THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
SONGEA SUB – REGISTRY
AT SONGEA
MISC. CIVIL APPLICATION NO. 17 OF 2023

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND MANDAMUS BY SAID MOHAMED HANGO

SAID MOHAMED HANGO .....APPLICANT

VERSUS

THE MINISTER FOR LABOUR, YOUTH, EMPLOYMENT & DISABILITY.....1ST RESPONDENT
WORKERS COMPENSATION FUND.....2ND RESPONDENT
ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Dated: 12th April, 2024

KARAYEMAHA, J.

In this application, the applicant is seeking an order of this Court to grant leave for him to apply for orders of *certiorari* and *mandamus* to move this Court to quash the whole of the decision of The Minister for Labour, Youth, Employment & Disability, (hereinafter the 1st respondent) dated 7th August, 2023. The 1st respondent confirmed the decision of the Director General which ruled out that the applicant suffered the permanent disability of 11% and that the applicant should be paid basing on the 70% of his salary times 11% times 84 months. Unhappy with that decision, the applicant seeks to challenge it. Being

administrative decision, the applicant seeks to challenge it by way of prerogative orders before this court.

The application is supported by an affidavit deposed by the applicant himself. It is, fervently opposed by the respondents through the counter affidavit deposed by Deo Victor Ngowi, a Senior State Attorney, employed by the 3rd respondent (The Attorney General). Simultaneous with the counter affidavit, respondents raised points of preliminary objections (the POs) to the effect that:

1. *The application is bad in law and untenable for contravening the provisions of section 80(2) of the Workers Compensation Act, Cap. 263.*
2. *The application is bad in law and untenable for contravening the provisions of section 12(1) and (2)(a) of the Workers Compensation Act, Cap. 263.*
3. *The application is bad in law for suing a non – existing party.*

It appears that the respondents abandoned the 3rd PO and I shall not labour into it.

Perhaps I should point out in the first place that the applicant is contesting the raising of the Pos whose intention is to bar substantial

justice to be done and rely purely on technicalities. Of significant, the applicant is hiding behind the overriding principle, which enjoins Courts to avoid technicalities in dispensing justice. However, in my considered view the principle cannot apply in the circumstances of a matter in which, after taking the gravity of the contravention, the same goes to the root of the matter. I am strengthened by decision of the Court of Appeal of Tanzania in **Mondorosi Village Council & others v. TBL & 4 others,** Civil Appeal No. 66 of 2017 (unreported) where it was held that:

> *"Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case. This can be gleaned from the objects and reasons of introducing the principle under section 3 of the Appellate Jurisdiction Act [CAP 141 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018, which enjoins the courts to do away with technicalities and instead, should determine cases justly."*

In this case, the applicant contravened the provisions of sections 80(2) and 12(1) and (2)(a) of the Workers Compensation Act (hereinafter the WCA) which requires any person dissatisfied with the decision of the 1st respondent to appeal to the Labour Court.

Contravention of these provisions cannot be subjected to overriding objectives because they entirely make the whole application incompetent in the eyes of the law. This will be vivid as we go deep in the discussion.

In addition, the perception that advocates should not raise preliminary objections is misplaced because they are an arena on which learned minds use to remind each other about development of the law. See, case of **Fatuma John and 12 others v. The Registered Trustees of Evangelical Lutheran Church in Tanzania - North East Diocese,** Misc. Civil Application No. 69 of 2022 (unreported), at the last paragraph of page 17.

I fully associate myself to the afore wording of my brother Manyanda, J. and I unhesitatingly reject the more extreme submissions made on either side as regards raising of preliminary objections. In addition, it remains a principle of primordial importance that, unless there are captivating reasons for doing otherwise, preliminary objections on points of law that brings the matter to the end must be attended at earliest stage of the matter and should not be taken lightly as wastage of time.

Let me now drive home to the Pos. Setting the ball rolling was Mr. Kabelwa, who, while submitting on the first limb of objection, pointed out procedures to challenge the 1st respondent's decision. He said aided by section 80(2) of the WCA that, the 1st respondent's decision is challenged by filing the appeal to the Labour Court not to file an application for judicial review. The learned state Attorney implored this Court to be inspired by its decision in **Emmanuel Massanja Maganga v. The Managing Director Out Door Tanzania**, Civil Appeal No. 162 of 2018 HC-DSM (unreported). The learned counsel argued further that judicial review is only available where there is no any other avenue through which a party may challenge the decision of the administrative body or power. He cited the case of **Michael David Nungu v Institute of Finance Management**, Civil Appeal No. 170 of 2020 CAT-DSM (unreported) which cited the case of **Attorney General v. Lohay Akonaay** [1995) TLR 80.

Therefore, it was the firm position of the respondents that the application at hand is purely bad in law for being preferred by way of leave to file application for *certiorari* and *mandamus* as an alternative to appeal contrary to the intents and purposes of Section 80 (2) of the WCA.

Submitting with respect to the second limb of PO, Mr. Kabelwa took the view that the 2nd respondent does not exist under the law. He contended that under section 12(1) and (2)(a) of the WCA it was the Board of Trustees of the Workers Compensation Fund to be sued not the 2nd respondent. He argued further seeking refuge to the cited provisions that as per law it is the Board of Trustees, which in its name is capable of suing or be sued. He concluded by submitting that the application is bad in law because the 2nd respondent and the Board of Trustees established under the cited provisions of law are two distinct parties. To underscore his position, the learned counsel cited the decisions in **Ilela Village Council v Ansaar Muslim Youth Centre and Kiwawa Konzo,** Civil Appeal No317 of 2019 and **Trustees of Chama Cha Mapinduzi v. Mohamed Ibrahim and Sons and another,** Civil Appeal No. 16 of 2008 (both unreported).

The applicant on his part obstinately, objected to the Pos raised on two fronts. **One,** that they are predicated on technicalities instead of substantial justice which spirit is emphasised under the overriding objective enshrined under Article 107A(2)(b) of the Constitution of the United Republic of Tanzania (henceforth the constitution) and sections 3A(1)(2) and 3B(1)(a)(b)(c) of the Civil Procedure Code, [Cap. 33 R.E.

2019] (henceforth the CPC). **Two,** the impending application is projected to challenge the administrative authority decision. He held the view that the procedure suggested by section 80(2) of the WCA would perfectly fit if the decision to be challenged is judicial or from adjudicating institutions.

Submitting with respect to the 2nd limb of objection the applicant stated that a suit should not fail because of joining a non existing party. While acknowledging section 12(1) and (2)(a) of the WCA, he also cited Order 1 Rule 9 of the Civil Procedure Code, [Cap. 20 R.E. 2019] to underscore his view that a suit should not get stuck for a hearing due t a failure to join a wrong party or failing to join a necessary party. He held the view that the court in case there is such anomaly, advocates must assist the court to rectify it and go on determining the matter on merit by considering interests of both parties. He, therefore, prayed this court to allow him to amend the application. His prayer echoes the holding in the case of **Ramadhan Sembejo Mongu v. District Executive Director of Musoma Council and 3 others,** Civil Case No. 6 of 2021 HC-Musoma (unreported).

I have considered the parties' arguments, the application and the law, that is, the WCA. The issue calling for determination is whether this application is tenable.

In the first place, I concomitantly agree with the applicant that the decision intended to be challenged is administrative. I further agree with him that the avenue available to challenge administrative decisions is through judicial review. This position is as old as the statutes. As stoutly submitted by the applicant, a grant of leave constitutes a prelude to and a requisite for application of prerogative orders of *certiorari*, *mandamus* and prohibition to challenge the administrative decision.

While that is the position in our legal regime, the practice is different when it comes to compensating workers who have suffered and endured harm in the due course of their employment. Any dissatisfactions in compensation are tackled and dealt with guided by the WCA. Under this Act, discontent from the decision of the Director General is appealable to the 1st respondent in the manner handed down in the WCA. What is at stake, in the matter at hand, is the appeal from the 1st respondent to the High Court, Labour Court. While the respondents are stressing that the 1st respondent's decision should be challenged in the Labour Court in terms of section 80(2) of the WCA, the

applicant holds the view that since the 1st respondent's decision is administrative one, it should be challenged by way of judicial review.

With respect to the applicant, this is not the requirement of the law guiding matters of this nature. It would be circumvention of the law if I agree with him that filing application for judicial review would be the proper way to challenge the 1st respondent's decision. I copiously subscribe to my brother Mlyambina's holding in **John Manson Kayombo (As an administrator of the Estate of Late Osmunda A. Millinga) v. Prime Minister's Office Labour, Youth, Employment and Persons with Disability & Attorney General,** Application for Revision No. 225 of 2023 that:

> *"I agree that the records of the Minister who also picks them from the Workers Compensation Fund are not judicial proceedings. In terms of Section 94 (1) (c) of the Employment and Labour Relations Act (supra), it is my humble view that the decision of the Minister should be challenged before the High Court Labour Division by way of review. Accordingly, in the present case, as the law stands, I agree with both parties that the question of jurisdiction of the High Court Labour Division was conclusively stated by Section 80(2) of the Workers Compensation Fund Act (supra). As such, there is a conflict between the provisions of Section 80 (2) of the Workers Compensation Act (supra) on the one hand and the Workers Compensation Regulations (supra) on the other. The Regulations, in particular,*

Regulation 29(3) o f the Workers' Compensation Regulations (supra), is overridden to the extent of the conflict."

What is gleaned from the foregoing holding is that apart from its challenges, section 80(2) of the WCA bestows jurisdiction to the High Court Labour Division. This provision says it all that:

"Any person aggrieved by a decision of the Minister may, within sixty working days, from the date of decision, appeal against that decision to the Labour Court."

The applicant has, therefore, to comply with the provisions of section 80(2) of the WCA. In view thereof, the 1st limb of objection is sustained.

The second preliminary objection is that the applicant failed to join the Board of Trustees of the Workers Compensation Fund as a necessary party to this application and joined a non-existing party, the Attorney General. Mr. Kabelwa has swiftly and vehemently submitted that the Board of Trustees draws its mandate from section 12(1) and 2 (a) of the WCA which provides as follows:

"12 (1) There is established a Board to be known as the Board of Trustees of the Workers Compensation Fund–
(2) The Board shall in its corporate name be capable of;
(a)suing and being sued."

Having powers under the cited provision to sue and be sued, it sounds odd, in my considered view, for the applicant to sue the 2nd respondent in lieu of.

The applicant has a similar position but holds the view that the anomaly is curable and the failure is not fatal to the case. I find Mr. Kabelwa's submission with force on this aspect. Reasons for agreeing with him are obvious. The Board of Trustees of the Workers Compensation Fund is a necessary party because the decision, which the applicant is challenging, traces its origin from the decision of the Director General of the Workers Compensation Fund. It is understood, therefore, that prayers sought, if granted, will require the Board of Trustees of the Workers Compensation Fund to pay the compensation claimed by the applicant. In a situation where this crucial party is not joined, it may pose difficulties in executing the Court's order.

The above position inclines me to agree with the respondents' contention and hold that failure to join a necessary party renders the application incompetent. Of course, this is the cardinal principle, which was stressed in the decision of the Court of Appeal in **Mussa Chande Jape v. Moza Mohammed Salim,** Civil Appeal No. 141 of 2018, (CAT-Zanzibar) (unreported), at page 12 where it was held thus:

> *"... it is now an acceptable principle of law (see Mullah Treatise (supra) at page 810) that it is a material irregularity for a Court to decide a case in the absence of a necessary party. Failure to join a necessary party, therefore is fatal (MULLAH at p.1020)."*

In the light of the foregoing excerpt and pursuant to Part III of WCA, which establishes the Board of Trustee of the Workers Compensation Fund, it is discerned that in suing under the WCA, the Board of Trustees is a necessary part to suits specifically emanating from the decision of the 1st respondent. Section 16 (3) to the WCA provides for the duties of the Board of Trustees with regard to the assets and liabilities. It states as follows:

> *"The Board **shall** be Responsible for the Management, including, the safeguarding of the assets, management of the revenue, expenditure and Liabilities of the fund."*
> (Emphasize added)

These duties are vested absolutely with the Board of Trustees of WCF. It is this board with mandate to implement them. In case the Board of Trustees of the Workers Compensation Fund is not part to a case, execution of the decree becomes a new fact to deal with it in terms of 16 (3) to the WCA. Undisputably, it turns out that it was condemned unheard. Traditionally, Courts of the land are required to mandatorily accord opportunities to parties to be heard when their rights

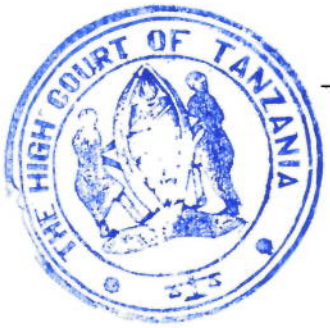
are being adjudicated before a decision is pronounced. This is the import of Article 13(6) of the Constitution.

In view of the discussion above, I am fully satisfied that the omission to join the Board of Trustees of CWF, established under section 12(1) and (2)(a) of the WCA, in the proceedings was a fundamental error which denied it the right to be heard. This is a significant violation of a fundamental principle of natural justice as lucidly explained hereinabove.

In the end, I find and hold that that the Board of Trustees of the Workers Compensation is a necessary party that need to be joined. Failure by the applicant to join it is fatal and cannot be cured. Consequently, the Pos are upheld and the application is struck out for being incompetent with no orders as to costs.

It is so ordered.

DATED at **MBEYA** this 12th day of April, 2024



J. M. KARAYEMAHA
JUDGE