IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB - REGISTRY OF MWANZA

AT MWANZA

LABOUR REVISION NO. 15 OF 2023

[*From Commission for Mediation and Arbitration for Mwanza*
Labour Dispute No. CMA/MZA/NYAM/112/2022/57/2022]

HAMZA OMARY ABEID ----------APPLICANT

VERSUS

PRO MINING SERVICE LTD----------RESPONDENT

RULING

June 20th & July 27th, 2023

Morris, J

Hamza Omary Obeid has before this court, an application for revision against the decision of Commission for Mediation and Arbitration for Mwanza (CMA). The application, however, seems to face a turbulent take off. It commences with a preliminary objection (PO) from the respondent. The latter contends that this application is defective for not being accompanied with an index which should have been served upon the respondent. The objector-respondent longs for the application to crumble preliminarily.

I ordered parties to have the PO argued by way of written submissions. They complied with filing-schedule set by the court. The submissions were drawn and filed by Laurent Bugoti and Joseph Kinango, learned Advocates for the respondent and applicant respectively. For the respondent, it was submitted that law obliges an application to be filed in compliance of rule 46 (2) and (3) of ***the Labour court Rules***, GN. No. 106 of 2007. That is, such application must be accompanied with an index and the same needs to be served upon the other party.

Contrary to the above, the respondent argued that the present application lacks such index. For that reason, he holds this application to be incompetent. Further reference was made to the case of ***Johnson Mwakisoma v IPSOS Tanzania Limited***, Revision No. 975 of 2019 (unreported). The respondent maintained that, in the cited case, this Court struck out a similar matter on the same non-compliance.

The applicant submitted in reply that the raised objection is not a pure point of law. That it does not meet the threshold of PO. He referred to ***Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd***, [1969] EA 701 to reinforce his stance. While conceding that the application

was not accompanied with the subject index, he was but quick to submit that the omission is not fatal under the circumstances. He remarked that the non-compliance does not go to the root of application; nor does it occasion injustice to other party.

Consequently, he was not on all-fours with the decision in the case cited by the respondent [***Johnson Mwakisoma vs. IPSOS Tanzania Limited*** *(supra)*]. To him, in such case, the Court struck out the application for non-compliance with a subsequent court order but not on the basis of not attaching or serving the index to the opposing party.

In addition to suggesting that no merit in the PO and praying for overrule of the same; the applicant wished-for for a less severe alternative. Hinging his request on overriding objective (oxygen) principle, he prayed to the to grant 7 days for him to file suitable application.

I have considered the rival submissions of both sides for and against the preliminary objection. The issue standing for determination is whether non pagination of an index and failure to serve the same to the respondent renders the application incompetent. That is, whether or not, the application

which has complied with all substantive and other procedural requirements should be defeated by lack of index.

Admittedly, the respondent's concern herein is not novel in this Court. I will, thus, not pose to reinvent the wheel in determining a similar situation. This Court once was placed in a similar situation in the case of ***Adam Lengai Masangwa and Another v Mount Meru Hotel***, Labour Revision No 1 of 2018 (unreported). The following was recorded as Court's holding at page 5;

> *"…though, as a matter of fact, the record clearly shows the applicants did not paginate nor serve a copy of an index to the respondent as required by law, nevertheless, such defect does not defeat the application because that is irregularity which does neither affect the substantive part nor does it defeat the end of justice."*

I quite subscribe to the foregoing position. I have reasons. **One**; the purpose of the index is to only tell what is contained in the application. In context, it serves as a table of content in a textbook. Yes; as the table of content does not articulate the theme of the literature, so is the index in regard of the current application. The index, therefore, does not form the

kernel of the application in question. That is my view. **Two**; the respondent is not or will not be prejudiced if the application is heard on merit.

Looking at this matter wholistically, if the PO was to be sustained, the resultant consequences are likely to be far reaching to the respondent than otherwise. For instance, the aggrieved party may opt for activation of refiling initiatives. Ultimately, the respondent's involvement in terms of time, finance and expertise to fend such processes will be inevitable. **Three**; with advent of the overriding objective principle, the court need be guided by justice rather than being clawed by technicalities. Accordingly, I partly agree with the applicant that this is a fit case where the *Oxygen Principle* may be put to use without causing travesty of justice to parties.

As I navigate towards conclusion of this ruling, I feel inclined to react on the argument of the respondent based on the case of ***Johnson Mwakisoma v IPSOS Tanzania Limited*** (*supra*). In line with the applicant's submissions, I hold that such case is different from the present matter. The former was not struck out solely on the basis of want of the index. Instead, the case was defeated by two anomalies. The said application was supported by a defective affidavit, on the one hand; and

there was glaring nonobservance of court order following the applicant's previous concession to the respondent's preliminary objection, on the other.

Absurdly, in the subsequent application the applicant not only he repeated the same mistake but also committed another one. In regard to repeating the error for which he had enjoyed the court's amnesty to rectify, the Court had the following to ground: -

> *" It is a common knowledge that court orders are made up with the basic purpose of regulating proceedings. It is expected in the present application the applicant to comply with the order of the court since the earlier application was struck on the same preliminary objection raised in the present application."*

With adequate respect, I fail to appreciate the motive of respondent's counsel in plotting to mislead the court in this respect. It is an inappropriate professional approach.

Therefore, for above reasons and analysis, I am inclined to find that the raised preliminary objection is barren of merit enough to warrant the striking out of the whole application. I overrule it. Nevertheless, I order the

applicant to rectify the documents and resubmit them within 7 days of this ruling. The No order as to costs is made.

C.K.K. Morris

Judge

July 27th, 2023

The ruling is delivered this 27th day of July 2023 in the absence of parties.

C.K.K. Morris

Judge

July 27th, 2023