

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LABOUR DIVISION)
(IN THE DISTRICT REGISTRY OF MWANZA)
AT MWANZA

LABOUR REVISION NO. 33 OF 2020
(Originating from CMA/MZ/NYAM/326/2019/140/03/2019)

BOC TANZANIA LIMITED APPLICANT

VERSUS

TOGOLAI DAVID KOPWE RESPONDENT

RULING

29/09/2021 & 15/03/2022

F. K. MANYANDA, J.

This is a ruling in respect of a preliminary objection raised by the Respondent to the hearing of the application. The notice of preliminary objection filed on 20/04/2020 initially contains three points of law. However, with leave of this Court, on 13/07/2021, the Respondent added another point of law to the objection making a total of fourth points namely: -

1. *That, Mr. Boniface Sariro being an advocate of the Applicant was not competent to swear an affidavit in support of the revision;*

2. *That the Applicant's application is incurably defective for being incomprehensible and offensive to the mandatory provisions of Rule 24(1) and (3) of the Labour Court Rules, GN No. 106 of 2007;*
3. *That the Application is incomprehensible amounting to abuse of process of the court for contravening mandatory provisions of Rule 28(1) of the Labour Court Rules, GN No. 106 of 2007; and*
4. *The application is incompetent as the Applicant moves this Honourable Court for revision citing non- existing law.*

When the matter was called for hearing on the preliminary objection, the Applicant was represented by Mr. Boniface Sariro, learned Advocate and the Respondent enjoyed the services of Mr. Mahmoud Mwangia, learned Advocate.

Mr. Mwangia argued on three points of law in the objection after dropping the third point.

Submitting in support of the first point, Mr. Mwangia contended that Mr. Sariro being an advocate of the Applicant is incompetent to swear an affidavit in support of the revision because an affidavit been a substitute for oral evidence should contain facts which the witness deposes either of his own knowledge or information believed to be true.



Mr. Mwangia was of the views that from the affidavit only facts in paragraphs 1, 9 and 10 are based on the knowledge of the deponent, the rest contain information which by their nature would only be in the knowledge of an officer of the Company. Elaborating his argument, Mr. Mwangia submitted that Mr. Sariro only represented the company but was not an officer of the Company, therefore what is deposed in paragraphs 2, 3, 4, 6 and 7 is based on information passed on to him by a third party. The Counsel argued that since he didn't indicate so in the verification clause, the same becomes hearsay.

The Counsel submitted that an advocate can only swear an affidavit on matter which are within his knowledge. He cited the cases of **Lalago Cotton Ginnery and Oil Mills Co. Ltd vs. the Loans and Advances Realization Trust (LART)**, Civil Application No. 80 of 2002 and **Tanzania Breweries Limited vs. Herman Bildad Minja**, Civil Application No. 11/18 of 2019 (both unreported).

Moreover, the Counsel also submitted that the remedy is to expunge the offending paragraphs. He cited the case of **Junior Construction Company Limited vs. MMST Tanzania Limited**, Misc. Civil Application No. 144 of 2020 (unreported) which followed the



authority in the case of **Phantom Modern Transport (1985) Limited vs. D. T. Dobbie (Tanzania) Limited**, Civil Reference No. 15 of 2001 (unreported)

The Counsel was of the views that once the offensive paragraphs are expunged from the affidavit, the remaining paragraphs are insufficient to support the application and prayed the application to be struck out.

Mr. Mwangia submitted in support of the second point of law in the preliminary objection arguing that the application is incurably defective for being incompressible and offensive of Rule 24(1) and (3) of the Labour Court Rules. The Counsel submitted that the rule requires a notice of application supported with an affidavit, not a chamber summons. He argued that the application cites Rule 24(1) and (3), but the affidavit is supported with a chamber summons which is unknown procedure in labour laws of this country.

He was of views that the application does not fall under Rule 24(11), therefore it is wrong to be made by a chamber summons. He cited a case of **Eugene Aloyce Kazoka and 87 Others vs. Abdallah Msangoma and 3 Others**, Labour Dispute No. 48 of 2008

(unreported) where this Court said all applications made under Rule 24(11) are to be by way of a chamber summons supported by an affidavit as opposed to other applications which are to be made by way of a notice supported by an affidavit. The Counsel prayed the application to be struck out because it offends the concerned provisions of the law.

In respect of the fourth point of law in the preliminary objection, Mr. Mwangia submitted that the application cited a none existing law therefore incompetent. The Counsel argued that the application is made under sections 91(1)(a) and (b), 2(b) 94(1)(b) and (i) of the Employment and Labour Relations Act, 2004, Act No.6 of 2004 which is no longer existing law. He was of the views that via GN No. 140 dated 28/02/2020, citation of that law now is [Cap. 366 R. E. 2019], the application is incompetent, the same be struck out.

Replying to the objection, Mr. Sariro submitted in respect of the first point conceding on the position of the law as submitted by Mr. Mwangia, but he quickly argued that he was competent to swear the affidavit because he represented the Applicant at the CMA, hence acquired knowledge which he personally perceived and are within his knowledge.



Mr. Sariro also conceded on the law regarding expunge of offensive paragraphs in an affidavit, but pointed out that in the instant matter the paragraphs are not offensive as the facts contained in them are well within the knowledge of the deponent.

As regard to the second point in the preliminary objection, Mr. Sariro submitted arguing that the same is academic in that the Labour Court has given a procedure to be followed in a manual known as "the High Court of Tanzania, Labour Division, How to File Applications Before the Labour Court." The Counsel pointed out that at pages 1 and 3 the manual gives two alternatives which a party may use any. He was of views that the application used a permitted procedure of chamber summons supported with affidavit, therefore it is proper before this Court.

Mr. Sariro responded to the fourth point of objection arguing that the application has been brought under existing law. He submitted that the name of the Act is the Employment and Labour Relations Act No. 6 of 2004 and it was enacted by the Parliament of the United Republic of Tanzania, it is still in force to date.

The Counsel submitted that GN No. 140 of 2020 did not repeal the said Act but rather it restyled its citation by chapter number. The

Counsel elaborated his point that the law is a book of statute in which each statute is given a chapter number.

It was the views of the Counsel that it is not illegal to cite a law by its name and number and year of its enactment or citing its chapter number. He concluded that the objection has been misconceived, the same be overruled.

In rejoinder, Mr. Mwangia reiterated his submissions in chief and added in respect of the third point that section 2(2) provides that the new edition supersedes all previous editions, therefore it is mandatory to cite the law in its current revised edition 2019.

Those were the submissions by the counsel for both parties. I am thankful to the Bar. Both Counsel with the usual zeal and eloquence argued their positions well. Moreover, I sincerely register my apology for late delivery of this judgement, the causes of delay were out of my control.

The issue is whether the application is incurably incompetent.

I will deal with the first point of objection. It has been argued by the Respondent's Counsel Mr. Mwangia that Mr. Sariro being the Applicant's advocate is incompetent to swear an affidavit in support



of the revision because those facts were not in his knowledge. The reason given is that Mr. Sariro was not an officer of the Company, therefore they are just hearsay. On his side Mr. Sariro, argued that he was competent to swear the affidavit because he represented the Applicant at the CMA, hence acquired facts which he personally perceived and are within his knowledge.

It is trite law that affidavits been substitutes of oral evidence must contain facts which are within the knowledge of the affiant. It is from this principle of law that limits an advocate to swear and file an affidavit in respect of proceedings which he appears only on matters which are in his personal knowledge. This was the ratio decidendi in the case of **Lalago Cotton Ginnery and Oil Mills Company Ltd vs LART (supra)** which was followed by the Court of Appeal in **Tanzania Breweries Limited vs. Herman Bildad Minja (supra)** where it stated as follows: -

"An advocate can swear and file an affidavit in proceedings in which he appears for his client, but on matters which are in the advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during these proceedings."

A question is whether the facts sworn by Mr. Sariro go beyond the facts supposed to be in his personal knowledge.

My perusal of the affidavit shows the deponent stated in paragraph one that he was the one who defended the Applicant in Labour Dispute No. CMA/M2/NYAM/326/2019/140/03/2019 hence was well conversant with the facts he was about to depose. The facts deposed in paragraphs 2, 3, 4, 5 and 6 gives a back ground of the dispute that the business of the company sometimes became poor as such it has to reduce its employees. Mr. Sariro says that he knew these facts when he was engaged to represent the Applicant and that these are facts which were made clear at the CMA proceedings as they formed part of issues dealt with. Mr. Mwangia says Mr. Sariro could not have known these facts because he was not an officer of the Company.

This Court takes note that this is a second time Mr. Sariro is representing the Applicant. He first represented her before the CMA. During the proceedings there are some facts he perceived personally and in fact he used the same in defending the Applicant. Those facts I believe came into his knowledge and he can speak about the same personally. Such facts include the background of the labour dispute. It could have been different if, let us say, it is his first time he is



representing the Applicant in this Court. In my opinion, those fact are within the knowledge of the Counsel as they concern facts obtained from the proceedings, they are not nitty-gritties of the company itself.

The question is answered in negative, Mr. Sariro is a competent person to swear the affidavit, the objection in the first point of law is misconceived.

As regard the second point of objection that the application is incurably defective for being incompressible and offensive of Rule 24(1) and (3) of the Labour Court Rules because it does not fall under Rule 24(11), therefore it is wrong to be made by a chamber summons supported with an affidavit.

Mr. Sariro replied that Labour Court has given a procedure to be followed in a manual known as "the High Court of Tanzania, Labour Division, How to File Applications Before the Labour Court." The said manual gives both alternatives which a party may use any that notice or chamber summons.

I have examined the said manual, I agree with Mr, Sariro, there are two alternatives in filing of applications under the Labour Court Rules. One and which is commonly used is by chamber summons supported

with affidavit and the second is by way of a notice supported with affidavit.

This matter has been brought under the former way. I don't see any illegality. Even if there can be said that there is any, the same does not go to the root of the matter, it is curable under the principle of overriding objectives brought in our laws via Act No. 8 of 2018. I find that the decision in the case of **Engine Aloyce Kazoka and 87 Others vs. Abdallah Msangoma and 3 Others (supra)** is distinguishable in that the manual mentioned above was not considered because it was not put before the court. This objection has no merit.

In the fourth point of law in the preliminary objection Mr. Mwangia submitted that the application cited a none existing law because by virtue of GN No. 140 dated 28/02/2020 the Employment and Labour Relations Act, 2004, Act No.6 of 2004 which is no longer existing. The reason he gave is that the citation of that law now is [Cap. 366 R. E. 2019].

Mr. Sariro on his side argued that the name of the Act is "the Employment and Labour Relations Act" No. 6 of 2004 and it was enacted by the Parliament of the United Republic of Tanzania, it is



still in force to date. Further, GN No. 140 of 2020 did not repeal the said Act but rather it restyled its citation by chapter number.

I agree with Mr. Sariro that the short title of the impugned law in issue is written in section 1 as follows: -

*"1. This Act may be cited as the **Employment and Labour Relations Act.**"*(emphasis added).

The said law was enacted in 2004 and it was given number 6 by the legislature.

There are three ways of citing a law provided under section 20 of the Laws Interpretation Act, [Cap. 1 R. E. 2019] which reads as follows: -

"20(1) Where a written law is referred to, it shall be sufficient for all purposes to cite or refer to that written law by : -

- a) the short title or the citation (if any) by which it was made citable;
- b) in the case of an Act, the year in which it was passed and its number among the Acts of that year; or
- c) in the case of an Act, the Chapter number given to the Act in any revised edition of the laws."

It follows therefore that a law can be cited by using a short title or by the citation it is made citable, by the year in which it was passed and its number among the Acts of that year and by the Chapter number given to the Act in any revised edition of the laws.

In this matter the law in issue could be cited by its short title, that is, "the Employment and Labour Relations Act", the same could be cited by the year and the number assigned to it, that is, "Act No. 4 of 2004" and it could as well be cited by the number given to it in the revised edition, that is, "Chapter 366 Revised Edition of 2019" which in short is written [Cap. 366 R. E. 20019].

I agree with Mr. Sariro that the law is a book of statute in which each statute is given a chapter number. Mr. Mwangia contention is also correct that when a law chapter number is revised and given a new one, the latter number supersedes the former one. In this matter, the chapter number was revised and restyled as Chapter 366 Revised Edition of 2019 which supersedes any other chapter number ever given to this law. However, change of chapter number neither eradicates other forms of citation nor changes the law it only affects the former chapter number. The citation of this application is correct in law. The fourth point of objection is none meritorious.

In the result, for reasons stated above, I do find that the preliminary objection has no merit. Consequently, I do hereby overrule the same. The application will proceed to hearing. Order accordingly.




F. K. MANYANDA

JUDGE

15/03/2022