IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOSHI DISTRICT REGISTRY)

AT MOSHI

LABOUR REVISION NO. 11 OF 2020

SECULARMS (T) LIMITED..... APPLICANT

VERSUS

SAULI AWAKI NADA ..... RESPONDENT

JUDGMENT

26/02/2021 & 28/04/2021

T. MWENEMPAZI, J:

This is an application for revision in which the applicant is praying for this court to revise and set aside an arbitration award dated 14th February, 2020 issued by Hon. G.P.Migire the Arbitrator. The grounds in support of the application are set out in the affidavit of Zakayo Kaaya, the principal officer of the applicant.

The application was heard by way of written submissions. The applicant's submission was drawn and filed by Mr. Herode Bilyamtwe while the respondent's submission was prepared by himself.

Mr. Bilyamtwe began his submissions by praying to adopt the applicant's affidavit as part of his submissions. He submitted that the applicant is challenging the ruling and award of the Commission for Mediation and Arbitration (CMA) against material irregularities and for being composed without adhering to proper procedures as laid down and provided by the law.

On the first ground Mr. Bilyamtwe submitted that in the beginning when the respondent filed an application for condonation, the same was granted without good reasons as the degree of lateness was said to be 18 days while in fact it was 58 days which were not accounted for. He submitted that the application for condonation should have not been granted, he thus prayed for this court to make a finding on the impropriety and revise the proceeding and ruling of condonation accordingly.

With respect to the ex-parte Award, the applicant had the following issues as basis for seeking revision. On the first issue Mr. Bilyamtwe submitted that after granting condonation the CMA should have called for mediation prior to admitting the dispute for arbitration as required by the law under Section 86(3) and (4) of the Employment and Labour Relations Act No. 6 of 2004. He contended that since the dispute subject of this revision was never mediated this court should make a finding on the impropriety and revise the CMA proceedings and Award accordingly. In this regard he fortified his argument with this court's decision in the case of ***Hotel and Lodges vs. Hawa Said and 2 Others,*** **Lab Div. Rev. No.69 of 2016,**

High Court of Tanzania(Labour Division) at Arusha which he attached a copy for ease of reference.

Submitting on the second issue, he enquired whether it was proper for CMA to refer the dispute for arbitration without availing parties with chance of mediation. On this issue he submitted that it is a mandatory requirement under Section 86(3), (4) and (5) of the Employment and Labour Relations Act, No. 6 of 2004 and Rule 13 of the Labour Institutions (Mediation and Arbitration) Rules GN No. 60 of 2007(Rules) for the Commission to conduct mediation before arbitration. He submitted further that rule 13 specifically provides that the Commission shall issue at least 14 days' notice of mediation hearing. He also submitted that the law requires under Rule 19 of the Rules for the CMA to give parties at least 14 days notice in writing of an arbitration hearing unless parties agree on a shorter period but in the present case the CMA after granting condonation on 15th May 2019 it issued a notice of arbitration seven days later.

On the third issue, Mr. Bilyamtwe questioned the procedure of referring the dispute for arbitration without the non-settlement affirming failure of mediation. It was his further submission that Rule 16 of the Rules makes it mandatory for the mediator to issues a certificate on Non settlement in the event of failure of mediation, in the matter at hand he submitted that the certificate issued was only signed by the respondent and not both parties as required by the law. He thus called for this court's intervention to cure the irregularity.

On the fourth issue Mr. Bilyamtwe submitted on whether it was proper to refer the dispute to arbitration without proof of signed prescribed form by the applicant consenting for arbitration. It was his submission that the law under section 86(7) (b) (i) of the Employment and Labour Relations Act, requires where mediation fails to resolve the dispute, a party has to refer the dispute to arbitration which was in this case not conducted. He submitted that a party referring a dispute to arbitration should do so in the manner as provided for by the law otherwise it is a fundamental irregularity which this court needs to issue appropriate orders under revision.

Mr. Bilyamtwe concluded his submission by stating that the applicant applied for setting aside ex-parte award by adducing reasonable grounds but the decision of the arbitrator was based on spite if not biasness. He thus urged this court to grant revision by setting aside the CMA ruling and Ex-parte Award in order to safeguard natural justice and constitutional right to be heard.

In his response, the respondent began his submissions by stating that on 17th December 2020 he went to the court to get a copy of the applicant's submission in support of his application for revision as ordered by this court but he did not get it. It was his views therefore that since the applicant failed to file his submission, the act is synonymous to non-appearance at hearing thus his application should be dismissed.

He also submitted that the applicant did not file the Notice of Application for Revision within six weeks as provided by the law under Section 91(1)(a) of the Employment and Labour Relations Act, No.6 of 2004.

With respect to the application for condonation the respondent submitted that he filed proper forms CMA F.1 and CMA F.2 on 26/02/2019 and by then he was only late for 18 days only as indicated in the forms and made application for condonation which was determined on 15/5/2019 and ruling pronounced however the applicant never made follow-up on the copy of ruling for reason best known to themselves.

The respondent submitted further that mediation was scheduled within 30 days soon after grant of condonation application whereby both parties were summoned to attend mediation hearing on 22/5/2019. He argued that the applicant misconstrued or intentionally manipulated facts by saying the mediation was skipped since they defaulted to attend mediation. He argued that the applicant is a sole cause for failure of mediation and the mediator had no choice but to issue certificate of non-settlement – CMA F.6. He started further that after issuance of CMA F.6 by the mediator he referred the matter to Arbitration where the arbitrator summoned both parties however the applicant did not appear. He contended that the applicant conduct has shown highest degree of laxity.

The respondent submitted that the ex-parte award is a result of applicant's conduct of failure to appear at the arbitration hearing several times. Responding to the issues raised by the applicant he stated that the issues

raised are nothing but a baseless story and manipulation of facts so as to mislead this court to believe false information. He went on giving reasons for the issues raised as follows; - first, arbitration took place after the mediator certified failure of mediation due to applicant's non-appearance at mediation hearing. Secondly, Mediator did not skip the mediation process as clearly shown in the record of proceedings. Thirdly, the Mediator filed Non-Settlement Certificate certifying failure of Mediation and the respondent referred the dispute to arbitration by filling Notice to refer dispute to arbitration. Fourthly, the dispute was correctly recorded to arbitration after Mediator certified failure of mediation and the respondent filed CMA F.8 after the applicant refused to attend mediation hearing. For the above reasons the respondent submitted that the applicant has failed to show valid ground for revision application he thus prayed for the application to be dismissed.

In rejoinder, the applicant stated that it is not true that he did not file written submission as per the court's order because he did so on 17th December 2020 as ordered. He stated that what the respondent submitted is a novel submission. He insisted that his submission has merit and prayed for the order of this court to quash and set aside all the proceedings, ruling and arbitral award of the CMA.

Having considered the submissions of the parties as summarized above, in determining the merit of this application I have noted that there is mainly only one issue for consideration which is in relation to whether in conducting hearing of the disputes the CMA adhered to the proper

procedures as provided by the law. In answering this issue, I will also discuss the four issues as raised by the applicant in his affidavit.

On the first issue the applicant has basically challenged the manner in which the CMA embarked on arbitration soon after granting condonation. According to the typed proceedings of the CMA on page 7 it is clearly shown that after the ruling granting condonation was delivered on 15/5/2019 the CMA ordered for mediation to be conducted on 22/5/2019. After that nothing is on record on what transpired on 22/5/2019 as the record shows that the next proceeding was on 28/6/2019 where the matter was set for Arbitration hearing. Now going by this record, the respondent's argument that the mediation was set but the applicant failed to appear is an allegation which is not supported by record of proceedings. It was observed by the court of Appeal of Tanzania in the case of **Alex Ndendya v. Republic (Criminal Appeal No. 207 of 2018 [2020] TZCA 202** that, "*It is settled law in this jurisdiction that a court record is always presumed to accurately represent what actually transpired in court. This is what is referred to in legal parlance as the sanctity of the court record*"

In light of the holding above and as per the record of proceedings I must concur with the applicant that the mediation never took place and this makes the whole procedure subsequent to condonation improper. The law under **section 86(3) of the Employment and Labour Relations Act, No. 6 of 2004** states that, "*On receipt of the referral made under subsection (1) the Commission **shall** - (a) appoint a mediator to mediate the dispute; (b) decide the time, date and place of the mediation hearing;*

(c) advise the parties to the dispute of the details stipulated in paragraphs (a) and (b)." (emphasis is mine). Now looking at this provision, it has been couched in mandatory word "**shall**" to mean that what is provided therein must be performed. It cannot be interpreted in any other way except full compliance. This means failure to observe what is provided is fatal. For this reason, I find this ground for revision meritorious in the sense that it was improper for the CMA to embark on Arbitration before attempting to mediate the parties as provided by the law. Mediation of a dispute is mandatory before referring the same to arbitration.

Having answered the above issue in affirmative going through the other issues will be an academic exercise because this is enough to dispose of the application in its entirety. Consequently, the application is granted, the CMA's Arbitration Proceedings and its Award are hereby quashed and set aside. I order the matter to be returned to CMA for compliance with mediation procedure in accordance with law.

Right of appeal explained.

DATED and DELIVERED at Moshi this 03th day of May, 2021

T. M. MWENEMPAZI

JUDGE