), (d), (e), (f), Rule 24(3)(a), (b), (c), (d) and Rule 28(1)(a) (b), (c), (d), (c), (d), (e) of the Labour Court Rules, 2007 GN No. 106 of 2007. It is supported by the affidavit of the applicant **Lilian Sifaeli**.

Both parties were represented whereby the applicant was represented by Mr. Isaya Mwanry, and the respondent was represented by Mr. Mika Mbise, both learned advocates. The application was argued by written submissions.

Before I decide whether or not to proceed with the substance of this application I wish to first deliberate on the legal issues raised by the respondent's counsel in his reply submission. In the said submissions, Mr. Mbise raised two legal issues to wit:

First, that the submission filed in support of the applicant's application seriously offends the provisions of Rule 43 (1) and (2) of the Labour Court Rules, G.N. No. 106 of 2007. He submitted so arguing that the notice of representation filed by the applicant indicates that the appointed advocate to represent her was one Mathias Kulwa, practicing as Ms. Mgaya Advocates of P.O. Box 2003, Century Plaza Building, 1st Floor, Mwanjelwa. However, the submissions in support of the applicant's application were drawn and filed by one Mr. Isaya Zebedayo Mwanri of BAISTAR Advocates, Postal Building, 1st Floor P.O. Box 1854, Mbeya. Mr. Mbise argued that the applicant changed advocates to represent her without issuing notice to this Court or the respondent as required under section 43 (2) of G.N. 106 of 2007, which provides that:

> *"Any party who terminates a representative's authority to act and then acts in person or appoints another representative shall give a notice to the Registrar and all other parties concerned of the changes."*

Mr. Mbise contended that the said Mr. Isaya Zebedayo Mwanri cannot act for the applicant in the absence of the written notice terminating the authority of Mr. Mathias Kulwa and appointing him. On this point he concluded that since a wrong person filed the submission in support of the applicant's application, it is as good as the applicant failed to prosecute her application and the consequence is to dismiss the same for want of prosecution.

Mr. Mwanry responded to the effect that the notice of representation was filed on 20th February 2020 and served accordingly. He said that the notice is in the Court file and if the learned counsel for the applicant had taken time to peruse the court file he would have seen the same.

I have gone through the Court file and found, as argued by Mr. Mwanry, that the notice of representation been filed. The notice appoints advocates Baraka Hitlani Mbwilo, Isaya Zebedayo Mwanri, Siamini Ng'wembe and Steward Ngwale from a law firm styled BAISTAR ADVOCATES to represent the applicant in this matter. However, I find the said notice of representation defective. Rule 43 (2) of the Labour Court Rules provides:

> *"Any party who terminates a representative's authority to act and then acts in person or appoints another representative shall give a notice to the Registrar and all other parties concerned* ***of the changes.*** *" [Emphasis added]*

My understanding of the above provision is that a party has to notify the Registrar and other parties concerned that he/she has denounced the

authority given to the previous representative and the same has been given to the newly appointed representative. In the notice filed on 20th February 2020 the applicant stated:

> *"NOTICE IS HEREBY GIVEN THAT applicant named above has appointed Advocate Baraka Hitlani Mbwilo, Isaya Zebedayo Mwanri, Siamini Ng'wembe and Steward Ngwale from a law firm styled BAISTAR ADVOCATES to represent the named applicant in this Application to its finality."*

The applicant's notice as appears above does not communicate as to whether the newly appointed advocates took the place of Mr. Mathias Kulwa, who represented her previously or they were appointed to work with him.

Second, Mr. Mbise contended that the affidavit in support of the application is defective. He said that the application is brought under, among other legal provisions, Rule 24 (3) of G.N. 106 of 2007, which demands for every application to be supported by an affidavit which must contain facts listed in sub-rule (3) (a) (b) and (c) of the same Rule. He contended that Rule 24 (3) (b) requires an affidavit to contain a statement of material facts in a chronological order, on which the application is based. However, the applicant's affidavit contains of a narration of obvious and some facts un-connected to the case before the learned Arbitrator and which did not form the basis of the impugned Award. He added that paragraphs 1, 2, 3, 4, and 5 are mere statements of the obvious and not material facts on which the application is based as

they introduce a new case of discrimination as the basis for the application, thus not in conformity with Rule 24 (3) (b).

Mr. Mbise also referred to Rule 24 (3) (c) of the Labour Court Rules which requires an affidavit to contain a statement of legal issues that arise from the material facts. He argued that the applicant's affidavit does not contain a statement of the legal issues that arise from material facts contained in the affidavit. Referring to paragraphs 18 (i), (ii) and (iii) and 19 of the applicant's affidavit he stated that what is contained therein does not qualify to be termed as legal issues arising from the facts alleged. He said that paragraph 18 (i), (ii), and (iii) is drawn in a way that it presents proposed issued in a case before hearing, begging for evidence to prove, which is not what is envisaged under the law. To bolster his stance, he referred this Court to the case of ***Audax s/o Andrew v. Coca Cola Kwanza Ltd***, Revision No. 19 of 2017 (HC at Mbeya, unreported) and that of ***Mobax Telecoms (T) Ltd. v. Charles Alberto Gugu*** [2013] LCCD No. 60 in which it was ruled that an affidavit in support of a chamber summons for revision must contain evidence and raise substantial issues.

Regarding paragraph 19, which supposedly provides for the reliefs, Mr. Mbise was of the view that the same does not provides any reliefs as it refers to the reliefs sought in the chamber summons. He contended that an affidavit is supposed to list the reliefs sought and not to direct the court to where the reliefs can be found. Nevertheless, he went further and challenged the reliefs under the applicant's chamber summons referred to in the affidavit. He said that the chamber summons shows that the application is for orders:

"1. That this Honourable Court be pleased to call for the original CMA records with Ref. CMA/MBY/112/2015 by, Hon. Godfrey Jonas dated 12th February, 2019 and examine such proceedings and its award to satisfy itself as to the correctness, rationality, legality and propriety of the CMA findings in the entire award.

2. That the Court be pleased to revise, quash and set aside the impugned Award and its proceedings and thereafter determine the dispute on its merits in the manner it considers appropriate.

3. Any other reliefs that the Court deem feet (sic) to grant."

Mr. Mbise was of the view that the reliefs as provided above are not sanctioned by the law. He argued that the grounds for revision are clearly set out in the law thus the reliefs presented by the applicant cannot be granted on the basis of material facts and legal issues not contained in the affidavit. He wondered that if the entire proceedings are to be quashed as asked for by the applicant, then how can the dispute be determined on merits when the whole evidence has been quashed?. In support of his argument he referred to the case of ***Omary Kitwana v. Tanzania International Services Ltd***, Revision No. 190 of 2011 (HC, Lab Div. at DSM, unreported) in which it was held:

"An Arbitrator's Award is not appealable, it is final and binding on the parties, save that, it can be reviewed by the Court on its own motion or on application by the aggrieved party on grounds recognized under the law. The grounds are specified under section 91 (2) (a) and (b) of the Employment and Labour Relations Act, No. 6 of 2004 as amended by section 14 (b) & (c) of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2010 read together with Rule 28 (1) of the Labour Court Rules G.N. 106

of 2007... In my understanding of the law, an application for revision of the CMA Award, which does not disclose any acceptable grounds for revision, as is the position in this matter, can be equated to a plaint which does not disclose cause of action..."

Mr. Mbise added that apart from the requirement to comply with these rules, an affidavit is required to be drafted in accordance with Order XIX Rule 3 of the Civil Procedure Code, Cap 33 R.E. 2002. He said this requirement has been settled in a number of decisions including ***Rebecca Daniel William v. Sandvik Mining Construction Ltd***, Labour Revision No. 10 of 2011 (HC at Mbeya, unreported) and ***Lloyd s/o Mwaitete v. Coca Cola Kwanza Ltd***, Misc. Application No. 13 of 2017 (HC at Mbeya, unreported) whereby the court ruled that the requirements under Order XIX Rule 2 of the Civil Procedure Code are fundamental and the violation thereof cannot be treated as a mere technicality. He argued that the affidavit in support of the application at hand carried hearsay and in-admissible evidence. He contended that the defect is vividly seen in the verification clause, where the deponent verify that contents of paragraphs 18 (i), (ii), (iii) and 19 are based on information obtained from her advocate, whom she did not mention the name and the said advocate did not supply his own affidavit to confirm the deponent's statement. He referred also to the case of ***Pentecostal Church of Mbeya v. Gabriel Bisangwa and Others*** and that of ***Jestina George Mwakyoma v. Mbeya Rukwa Autoparts and Transport Ltd***, Court of Appeal of Tanzania, Civil Application No. MBY 7 of 2000 (unreported).

In response, Mr. Mwanry argued that the respondent's counsel has taken them by surprise by raising the issue concerning affidavit at the stage of

submissions. He said that the question of defective affidavit is a purely point of law which does not call for the question of jurisdiction. He cited the case of ***National Bank of Commerce v. Maisha Musa Uledi, Life Business Centre***, Civil Application No. 410/07 of 2019 (unreported) in which it was held that a preliminary point of law which does not call for jurisdiction of the court must be raised at the earliest possible opportunity. He contended that the point of law was supposed to be raised before the order for arguing the matter by written submission was issued. He further argued that unlike in other normal litigations, in labour practice there are rules governing the raising of preliminary objections. He referred to Rule 24 (4) (a) and (b) of the Labour Court Rules which provides:

> *"A notice of opposition, a counter affidavit or both shall be filed within fifteen days from the day on which the application is served on the party concerned and substantially be in conformity with the necessary changes required by the context of sub rules (1) and (2)."*

Basing on the above provision he argued that the respondent never filed any notice of opposition within the prescribed time thus cannot circumvent the mandatory requirement by bringing the preliminary objection through a back door. He as well cited the case of ***James Burchard Rugemalira v. The Republic & Mr. Harbinder Seingh Sethi***, Criminal Application No. 59/19 of 2017, (CAT at DSM, unreported) in which the Court dismissed a point of objection on account of failure to follow the requirement of the law in rising the objection. The Court stated:

> *"It should be remembered that a notice of objection is always intended to let the adverse party know a point of*

law raised so that when it comes up for hearing he should be aware in advance what the nature of the point of objection is all about and this will enable him to prepare himself for a reply thereof, if any."

He urged this Court not to entertain the point of law raised as it was raised in contravention of the law. He further resorted to the overriding objective principle and argued that Article 107 (2) (e) of the Constitution of the United Republic of Tanzania, 1977 restricts the use of legal technicalities in dispensing justice. He also referred to the case of ***Yakobo Magoiga Gichere v. Peninah Yusuph***, Civil Appeal No. 55 of 2017, (CAT at Mwanza, unreported) to cement on the same point.

I have considered the submissions of both counsels in this point of law. I wish to state from the outset that I do not agree with Mr. Mwanry's position that the point of law should not be entertained by this Court as it was lately raised. In my considered view, a point of law can be raised at any stage of the proceedings by either any of the parties or by the court *suo motu* so long as parties are accorded the opportunity to address the court on the same. See: ***Hassani Ally Sandali v. Asha Ally***, Civil Appeal No. No. 246 of 2019 (CAT at Mtwara, unreported) and ***Oil Com Tanzania Ltd v. Christopher Letson Mgalla***, Land Case No. 29 of 2015 (HC at Mbeya, unreported).

Mr. Mwanry cited the case of **James Burchard Rugemalira** (supra) and argued that the point of law was not raised in accordance with the law and the applicant was taken by surprise. In my settled view I find the said case distinguishable to the one at hand. In the ***Rugemalira case (***supra)

the preliminary objection was raised with no sufficient details and the matter was argued orally whereby the applicant was taken by surprise during the oral hearing as to the details of the preliminary objection. In the case at hand the legal point was raised and explained by the respondent's counsel in his written submission whereby the applicant's counsel had ample time to read, understand and reply thereof. To this point I proceed to deliberate on the point of law raised by the respondent's counsel.

On this point, Mr. Mbise basically raised three issues regarding the affidavit. First, that the applicant's affidavit does not contain a statement of material facts connected to the case determined at the CMA and subject of this revision; second, that it does not contain a statement of legal issues that arise from material facts; and third, that it does not contain the reliefs sought. Rule 24 (3) of GN 106 of 2007 requires an affidavit to contain the names, description and addresses of the parties; ***a statement of the material facts in a chronological order, on which the application is based; a statement of the legal issues that arise from the material facts; and the reliefs sought.***

I have gone through the applicant's affidavit. From paragraph 2 to 17 the applicant gives detailed account of what transpired before the matter was filed in the CMA and a minimal account of what transpired in the CMA. However, as much as the applicant did not provide a detailed account of what transpired in the CMA forming the basis of this application, I do not find the same being fatal enough to render the

whole affidavit defective. What has been presented is still relevant for the determination of the issues in this application.

Concerning the statement of legal issues, Mr. Mbise specifically referred to paragraph 18 (i) (ii) and (iii) of the affidavit and argued that what has been presented there does not qualify to be termed as legal issues, but rather proposed issues in a case before hearing. Under this paragraph the applicant states:

> *"18. That the following are the basis of the Application for revision:-*
>
> *i. Whether it was proper for the Trial Arbitrator to declare fair termination even without evidence to show that the Applicant was responsible with issuing stock on credit and proposing TSHS 800,000,000/= to be written off as bad debts, the same amounts to gross negligence as provided by the laws.*
>
> *ii. Whether it was fair for the Trial Arbitrator to hold that the applicant failed to adhere to the procedure of bonafide policy by engaging herself with a Company known as BE. & JOJO COMPANY LIMITED as one of the grounds to warrant termination.*
>
> *iii. Whether the Trial Arbitrator properly evaluated the evidence before him."*

Considering the above stated issues, it is my opinion that, under the law there is no specific style provided in stating the issues to be determined by the court. It follows therefore that it is just a matter of writing style one has so long as the raised issues are relevant to the determination of the matter before the court.

Regarding reliefs, Mr. Mbise argued that the applicant raised no reliefs in her affidavit as required under the law. Under paragraph 19, the applicant states:

> *"19. That about the relief sought, the applicant deponed this affidavit in support of the relief sought in the chamber summons."*

I in fact agree with Mr. Mbise that the applicant has not stated any reliefs as required under the law. She ought to have stated what reliefs she wants from this Court and not to refer it to the chamber summons. In addition, looking at the chamber summons, particularly paragraph 2, the applicant is asking for this Court to revise, quash and set aside the impugned Award and its proceedings and thereafter determine the dispute on its merits. This kind of relief, if at all should be taken to be a relief, is rather strange. This Court cannot quash the Award and proceedings and at the same time proceed to determine the dispute on its merits.

On the last defect, Mr. Mbise argued that the affidavit in support of the applicant's application is defective for containing hearsay evidence. He specifically referred to the verification clause whereby the deponent states:

> *"I **LILIAN SIFAEL** do hereby verify and state that all what is stated herein above from paragraph 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 are true to the best of my own knowledge and what is stated in paragraphs 18 (i), (ii), (iii) and 19 is true based on the information received from my Advocate which I verily believe to be true."*

It is trite law that once a deponent in an affidavit relies upon the information supplied by a third party or deposes facts which are not within his knowledge; it becomes imperative for the said third party mentioned in the verification clause to file a supplementary affidavit to back up the assertions. Otherwise, the deposition so made would be rendered nothing other than being hearsay information. In ***Tanzania Milling C. Ltd v. Zacharia Amani t/a All Gold Co. & Another***, Civil Application No. 415 of 2018 (unreported) the Court of Appeal while quoting in approval its previous decision in ***Benedict Kimwaga v. Principal Secretary of Health***, Civil Application No. 31 of 2002 (unreported) held:

> *"If an affidavit mentions another person, then that other person has to swear an affidavit. However...the information of that other person is material evidence because without the other affidavit it would be hearsay."*

See also: ***NBC Ltd v. Superdoll Trailer Manufacturer Co. Ltd***, Civil Application No. 13 of 2002 (unreported) and ***John Chuwa v. Anthony Ciza*** [1992] TLR 233, whereby the Court of Appeal reiterated the position that if an affidavit mentions another person it becomes inevitable for that person to file an affidavit, short of which makes such affidavit a mere hearsay. In the affidavit at hand, apart from the deponent not mentioning the name of the advocate she claims to have received information on the respective paragraphs, the said advocate did not swear an affidavit to support her assertions.

Mr. Mwanry resorted to the overriding objective principle to save his client's neck. It has been settled in a number of decisions that the

overriding objective principle is not a panacea of all ills. It cannot be invoked where a party has contravened express provisions of the law. For not containing reliefs and for containing hearsay I find the affidavit in support of the applicant's application being fatally defective. It renders the application incompetent from the time of filing. It can therefore not be saved under the overriding objective principle. See: ***Puma Energy Tanzania Limited v. Ruby Roadways (T) Limited***, Civil Appeal No. 03 of 2018 (CAT at DSM, unreported); ***Mondorosi Village Council & 2 Others v. Tanzania Breweries Limited & 4 Others***, Civil Appeal No. 66 of 2017 (CAT, unreported); ***Mariam Samburo v. Masoud Mohamed Joshi and Others***, Civil Appeal No. 109 of 2016 (CAT, unreported) and ***Njake Enterprises Limited v. Blue Rock Limited & Another***, Civil Appeal No. 69 of 2017 (unreported).

Having observed as above, I struck out the applicant's application for being incompetent. I however, grant leave to the applicant to re-file her application if she so wishes, within 14 days from the date of this judgment.

Dated at Mbeya on this 29th day of July 2020.

L. M. MONGELLA

JUDGE

Court: Judgment delivered in Mbeya in Chambers on this 29th day of July 2020 in the presence of Mr. Mika Mbise for the respondent.

L. M. MONGELLA

JUDGE