IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DODOMA DISTRICT REGISTRY

AT DODOMA

LABOUR REVISION NO. 24 OF 2021

(Arising from Labour Dispute No. CMA/DOM/69/2021 and Miscellaneous Application No. CMA/DOM/13/2021)

SALIBHAI INVESTMENT LIMITED.....APPLICANT

VERSUS

NICHOLAUS JOHN ZAMBETAKIS.....RESPONDENT

JUDGMENT

Last Order: 23rd August 2023.
Date of Ruling: 15th September 2023.

MASABO, J:-

Before me is an application for revision of the decision of the Commission for Mediation and Arbitration (the Commission) in Labour Dispute No. CMA/DOM/69/2021 and Miscellaneous Application No. CMA/DOM/13/2021. The application has been preferred under section 91(1) (a), 91(2) (b) (c) and section 94(1) (b) (i) of the Employment and Labour Relations Act, Cap. 366 R.E 2019 (referred in abbreviation as the ELRA) Rule 24(1), 24(2), (a), (b), (c), (d), (e) and (f), 24(3) (a), (b), (c) and (d) and Rule 28(1) (a), (b), (c), (d) and (e) of the Labour Court Rules GN. No. 106 of 2007.

The abbreviated background to the present application is that, the respondent was employed by the applicant as pastry chef from 1st January

2021 to 31st December 2022 and his basic wage was of Tsh. 13,333/= per day and Tshs. 136,430/= as allowance per day worked. He rendered his service until on 23rd April 2021 when his contract was unilaterally terminated by the applicant due to what she alleged as loss of business as a result of the economic downturn occasioned by the Covid 19 pandemic. The respondent was paid his terminal benefit but he was aggrieved. On 30th April 2021, he referred a complaint to the CMA claiming compensation for unfair termination, transport allowances, overtime allowances and unpaid public holiday allowances.

When the matter was scheduled for mediation, the applicant did not appear. In consequences thereto, the mediator proceeded to hear the *matter ex parte* the applicant on 30th June 2021. Thereafter, an *ex parte* award was issued in favour of the respondent on 2nd July 2021. Aggrieved, the applicant moved the mediator to set aside the *ex-parte* award but his effort proved futile after her application was dismissed for want of merit in a ruling delivered on 5th October 2021. The dismissal order aggrieved the applicant further and prompted her to file the instant application. When the application came for a *viva voce* hearing, the applicant was represented by Mr. Sweetbert Festo, learned Advocate and the respondent was represented by Mr. John Mbingo, personal representative.

Invited to address the court in the support of the application, Mr. Festo submitted that the mediator's ruling is illegal as he had no jurisdiction to decide on the merit of the dispute. His role was to mediate the parties and

not to decide it. In fortification he cited the provision of section 86(3) and (4) of the EALRA as applied in **Barclays Bank (T) Ltd vs. Ayyam Matessa,** Civil Appeal No. 481 of 2020, Civil Appeal No. 481 of 2020 (unreported) and the case of **Board of Directors Centre for Foreign Relations vs. Hassan Ally Hassan,** Revision Application No. 434 of 2022 (unreported). He added that, what the mediator was supposed to do is to mark the mediation failed.

It was his submission further that the mediatior erred in deciding that the respondent was unfairly terminated because the respondent had a fixed term contract of two years from 31st January 2021 to 31st December 2022. Thus, the remedy available to him, if any, was for breach of contract and not unfair termination. In support, he cited the case of **Mtambua Shamte and 64 Others vs. Care Sanitation and Suppliers**, Revision No. 154 of 2010(unreported) and **Asanterabi Mkonyi vs, Tanesco**, Civil Appeal No. 53 of 2019 CAT-Unreported. He proceeded that, the mediator erred in citing section 13 of the ELRA and Rule 37 of the Labour Court Rules as these provisions deal with termination emanating from disciplinary conducts which was not the case in point.

Submitting on the third issue, he argued that the applicant was condemned unheard contrary to the law. The summons allegedly sent to her via EMS, appears to have been be sent one Monica Mohamed who is not the applicant or employee of the applicant and were received by one Marry who is also not her employee. In the foregoing, he argued, the decision was invalid for

want of the applicant's right to be heard. On this he cited the case of **Board of Directors Centre for Foreign Relations vs. Hassan Ally Hassan,** Revision Application No. 434 of 2022 and the case of **PMM Estate (2001) Ltd vs. Godfrey Dotto Juventine,** Labour Revision No. 696 of 2018 in support. In the alternative to this ground, it was submitted that as per rule 14(3) of the Labour Court Rules, failure to attend a hearing is not a warrant to hold in favour of the party present at the hearing. Moreover, it was argued that the service of summons to appear for hearing and for *ex parte* award are different and ought not to be treated as one. Therefore, since no proof was rendered as to service of summons, the mediator erred to decline the application for setting aside the *ex parte* award. He cited the case of **Polycem Tanzania Limited vs. Jummanne Samnachilindi and 5 Others,** Revision No. 495 of 2019 (unreported) to bolster his submission.

On the last issue he submitted that Rule 8 (1) (a) of the Code of Conduct, 2007 allows the employer to terminate the employee if he complies with procedures. In the present case, clause 9.2 of the contract concluded by the applicant and respondent gave the parties a right to terminate the contract by giving each other a three months' notice. In compliance thereto, the respondent was given such notice and he signed the same as per annexure SA2 to the affidavit. The decision of this court in **Anyelwisye M. Malele and Others vs. Southern Sun Hotel Ltd and Others,** Revision No. 258 of 2021 (unreported) was cited in support and it was argued that, in this case it was held that the parties are bound by their contract. Therefore, the meditator's award was wrong by procured as the respondent was properly

terminated and paid his contractual rights. In conclusion he prayed that the award and the decision of the mediator be quashed and set aside.

In reply to the issue on jurisdiction, Mr. Mbingo, the respondent's representative, submitted that the mediator had jurisdiction to hear and determine the matter as per section 87(3) of the ELRA and his decision was correctly made after the applicant defaulted appearance after he was duly summoned to appear. He argued that the cited case of **Barclays Bank (T) Ltd vs. Ayyam Matessa** (supra) is distinguishable to the case at hand.

On the submission that the mediator erred in entertaining an application for unfair termination, a prayer by which the respondent moved the commission under through CMAF.1, it was submitted that, the CMAF1 was properly filed as it has many parts. The respondent filed part one on termination of employment and prayed for compensation for unfair termination. He added that, although the respondent ought to have filed part B of the form on breach of contract, the anomaly is minor and did not take away the respondent's right for compensation for unfair termination.

On service of summons, he submitted that the respondent firmly believes that the summons were delivered to the applicant through her employees who are Monica, Merry and Celina. The summons was delivered at Shoppers Supermarket, a subsidiary/sister company to the applicant. The two companies are owned by the applicant herein and are both situated at Regent estate, Plot 484 and 491, Mikocheni Dar es Salaam. They also use

the same offices. Thus, the argument that the summons were not served to the applicant is misconceived and with no merit. He added that, the fact that the applicant filed an application for setting aside the ex parte award attests to the fact that the summons for exparte award was served on him otherwise he would not have filed the application for setting it aside.

As regards the numerous cases cited by the applicant's counsel in support of his submission, the representative briefly submitted that, he was unable to grasp their gist as they are in accordance with the counsels understanding. All he knows is that the case of **Barclays Bank (T) Ltd vs. Ayyam Matessa**, (supra) is distinguishable from the case at hand. He concluded by praying for dismissal of the application and for an order upholding the *ex parte* award.

In rejoinder, Mr. Festo reiterated his submission in chief on the issue of jurisdiction of the mediator. As regards to CMF.1, he rejoined that the respondent indicated that there was an unfair termination. Hence, he cannot change anything at this stage as in law the parties are bound by pleadings and this court cannot depart from them. Since the claim was for unfair termination, the commission had no right to grant compensation for termination for breach of contract. In contravention to this rule, the mediator departed and in so doing, erred in law. On proof of service, he rejoined that service to Shoppers Supermarket cannot be regarded as service to the applicant as Shoppers Supermarket was not a party to the claim. He added that, Shoppers Supermarket is different from the applicant company and

there is no indication in the pleadings herein that the two are sister companies or subsidiary to each other. Therefore, the argument that the documents were properly served through an employee of Shoppers Supermarket should not be accorded any weight. This was the end of submissions.

Having carefully considered the rival submissions from both sides and after going through the record of the application, the issue to be determined is whether the mediator's refusal to set aside the *ex parte* award was justified. From the impugned ruling, it is deciphered that, while dismissing the application the mediator held that much as the law vests the Commission with power to reverse the *ex parte* order, the reversal can only issue where the applicant has demonstrated to the satisfaction of the Commission that, his failure to enter appearance was due to a good cause. This requirement was not met by the applicant as she demonstrated no good ground.

In clarification, it was stated that the applicant's lamentation that she was not served with a summons to appear before the tribunal was a lame excuse as the means used to serve her with the summons for ex parte award was similar to the one used to serve her with the summons for mediation hearing. The fact that she received the summons for the ex parte award presupposes that she also received the summons for mediation and was fully aware that there was a matter pending against her at the Commission but she deliberately defaulted appearance.

Section 87(5) (b) of the ELRA which was invoked by the Commission while arriving at the conclusion above and which this court has to apply in determining the present application vests the Commission with discretionary powers to reverse its *ex parte* decision made under section 87(3) of the same Act if it is satisfied that the party against whom the hearing proceeded *ex parte* has shown a good ground for his failure to attend the hearing. This provision has been applied in numerous matters, among them, the case of **Mbeki Teacher's Saccos vs. Zahra Justas Mango**, Revision No. 164 of 2010, High Court Labour Division at Mbeya, (unreported) where it was held that demonstration of a sufficient reason is a pre- condition for the court to set aside *ex parte* order. In a subsequent decision in **Ms. Jaffer Academy vs. Nhawu Migire**, Revision No. 71 of 2010 High Court Labour Division at Arusha (unreported) it was held that:-

> Where a party aggrieved by an ex parte award on ground that the order to proceed ex-parte was wrongly made, the proper procedure open to the aggrieved party is to apply to the CMA, explaining the reason for failure to appear before it; and seeking to set aside the ex-parte award. If the commission is satisfied that such a party had a good ground for failing to attend hearing, it will reverse the ex parte order so made and allow the matter to proceed inter parte (the emphasis is added).

The phrase good ground for purposes of setting aside an ex parte order, has not been universally defined. What constitutes a good ground is dependent upon the circumstances of each case. In the instant case, it has been claimed that the sole reason why the applicant did not enter appearance at the

hearing is nonservice of the summons. On his part, the respondent has passionately argued that service was duly done and that nonappearance was not accidental as claimed but a deliberate act by the respondent. The narrow issue nascent from this submission is whether the applicant was duly served with the summons to appear for hearing and whether his non-appearance at the hearing was with a good cause warranting the exercise of the Commission's discretion under section 87(5) of the ELRA.

In any court or tribunal's proceedings service of summons to the opponent party is a vital legal requirement as it serves to inform him of the existence of a suit/complaint against him and what is required of him. Hence, a precursor to the exercise of the right to be heard which is at the epicentre of the right to a fair trial which courts and tribunals are enjoined to guarantee. It is in the foregoing context that rule 7(3) of the Labour Institution (Ethics and Code of Conducts for Mediators and Arbitrators) Rules, GN. 66 of 2007 prohibits mediators and arbitrators from conducting any proceedings in the absence of parties, except where they are satisfied that adequate notice of the time, place and purpose of the hearing have been served to the parties. It states:-

> Every Mediator or Arbitrator shall not conduct a hearing without all parties being present, except where satisfied that adequate notice of the time, place and purpose of the hearing have been served to the parties.

A mediator or arbitrator can only proceed with an ex parte hearing if he is satisfied that the defaulting party was adequately served with notice to

appear for mediation hearing but deliberately defaulted appearance (see 87(3) (a) and (b) of the ELRA and Rule 14 (2) (a) (ii) of GN 67). Proceeding with the matter *ex parte* in the absence of proof of service of summons is wrong and if established, would undoubtedly suffices as a good ground warranting the reversal of the *ex parte* order.

During my perusal of the record of the Commission, I have observed that after the matter landed before the Commission, it was scheduled for mediation which was to take place on 17th May 2021. However, on that date only the respondent, (then the applicant) appeared accompanied by his representative one Khamis Taratibu. The matter was adjourned to 24th May 2021 with an order that the respondent be served. On that day, 24th May 2021, the applicant was once again absent. Only the respondent and his representative appeared. The mediator ordered the matter to be heard ex parte the applicant citing the provision of section 87(3) (b) of Employment and Labour Relation Act Cap. 366. For easy of reference as to what transpired on these dates, a non-official English translation of the Swahili proceedings of the respective dates is provided below:

17/05/2021

Mediator: Hellen Mtawa

Complainant: Present

Representative: Khamis Taratibu

Status of the matter: mediation hearing,

CMA

The respondent has defaulted appearance for mediation hearing of the matter. The matter is adjourned until 24/5/2021 and a summon should be issued.

Mediator

17/05/2021

24/05/2021

Mediator: Hellen Mtawa

Complainant: Present

Representative: Khamis Taratibu

Status of the matter: mediation hearing,

CMA

The respondent has defaulted appearance of the mediation hearing. Therefore, the matter shall be heard ex parte under section 87(3) (b) of Cap. 366. Hearing on 1/6/2021.

Mediator

24/5/2021

Indeed, on 1st June 2021, the matter was heard *ex parte* as the applicant was still at large and on 2nd July 2021, the *ex parte* award was issued. The omission of the mediator to inquire as to whether its order for issuance of summons was complied with and whether the service was duly served to the respondent is prominently revealed in the above proceedings. Since the respondent has argued that the summons were served, I have asked myself

whether the tribunal was rendered with such proof. Proof of service is invariably done through an affidavit of service deponed by a process server. Where service is not at issue, a copy of the summons bearing an endorsement by the respondent can also suffice. None of these two was rendered on 24/5/2021 when the applicant and his representative appeared before the Commission. Hence it, can fairly be assumed that the order to proceed *ex parte* was based on mere speculation that the respondent was served.

In my further perusal of the record I have noticed that, there is a summons calling upon the parties to appear before the Commission on 17/5/2021 and a second one calling upon the parties to appear for hearing on 24/5/2021. Each of them is accompanied by a receipt showing that it was dispatched through EMS. Both were addressed to one Monica Mohamed of P.O. Box 105383 Dar es Salaam. No explanation was rendered why the applicant resolved to this mode of service and the record is totally silent about it. Assuming that the commission based its finding on these two receipt, can be held that they sufficiently proved service to the Applicant. The answer is in the negative. Much as the summons had the name of the applicant, the addressee to the EMS was, as stated above, one Monica Mohamed whose relationship with the applicant remained undisclosed until the time when the applicant moved the Commission for setting aside its ex parte award. I find this to be a fatal anomaly as the summon ought to be sent to the applicant company and not to someone else.

Needless to emphasize, in law, a company is a corporate body with right to sue and be sued in its own name and separate from its subscribers, directors and employees. Suits for or against a company must, as a rule, be in its name and so are the summons. Therefore as correctly argued Mr. Festo, the EMS ought to have been addressed to the applicant company. Addressing them summons to the company's employee or an employer of another company be it a sister or subsidiary company was totally wrong and can not be considered as proof of service to the applicant. The applicant's claim that he was condemned unheard is undoubtedly, with merit.

Much as the finding with respect to services ufficiently resolves the application, I will briefly comment on the issue of jurisdiction. Relying on the decision of the Court of Appeal in **Barclays Bank** (supra) the applicant has argued that, even if it was found by this court that the applicant was duly served, the *ex parte* award cannot be sustained as it was issued by the mediator who had no jurisdiction to issue such award as his role is just to mediate between the parties, not otherwise.

In this authority, the Court of Appeal dealt with a matter akin to the one at hand. Consequent to the respondent's non appearance for mediation hearing, the mediator ordered that the hearing proceed ex parte. Thereafter, he proceeded to hear it and in the end, just as the mediator herein, issued an *ex parte* order. After an extensive deliberation of the above and related provisions of the ELRA, GN No. 66 of 2007 and No. 67 of 2007 as well as

persuasive authorities from different jurisdictions, the Court of Appeal concluded that:-

> What should then be construed to be the scope of the application of the provision by the mediator? In our view, since the phrase to decide used in the respective provision is broader enough to capture an order to proceed ex parte which does not by itself amount to arbitration, we would construe the power under the respective provision as limited into making such an order and refer the complaint to arbitration under rule 20(2) of the G.N. No. 67 of 2007. We have also considered that making a finding that, the arbitration should proceed ex parte forms part of the decision process.

The respondent herein has argued that this authority is inapplicable in this case as the ex parte award being challenged was issued before the apex court issued the said decision. He has implicitly suggested that applying the above authority to the present application will amount to giving it a retrospective effect contrary to the law.

With much respect to the respondent's representative, his argument seems to have been lucidly misconceived because the decision of the apex court is not an enactment which would have made the principle against retrospectivity of statutes applicable. Also, as correctly summitted and argued by Mr. Festo, the apex court did not re- invent the wheel in its decision. All it did was interpreting provisions of the law which have been existent since 2004 and 2007. Besides, the authority of the apex court shows that the ex parte award from which it emanated was made prior to 2014

which is more more than 6 years before the respondent herein obtained the ex parte award subject to this application. The argument by the respondent's representative is thus without merit. Just as the mediator in **Barclays Bank** (supra), the mediator herein had no jurisdiction to issue an ex parte award.

For the reasons afore stated, I allow the application and consequently nullify and set aside the proceedings and decision of the Commission in Miscellaneous Application No. CMA/DOM/69/2021. I subsequently quash and set aside the proceedings and the ex parte award in CMA/DOM/13/2021. Let the case file be remitted to the Commission for hearing of the mediation before another mediator. This being a labour dispute, each party shall bear its own costs.

DATED at **DODOMA** this 15th day of September, 2023.

L.J. MASABO

JUDGE