

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

(TANGA DISTRICT REGISTRY)

AT TANGA

MISCELLANEOUS LABOUR APPLICATION NO. 16 OF 2021

(Originating from Labour Execution No. 18 of 2021)

WS RISK AND PROTECTIVE SERVICES LIMITED.....APPLICANT

-VERSUS-

LABOUR COMMISSIONER.....RESPONDENT

RULING

Date of last order: 23/09/2021
Date of ruling: 01/04/2022

AGATHO, J.:

This is an Application made under Section 91(3), 94(1)(f) of the Employment and Labour Relations Act No. 6 of 2004 and Section 81(2)(c) as amended by the Written Laws (Miscellaneous Amendment) Act No. 3 of 2020, Rule 24(1), (2) and (3), Rule 28(1)(c), (d), (e) of the Labour Court Rules, GN. No. 106 of 2007. The Application comprises of a Notice of

Application accompanied with a Chamber Summons supported by an affidavit on the following orders;

1. That this Court be pleased to stay execution of the Labour Commissioners compliance order dated 29th April 2021 pending determination of the objection filed before the Labour Commissioner.
2. That this Court be pleased to grant any relief deem fit and just to grant.

In response to the Application, the Respondent filed a Notice of Opposition pursuant to Rule 24(4) of the Labour Court Rules GN. No. 106 of 2007 and the Counter Affidavit. The Application was fixed for hearing in form of written submissions.

Briefly, the background of this application is that the Applicant alleged that having noticed that their employee one Philemon Jock was wrongly paid an additional salary of TSH. 90,000/= contrary to his employment contract. Then through its Branch Officers in Tanga decided to explain to the employee through a convened meeting regarding the overpayment in adherence to Section 28(1) (a) and (b) and (5)the Employment and Labour Relations Act [Cap 366 R.E. 2019].

The Applicant further submitted that the employee refused to sign the attendance and later decided to report the Applicant to the Labour Officer in Tanga who issued an order to appear. He further submitted that he took an initiative to meet with the Labour Officer but he was unsuccessful due to miscommunication. However, from the alleged miscommunication, he decided to write an official letter to the Labour Commissioner but surprisingly, the Labour Officer reply was a Compliance Order issued on 14th April 2021 which he considered to be contrary to the principle of natural justice since there was denial of the right to be heard.

The Compliance Order required the Applicant to refund all the amount of money that was deducted which was 810,000/= Tshs and that consequently, the employee applied before this Honourable Court for execution; Labour Execution No.18 of 2021 and that led to the instant application for stay of execution.

In response, the Respondent submitted that the application for stay of execution is governed under Section 91(3) of the Employment and Labour Relations Act [Cap 366 R.E 2019] and

Order XXI Rule 24(1),(2)and (3) of the Civil Procedure Code [Cap 366 R.E. 2019].He further submitted that in an application for stay of execution, the applicant is required to show sufficient cause, presence of a triable issue in the intended appeal and that substantial loss will be suffered if the order sought is not granted.

On the existence of a triable issue, the counsel referred the case of **The Hon. Attorney General and two others v. Valerian Bamanya T/A Tanzania Associated Merchandise, Civil Application No.119 of 2003** (decided on the 27th day of September, 2005) where the case of **Tanzania Railways Corporation v. Mrs. Agusta Upendo Rweyemamu, Civil Application No. 106 of 2004 CAT (unreported)** was referred. In the latter case, the Court granted stay of execution on the ground that there was a triable issue in the intended appeal.

The Respondent further submitted that the Applicant did not substantiate if there was an objection that was referred to the Labour Commissioner against the Compliance Order as per Section 47(1) of the Labour Institutions Act [Cap 300 R.E

2019] which requires the objection to be referred within thirty (30) days of the receipt of the order. He therefore contended that the Applicant was time barred to pursue his right and that there is no triable issue.

The Respondent further submitted that the Applicant wrongly deducted the salary of the employee contrary to Section 28(1)(a) and (b) and 5 (a) and (b) of the Employment and Labour Relations Act without proof that the deducted amount was a loan and that there was no consensus ad idem between the employer and the employee about the deduction. He added that the Applicant has not shown that he will suffer substantial loss if the order for stay of execution is not granted and finally prayed that the Application be dismissed with costs.

In his rejoinder, the Applicant submitted that since the matter is still at the Labour Commissioner, the application is relevant. He added that the Labour Commissioner's Order was issued without affording opportunity to show the calculations that resulted to overpayment of TSH. 90,000/= per month.

The Applicant further submitted that he will suffer financial loss irreparably since the employee did not dispute the

overpayment but refused to be deducted from the alleged Applicant's negligence.

Under labour laws, the application for stay of execution is governed under Section 91(3) of the Employment and Labour Relations Act [Cap 366 R.E 2019], Rule 24(1), 24(2), 24(3), 24(11) (b) of the Labour Court Rules, GN. No. 106 of 2007. Section 91(3) of the Act provides that the Labour Court may stay the enforcement of the award pending its decision. See the case of **Tujijenge Tanzania Ltd v. Mwamba Paul Maduhu, Misc. Labour Application No. 24 of 2021 at page 4.**

Although the Respondent did not protest, the Court has observed that the application brought before this Court has been made under inapplicable laws. Rule 28 of the Labour Court Rules is about revisional powers, the application at hand is for stay of execution. Also, the Employment and Labour Relations Act No. 6 of 2004 has been revised, the current one is Cap 366 R.E. 2019. Moreover, even the Chamber Summons does not tally with the Notice of Application, however Courts have to consider that justice is done rather than being tied

with technicalities. That is the essence of the overriding objective principle enshrined in Article 107 A (1) (e) of the Constitution of the United Republic of Tanzania as amended and Section 3 of the CPC [Cap 33 R.E. 2019]. Considering that in the Notice of Application, Section 91(3) of the Employment and Labour Relations Act [Cap 366 R.E. 2019] has been referred, then that suffices the Court to proceed to determine the application.

Regarding the application, the Court is supposed to consider whether the applicant has shown a sufficient cause, whether there are triable issues regarding the execution and whether the applicant has shown that he will suffer substantial loss if the order of stay of execution is refused. All these have to be stated in the affidavit. The Applicant has not stated in the affidavit that if the application is not granted, he will suffer substantial loss. This has been shown in the Applicant's written submissions.

The Applicant further submitted that he was denied the right to be heard from the compliance order that was issued by the Labour Commissioner. Section 47(1) of the Labour Institutions

Act [Cap 300 R.E 2019] provides that an employer may object in writing to a compliance order issued in terms of Section 46 of the Act within 30 days of the receipt of that order. The format for the said objection is form LAIF. 5 made under Regulation 10 (1) of the Labour Institutions (General) Regulations of 2017, GN No. 45 published on 24/02/2017. The said objection form is found in the Rules. In the present application, there is no proof that the Applicant filed an objection to the Labour Commissioner from the date of pronouncement of the Order which was issue on the 14th day of April 2021, exhibit WS-2 of the Applicant's Affidavit in support of the Application. However, there is a letter (dated 29/04/2021), which in my view was perhaps meant to serve as an objection. But then again as section 47(1) [Cap 300 R.E 2019] the objection ought to be served on the labour commissioner. Moreover, a copy be served upon a registered trade union, a stipulated under Section 47(1) of [Cap 300 R.E 2019]. It is not clear whether the employee was a member of a trade union. It is clear though that the letter (dated 29/04/2021) was received by the labour officer of Labour Office in Tanga. The Applicant further made initiatives to seek

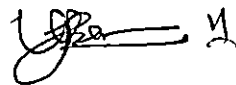
room to be heard vide the letter dated 06/08/2021 which was addressed to the Labour Commissioner in Dodoma. Therefore, in my view, and under the overriding objective principle enshrined in Article 107A(e) of the United Republic of Tanzania Constitution, 1977 as amended requires the Courts to dispense justice without being tied up with technicalities. That is also reiterated in Section 3A(1) and (2) of the Civil Procedure Code, [Cap 33 R.E. 2019]. Therefore, the letter dated 29/04/2021 served as the objection against compliance order as per section 47(1) of the [Cap 300 R.E 2019]. Indeed, in **Paulo Francis Kilasara v Stanbic Bank Tanzania Ltd, Civil Application No. 80/01 of 2019 CAT at Dar es salaam at page 13** the CAT held that the overriding objective cannot be used blindly. The CAT went further citing its decision in **Puma Energy Tanzania Limited v Roadways (T) Ltd, Civil Appeal No.3 of 2018** where it held that the overriding objective was not designed to blindly disregard mandatory procedural requirements going to the root of the matter before the Court, as it were. In my view failure to use the objection form does not go to root of the matter. Under substantive justice the letter written by the Applicant to the Respondent

while not the objection form as provided for under Rule 10 of the Labour Institutions Rules, 2017 it serves the purpose of the objection. That is because it contains some triable issues that are worth to be considered by the Labour Commissioner.

The present application therefore has sufficient cause. Moreover, the Applicant deserves to be heard by the Respondent. For that reason, the application is granted, the execution of compliance order of the Labour Commissioner is stayed pending determination of the objection which was raised on 29/04/2021. This being a labour matter no order for costs is made.

It is so ordered.

DATED at TANGA this 01st Day of April, 2022.



**U. J. AGATHO
JUDGE
01/04/2022**

Date: 01/04/2022

Coram: Hon. U. J. Agatho, J

Applicant: Present/Jacob Lukwaro (HR Manager of ^{W/S}his Risk)

Respondent: Ritha Julius Mollel (for the Labour Commissioner),
& Philemon Jorku (employee)

B/C: Zayumba

Court: Ruling delivered on this 01st day of April, 2022 in the presence of Jacob Lukwaro (HR Manager of WS Risk) and Ritha Julius Mollel (representative of the Labour Commissioner) and Philemon Jorku (employee).




U. J. AGATHO
JUDGE
01/04/2022

Court: Right of Appeal fully explained.




U. J. AGATHO
JUDGE
01/04/2022