THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

LABOUR REVISION NO. 18 OF 2020.

(Originating from Labour Dispute No. CMA/IR/68/2018, in the Commission for Mediation and Arbitration for Iringa, at Iringa).

BETWEEN

BARCLAYS BANK TANZANIA LIMITED..... APPLICANT

AND

ADAM MHAGAMA & 4 OTHERS..... RESPONDENTS

RULING

21st June & 24th August, 2022.

UTAMWA, J.

The applicant, BARCLAYS BANK TANZANIA LIMITED was aggrieved by the award (impugned award) of the Commission for Mediation and Arbitration of Iringa, at Iringa (the Commission) in Labour Dispute No. CMA/IR/68/2018 delivered on 26th November, 2020. She thus, moved this court to call for records, revise and set aside the impugned award.

The brief background for this matter goes thus: the respondents, ADAM MHAGAMA, MAXMILLIAN MSOVELA, JULIUS NGWILA, FELICHISMO KALANGA and SULEIMAN JUMA were the employees of the applicant in different positions. The respondents' employments were terminated by the applicant on the reason of misconduct. They then instituted the labour dispute mentioned above before the Commission claiming for among others, terminal benefits and compensation for unfair termination. The Commission decided in favour of the respondents and ordered, through the impugned award, the applicant to pay the respondents a total sum of Tanzanian Shillings (Tsh.) **87,327,709.84/=** being severance pay and salaries for 12 months.

The application is preferred by way Chamber Summons made under Sections 91(1), (a) and (b), 91(2), (b) and (c), Section 94(1), (b), (i) of the Employment and Labour Relations Act, Act No. 6 of 2004 (henceforth ELRA) as amended by Section 14(b) of the Written Laws (Miscellaneous Amendment) Act. No. 3 of 2010, Rule 24(1), 24(2), (a), (b), (c), (d), (e) and (f), 24(3), (a), (b), (c) and (d) and Rule 28(1), (c), (d), (e) of the Labour Court Rules, GN No. 106 of 2007 (henceforth LCR). It was supported by an affidavit and supplementary affidavit sworn by one Dotto Kahabi, the Head of Legal and Company Secretariat of the Applicant.

On the other hand, the respondents filed joint counter affidavit and supplementary counter affidavit sworn by Mr. Omary Khatibu Salehe, learned counsel. Essentially the respondents resisted the application and disputed the facts deponed by the applicant. The respondents also filed a notice of preliminary objection (The PO) based on a single limb that: the

applicant's application is incompetent for failure by the applicant to file a mandatory notice of intention to seek this revision, i.e. the CMA Form 10 (Henceforth the Form). This omission was contrary to Regulation 34 (1) of the Employment and Labour Relations (General) Regulations, GN. No. 47 of 2017 (Henceforth the GN.).

In this squabble, the applicant was represented by Mr. Avitus Rugakingira, learned counsel whereas the respondents were represented by their counsel mentioned above. The PO was argued by way of written submissions.

In the written submissions in-chief by the respondents' counsel, it was argued that, it is a requirement of the law that the Form has to be filed in the Commission before one files an application for revision against an award of the Commission before the High Court (The HCT). Nonetheless, the applicant herein lodged this application for revision before filling the Form in the Commission. The course thus, contravened the provisions of Regulation 34(1) of the GN. He further contended that, the form is important as it commences the whole process of the application for revision. Without such Form, the application becomes incompetent.

The respondents' counsel further argued that, it is undisputed that the applicant lodged this revision without firstly filling the Form as stipulated by the law. The present application is therefore, incompetent. This was the legal position underlined in the case of **Unilever Tea Tanzania Limited v. Paul Basondole, Labour Revision No. 14 of 2020, HCT, at Iringa** (unreported). He thus, prayed for this court to

strike out the application due to the procedural irregularities on the face of records committed by the applicant which led to miscarriage of justice to the respondents.

In his replying written submissions, the learned counsel for the applicant submitted that, Regulation 34(1) of the GN requires the Form to be filed within 30 days. On the contrary, Section 91(1), (a) and (b) of the ELRA provides for six (6) weeks to apply for the revision in case one is dissatisfied with the Commission's decision. In the matter at hand, the applicant filed her application within 42 days and that marks the clear intention of the applicant to seek for revision.

The applicant's counsel further argued that, Regulation 34(1) cited supra is not a mandatory provision to move the court when one is seeking for revision. The mandatory provisions are Sections 91(1), (a) and (b), 91(2), (b) and (c), Section 94(1), (b), (i) of the Employment and Labour Relations Act, Act No. 6 of 2004 as amended by Section 14(b) of the Written Laws (Miscellaneous Amendment) Act. No. 3 of 2010, Rule 24(1), 24(2), (a), (b), (c), (d), (e) and (f), 24(3), (a), (b), (c) and (d) and Rule 28(1), (c), (d), (e) of the Labour Court Rules, GN No. 106 of 2007. Leaving out any of the above provisions the application becomes incompetent. He added that, all the above mandatory provisions were observed by the applicant and thus, the court was properly moved. He urged the court not to be tied up by legal technicalities considering that this is a labour matter.

The applicant's counsel, thus, urged the court to overrule the PO and order the matter to proceed on merits to save the interest of justice. This is

because, striking out the applicant's application will prejudice the applicant as she will be denied the constitutional right to be heard.

By way of rejoinder, the respondents' counsel submitted that, the applicant's counsel agrees that Regulation 34(1) of the GN must be complied with before filing any application for revision. Regulation 34(1) is important that is why it has been provided in the law. The above regulation is coached in mandatory terms "shall" to connote that it is mandatory and not permissive. The applicant did not thus, follow the procedure as provided by the law.

I have considered the the submissions by both parties, the record and the law. Reading from the record, and according to the arguments by the parties, it is undisputed that the applicant did not in fact, file the Form at issue as required by the provisions of law cited above. The major issue in determining the PO is therefore, *whether the application at hand is incompetent for the applicant's omission to file the Form in the Commission prior to its filing before this Court.*

The provisions of Regulation 34(1) of the GN which are at issue are couched thus, and I quote them verbatim for purposes of a readymade reference:

> "The forms set out in the Third Schedule to these Regulations shall be used in all matters to which they refer."

According to the third schedule of the GN itself, the Form is couched in the following terms which I also reproduce for an expedited reference:

"CMA F.10

NOTICE OF INTENTION TO SEEK FOR REVISION OF AWARD
(Made under Regulation 34(1))

LABOUR DISPUTE No: .....

BETWEEN

.....APPLICANT

AND

.....RESPONDENT

TAKE NOTICE that the Applicant/Respondent being dissatisfied with the Commission's award in the above mentioned Labour Dispute issued on..... by Honourable.....DO HEREBY intend to seek Revision/Review to the High Court of Tanzania (Labour Division) against the said award. Please forward as expeditiously as possible certified copies of proceedings and award to the:

High Court of Tanzania,
(Labour Division),
.....(Place).

Dated at .....this ..... day of.....

.....
Applicant

Presented for filing this ..... day of..... (year)

.....
Registry Clerk

Copy:
Respondent."

Owing to the wording of Regulation 34(1) of the GN and the Form itself (all quoted above), it is clear in my opinion that, the law makers did not intend put them in place for cosmetic purposes. The law intended to make the filing of the Form in the Commission a mandatory step before one files a revision against any award of the Commission before the HCT. The step is thus, a pre-condition for the revisional application.

In my further view, the Form plays the role of a notice for the intended revision to both the Commission and the adverse party. This is the reason why it is titled "NOTICE OF INTENTION TO SEEK FOR REVISION OF AWARD." It is also indicated at the bottom of the Form that it has to be served to the adverse party (the respondent). I am of further view therefore, that, as a notice of the intended revision, the Form plays a great role in the process of adjudicating the intended revision. It was intended to prompt the Commission to prepare the necessary documents for the revision (the proceedings and award of the Commission) and forward them to the High Court for the purposes as shown in the body of the Form itself. The Form was also aimed at alerting the respondent prior to the filing of the revision so that he/she can properly prepare himself/herself for defending his interests by promptly applying and obtaining such necessary documents from the Commission.

In other words therefore, the requirement to file the Form (as a notice of the intended revision) prior to the filing of the revision was intended to promote or enhance the respondent's right to fair trial generally and the right to be heard specifically. Such rights are fundamental and enshrined under article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 RE. 2002 (The Constitution) under the umbrella of "fair hearing." It is for the significance of the above highlighted principles of law that, it was held by the CAT in the case of **Kabula d/o Luhende v. Republic, Criminal Appeal No. 281 of 2014, CAT, at Tabora** (unreported) that, the right to fair trial is one of the

cornerstones of any just society and an important aspect of the right which enables effective functioning of the administration of justice.

The requirement discussed above is therefore, a vital step in applications of the nature under discussion. In the case of **Arafat Benjamin Mbilikila v. NMB Bank PLC, Revision No. 438 of 2020, HCT (Labour Division), at Dar es Salaam** (unreported) this court (My Sister Magimbi, J.) also held that, the requirement is important and mandatory since Regulation 34(1) of the GN and the Form itself are based on section 98(1) of the Employment and Labour Relations Act, Cap. 366 (the ELRA). These provisions of the ELRA vests in the Minister responsible for labour powers to make regulations and prescribed forms in consultation with the Council, for the purpose of carrying out or giving effect to the principles and provisions of that Act. In the **Arafat case** (supra) this court struck out the revision before it for the failure by the applicant to comply with the above discussed requirement.

Furthermore, like it was held in the **Arafat Case** (supra) the provisions of Regulation 34(1) of the GN use the term "shall" which essentially implies an obligation. This is the spirit embodied under section 53(2) of the Interpretation of Laws Act, Cap. 1 RE. 2019. Indeed, I am aware that, it is not always that when statutory provisions use the term "shall" then failure to comply with them will constitute a fatal blow against the defaulter. The contemporary construction of that term is basically that, the same implies an obligation unless an injustice is likely to be caused by such an interpretation; see decisions by the CAT in the cases of **Bahati Makeja v. Republic Criminal Appeal No. 118 of 2006, Court of**

Appeal of Tanzania at Dar es Salaam (unreported), **Herman Henjewele v. Republic Criminal Appeal No. 164 of 2005, Court of Appeal of Tanzania at Mbeya** (unreported) and **Goodluck Kyando v. Republic, Criminal Appeal No. 118 of 2003, Court of Appeal of Tanzania at Mbeya** (unreported). In the case at hand however, I do not think if construing the term "shall" as implying obligation causes any injustice owing to the significance of the requirement under consideration as discussed earlier.

In my further view, the irregularity committed by the applicant in the matter at hand cannot be saved by the useful principle of overriding objective. This principle has been underscored in our written laws. It essentially requires courts to deal with cases justly, speedily and have regard to substantive justice as opposed to procedural technicalities. The principle was also underscored by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported) and many other decisions by the same court.

The reasons why the omission under discussion cannot be condoned by virtue of the principle of overriding objective are the ones adduced above. Moreover, procedural laws like the one under discussion are very important, they are vehicles of parties' rights and justice. They are also significant for maintaining uniformity, certainty, stability and predictability of the law. These are crucial aspects in the process of adjudication in a legal system of any just society like ours.

Procedural laws therefore, have to be respected and observed for the noble role they play in serving substantive justice. They should not be floated at the whims of the parties. Otherwise, they will be rendered nugatory and mere poetic verses which lack the requisite binding force. If disrespect to them is not seriously controlled by courts of this land, matters in our courts will be handled arbitrarily and randomly, hence chaos and injustice will prevail.

Indeed, by underscoring the above view on respect to procedural rules, I am not advocating for courts to be overwhelmed by procedural technicalities in dispensing justice. The point I want to bring home is that, the existence of what I may call the *anti-technicalities* principle (which said legal principle prohibits courts from being overwhelmed by procedural technicalities in dispensing justice) does not mean that procedural rules should be disregarded altogether. Rather, it emphasizes respect to them except where they become a threat to justice, which is not the case in the matter at hand like I hinted previously. No wonder courts in this country have emphasized respect to procedural rules in opportune circumstances; see for example, the cases of **Bahadir Sharif Rashid and 2 others v. Mansour Sharif Rashid and another, Civil Application No. 127 of 2006, CAT at Dar es Salaam** (Unreported) and **Thomas David Kirumbuyo and another v. Tanzania Telecommunication Co. Ltd, Civil Application No. 1 of 2005, CAT at Dar es Salaam** (unreported).

The CAT in the case of **Zuberi Mussa v. Shinyanga Town Council, Civil Application No. 100 of 2004, CAT at Mwanza** (unreported), also made useful remarks on procedural laws. It observed

that, even the provisions of article 107A (2) (e) of the Constitution which prohibit courts from being overwhelmed by procedural technicalities (i.e. which underscore the *anti-technicalities* principle highlighted earlier), did not mean that procedural rules should be disregarded.

Certainly, it must be born in mind that, some procedural rules like the one under discussion are so significant in the process of adjudication. Violating them thus, cannot be ranked as a mere technical matter. Such violation goes to the root of the case and results into injustice for a reason or another. The submission by the applicant's counsel in this matter that this court should not be overwhelmed by procedural technicalities is therefore, misplaced.

It follows thus, that, acquiescing the applicant's unauthorized practice in the matter at hand (i.e. filing the present revision ahead of filing the Form in the Commission) which said course is against the law, will amount to condoning such hazardous random procedures of revisions which may occasion injustice.

Due to the above reasons, the contention by the applicant's counsel that the applicant filed the revision timely is irrelevant since the condition precedent was not met before the timely filing of the revision. Besides, the PO under discussion was not based on the point of time limitation. Furthermore, his argument that all the mandatory provisions in filing the present application were met is not merited. This is because, it is not supported by the record and the applicant's admission that the Form was not filed prior to the filing of the present application.

It is also my view that, the contention by the applicant's counsel that this court should waive the requirement on the ground that this is a labour matter is not tenable. This is for the significance of the requirement in the process of adjudication demonstrated above. Besides, the Form was made applicable in these same labour matters and not in any other matters. This is so because, Regulation 34(1) of the GN relates to labour matters. The GN itself was made under the ELRA as hinted earlier which also governs labour matters.

Having observed as above, I agree with the contentions by the counsel for the respondent and find that, the omission committed by the applicant has a deleterious effect to the revision at hand. I consequently answer the issue posed above affirmatively that, the application at hand is incompetent for the applicant's omission to file the Form in the Commission prior to its filing before this Court. I therefore, uphold the PO and strike out the application at hand. Each party shall bear its own costs since this is a labour matter and it is not considered to be vexatious or frivolous. It is so ordered.

J.H.K UTAMWA

JUDGE

24/08/2022

24/08/2022.

CORAM; JHK. Utamwa, J.

For Applicant: Ms. Nuru Stanley, advocate H/B for Mr. Emmanuel, advocate.

For Respondent; Mr. Omary Khatibu, advocate.

BC; Gloria, M.

Court; ruling delivered in the presence of Ms. Nuru Stanley, advocate holding briefs for Mr. Emmanuel Godson Myage advocate for the applicant and Mr. Omary Hkhatibu advocatefe for the respondent in court this 24th August, 2022.

JHK UTAMWA

JUDGE

24/08/2022.