

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

LABOUR REVISION NO. 10 OF 2020

**(Originating from Labour Dispute No. CMA/NJ/24/2019 in the
Commission for Mediation and Arbitration of Njombe, at Njombe)**

BETWEEN

CHINA HENAN INTERNATIONAL

COOPERATION GROUP COMPANY LIMITED..... APPLICANT

AND

HEZRON MSIGALA..... RESPONDENT

RULING

01st September & 14th November, 2022.

UTAMWA, J:

The applicant, CHINA HENAN INTERNATIONAL COOPERATION GROUP COMPANY LIMITED was aggrieved by the ruling (the impugned ruling) of the Commission for Mediation and Arbitration of Njombe (hereinafter referred to as the Commission). In the impugned ruling, the Commission refused to set aside an *ex parte* award it had made earlier. The applicant thus, filed the present application before this court. The

application is brought under sections 91(1)(b), 91(2)(b), 94(1), (b), (i) of the Employment and Labour Relations Act, Act No. 06 of 2004 read together with Rules 24(1), (2), (a), (b), (c), (d), (e) and (f), 24(3), (a), (b), (c), (d) and 28(1), (c), (d) of the Labour Court Rules, GN. 106 of 2007. The applicant moves this court to revise the proceedings, the impugned ruling and *ex-parte* award of the Commission. It is supported by the affidavit of one Wang K, the applicant's Principal Officer.

The applicant's affidavit essentially deposed that, the Commission on 2nd August 2019 issued an *ex parte* award against the applicant and in favour of the respondent, HEZRON MSIGALA. The applicant then made an application before the same Commission to have the award set aside. However, on 12th August the Commission dismissed the said application. The affidavit deposed further that, the applicant was not served with any summons prior to the making of the *ex-parte* award. She was thus, denied the right to be heard.

The respondent, HEZRON MSIGALA resisted the application by filing his counter affidavit. In the counter affidavit the respondent averred that, the applicant was duly served with summons, but refused the service. She thus, waived her right to be heard.

The brief background of the present matter goes thus; the respondent had preferred a labour dispute before the Commission against the applicant for unfair termination of his contract of employment. He claimed that the procedures for the termination were not followed. The Commission decided the dispute *ex-parte* against the applicant because,

she did not enter appearance on various times despite due service upon her. The applicant then applied to set aside the *ex-parte* award. Nonetheless, the Commission dismissed her application for *inter alia*, want of sufficient reasons. The applicant still intending to have the *ex-parte* award set aside, filed the present application before this court.

At the hearing of the application, the applicant was represented by Mr. Frank Ngafumika, learned advocate. The respondent appeared in person and was also represented by Mr. Innocent Kibadu, learned advocate. The application was argued by way of written submissions.

The applicant's counsel submitted in support of the application that, the record shows that, the matter before the Commission proceeded *ex-parte* as against the applicant following her refusal to accept service of summons. However, the applicant was not served with any summons informing her of the labour dispute at issue.

The applicant's counsel also pointed out irregularities in the decision of the the Commission. The first irregularity was that, the Commission raised a new issue of time limitation in composing the impugned ruling and decided it without affording the parties an opportunity to address it. He also faulted the Commission in issuing summons in a name of an individual person instead of in the name of the applicant. He further contended that, the mode of service of summons to the applicant was improper.

The counsel for the applicant therefore, urged this court to grant the application and set aside the *ex-parte* award. He further prayed for this

court to order that the file be remitted back to the Commission for the hearing of the dispute to proceed *inter-partes*.

In the replying submissions, the respondent's counsel contended that, the applicant was duly served with summons, but refused to accept the same. Moreover, she was served with the *ex-parte* award. The applicant was thus, duly given an opportunity to be heard, but she waived it. He added that, the legal issue raised by the applicant's counsel are baseless since he has failed to elaborate on them. The applicant therefore, failed to adduce good reasons for convincing the Commission in setting aside its *ex-parte* award. The learned counsel for the respondent thus, urged this court to dismiss this application.

I have considered the applicant's affidavit, respondent's counter affidavit, the respective written submissions by the parties, the record and the law. I will firstly consider the legal issue raised by the applicant's counsel on the manner the Commission raised and determined the issue of time limitation in composing the impugned ruling. If need will arise, I will also consider the merits of the application at hand. This adjudication plan is based on the understanding that, in case the legal issue will be upheld, it will be legally capable of disposing of the entire matter without considering the merits of the application. I also opt to consider that legal issue firstly thought the applicant raised it in the submissions in-chief and not in the affidavit. This is because, in law, a legal point, especially the one touching the jurisdiction of court can be raised at any stage of the proceedings even on appeal. Indeed, an issue of time limitation touches the jurisdiction of

court because, in law, courts lack mandate to entertain matters filed out of time.

The issues in relation to the legal issue under consideration are therefore, four as follows:

- i. Whether the Commission actually raised the legal issue on time limitation *suo motu* and determined it without firstly giving an opportunity to the parties to address it.
- ii. In case the answer to the first issue will be affirmatively, then whether the Commission was entitled to act *suo motu* in raising the legal issue and determining it in the manner it did.
- iii. If the answer to the second issue will be negative, then what is the effect of the irregularity to the proceedings of the Commission and the impugned ruling?
- iv. Which orders should this court make depending on the answers to the three preceding issues?

Regarding the first issue, I am settled in mind that, it has to be answered affirmatively. This is because, it is clear in the impugned ruling (from the 4th – 6th pages of the typed version) that, the Commission in fact, raised the issue of time limitation *suo motu* though the parties had not addressed it. The Commission then determined the issue without firstly re-opening the matter and inviting the parties to address it on the issue it had raised. The

Commission in fact, held at the 6th page that the application before it was time barred by virtue of Regulation 30(1) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007. Nonetheless, it proceeded to determine the merits of the application before it. The first issue posed above is thus, answered affirmatively. This finding attracts the examination of the second issue.

Concerning the second issue, my settled opinion is that, the course taken by the Commission was improper. This is because, the issue of time limitation is usually raised before a matter is heard on merits. This is because, courts and tribunals do not have jurisdiction to entertain time barred matters. In fact, if the Commission saw the importance of determining the issue time limitation before considering the merits of the application before it, it ought to have re-opened the proceedings and invite the parties to address it on the so raised legal issue. This course would have given them the right to be heard and would have promoted fair trial to them. This was the stance underscored by the Court of Appeal of Tanzania (The CAT) in various precedent including the following: **Zaid Sozy Mziba v. Director of Broadcasting, Radio Tanzania Dar es salaam and another, CAT Civil Appeal No. 4 of 2001, at Mwanza** (unreported) and **Pan Construction Company and Another v. Chawe Transport Import and Export Co. Ltd, Civil Reference No. 20 of 2006, CAT at Dar es Salaam** (unreported). These precedents essentially guide that, where in the course of composing its decision a court discovers an important issue that was not addressed to by the parties at the time of

hearing, it is duty bound to re-open the proceedings and invite the parties to address it on the discovered issue.

Furthermore, upon the Commission finding that the matter before it was time barred, it could not have proceeded to determine it on merits as it did. This is for the same reason hinted above, that a court of law is not entitled to determine the merits of a matter which is time barred. The Commission ought to have dismissed the matter upon finding so.

Owing to the reasons shown above, I answer the second issue negatively that, the Commission was not entitled to act *suo motu* in raising the legal issue and determining it in the manner it did. This answer calls for the test of the third issue.

On the third issue, I am of the view that, the course taken by the Commission denied the parties, especially the applicant who lost the application, of the right to fair trial. That course also violated the Principles of Natural Justice by denying the parties, especially the applicant of the right to be heard as far as the issue of time limitation was concerned. The above mentioned right to fair trial/hearing is a fundamental right and is well enshrined under article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1077, Cap. 2 RE. 2022. This right has been ranked as one of the corner stones of the process of adjudication in any just society like ours, and in both civil and criminal proceedings: see the decision by the CAT in the case of **Kabula d/o Luhende v. Republic, CAT Criminal Appeal No. 281 of 2014, at Tabora** (unreported). No court of this land can therefore, easily temper with such right.

Again, it is trite and settled law that, any decision reached in violation of the Principles of Natural Justice mentioned above cannot stand. The law further guides that, it is immaterial whether the same decision would have been arrived at in the absence of the violation; see the case of **General Medical Council v. Spackman [1943] AC 627** followed in **De Souza v. Tanga Town Council [1961] EA. 377** (at p. 388), and **Abbas Sherally and another v. Abdul Sultan Haji Mohamed Fazalboy, CAT Civil Application No. 133 of 2002, at Dar es Salaam** (unreported). See further the case of **Alex Maganga v. Awadhi Mohamed Gessan and another, HCT Civil Appeal No. 13 of 2009, at Dar es Salaam** (unreported).

In my further view therefore, the irregularities discussed above cannot be cured by the principle of overriding objective. This is because, they go to the root of the case and prejudiced the applicant by denying her of fundamental rights mentioned above. Admittedly, the principle of overriding objective has been underscored in our various written laws. It essentially requires courts to deal with cases justly, speedily and to have regard to substantive justice as opposed to procedural technicalities. The principle was 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 others.

Nevertheless, it cannot be concluded that the principle of overriding objective suppresses other important legal principles that were also intended to promote justice like those highlighted herein above. The

holding by the same CAT in the case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported) supports this particular view. Indeed, this precedent is an authority that, the principle of overriding objective does not operate mechanically to save each and every blunder committed by parties to court proceedings or by courts of law themselves.

Having observed as above, I find that, the irregularity committed by Commission was fatal to the impugned ruling. This finding serves as the proper answer to the third issue posed previously.

In relation to the fourth and last issue, I am of the settled opinion that, owing to the fatal effect of the irregularity committed by the Commission, the impugned order cannot stand. The proper orders for this court to make are thus, to nullify and set aside the impugned order. Indeed, the court will not order for the setting aside of the *ex-parte* award as prayed by the applicant. It will only be prudent, under the circumstances of the case to order for the re-hearing of the application to set aside the *ex-parte* award. These proposed orders are good answers to the fourth issue.

Now, having found as above, I am of the view that I am not legally obliged to test the other reasons for the application since the findings I have made on the four issues posed above are capable enough to dispose of the entire application. Otherwise, I will be performing a superfluous or academic exercise which is not the core objective of the process of adjudication.

Due to the above reasons, I accordingly make the following orders as proposed earlier: I nullify and set aside the impugned order. I also order for the re-hearing of the application to set aside the *ex-parte* award. Such re-hearing shall be before another competent officer of the Commission. Each party shall bear its own costs since this is essentially a matter in a labour nature. It is so ordered.



JHK UTAMWA

JUDGE

14/11/2022.

14/11/2022.

CORAM; JHK. Utamwa, J.

For Applicant: Mr. Omary Khatibu, adv. H/B for Mr. Ngafumika, adv.

For Respondent: Mr. Omary Khatibu, adv. H/B for Mr. Kibadi, adv.

BC; Gloria, M.

Court: Ruling delivered in the presence of Mr. Omary Khatibu, advocate, holding briefs for Mr. Frank Ngafumika, advocate for the applicant and Mr. Innocent Kibadi, counsel for the respondent, in court, this 14th November, 2022.



JHK UTAMWA

JUDGE

14/11/2022.