IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 675 OF 2018

BETWEEN

MAURIZIO MIAN..... APPLICANT

VERSUS

SKOL BUILDING CONTRACTORS LTD..... RESPONDENT

JUDGMENT

Date of Last Order: 13/03/2020

Date of Judgment: 24/04/2020

A. E MWIPOPO, J

The applicant **MAURIZIO MIAN** has filed the present application seeking revision of the ruling of the Commission for Mediation and Arbitration (herein after to be referred to as CMA) which was delivered on 17TH July, 2017. He is praying for the Court to grant the application for condonation.

At the hearing of the application the applicant was represented by Mr. Nashon Nkungu Learned Counsel whereas Mr. Dickson Matata, Learned

Counsel appeared for the Respondent. The hearing proceeded by way of written submissions, and both parties adhered to the schedule.

The applicant submitted that the applicant submitted 3 reasons that hindered him to act timely and file his claims before the Commission within prescribed time. Those reasons were sickness, ongoing efforts to settle the matter out of court and seeking legal advice.

In the affidavit, which he prays for the court to adopt as part of the submission, there are 3 grounds for revision in support of the application. The first ground of revision is that the Commission erred in law and fact for failure to accord weight to the attachment that were appended to applicant's affidavit in support of the application before. The applicant submitted on the ground that there is no strict requirement for certain proof. He submitted before the Commission copy of his travelling document and pictures taken while at hospital to prove that he travelled to Italy for treatment purposes. But the arbitrator pointed out in the award that applicant did not produce sick sheet or doctors report thus he failed to prove that he was sick. He further that submitted that Rule 27 of the Labour Institutions (Mediation and Arbitration) Rules, G.N No. 64 of 2007, gives Arbitrator the power to order disclosure of relevant information and

production of document after being requested by any party of the proceedings. But neither the respondent or Commission acted on such Rule leaving the applicant to believe that what he have produced was sufficient. Therefore he submitted that it is quite unfair for punishing the applicant for such omission.

He argued that Labour laws have been purposely enacted so that the parties are presumed to be ignorant of the legal requirement and the commission to be the one to lead them to the right way and not applying strict legal procedure, to strengthen his argument he referred the case of **Reli Assets Holding Co. Ltd. Vs. Japhet Casmil & 1500 Others, Revision No. 10/2014 (High Court- Labour Division- TBR).**

He further argued that the Hon. Arbitrator did not consider the adduced evidence and she did that without any reason. For instance the applicant in his affidavit in paragraph 5 apart from travelling documents, he attached his picture when he was at hospital, but the Hon. Arbitrator did not even bother to mention it.

On second ground that the applicant was settling the matter out of Court, he submitted that the applicant on his affidavit swore that for the whole period after he left the country he was making constant

communication whereby he was sending e-mails to the respondent Company's CEO, named Vicent Massawe. He went further by producing such e-mails and attached them as annexure D, and this fact was neither denied nor disputed by the respondent but still the Hon. Arbitrator holding that the applicant did not produce any proof that there was on going communication. By ignoring what is stated in affidavit the arbitrator ended up with wrongly ruling. He was of the opinion that the condonation is the pre mature stage on the matter therefore there is no need of any substantial findings on it.

The applicant further submitted that omissions to record and failure to consider adduced evidence attached to the affidavit by the Hon. Arbitrator goes to the root of the matter and greatly affect findings, to support his submission he referred different cases including the case of **Thobias Ndege Vs. Mwatex (2001), Ltd, Lab. Division - Mwanza, Revision No. 110/2009.**

On the third ground that the delay occurred while the applicant was seeking for legal advice, it was submitted that the Hon. Arbitrator failed to grasp what is stated in a sworn affidavit that immediately after getting back to Tanzania the applicant sought for legal assistance. He further

argued that counting from 02nd November 2016 to 23rd November 2016 when he filed the matter before CMA it just 21 days which is quite reasonable time contrary to the decision of the CMA.

He argued that the applicant in his application before CMA adduced a good cause as per Rule 31 of the Labour Institutions (Mediation and Arbitration) Rules, G.N No.64/2007. In support of his argument he referred the case of **Exim Bank Tanzania Limited Vs Johan Harald Christer Abrahmson and 3 Others, Civil Reference No. 11 of 2018, Court of Appeal of Tanzania at Dar Es Salaam, (Unreported).**

Opposing to the application respondent submitted that the application before the commission was preferred out of the prescribed time provided under Rule 10(2) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 67 of 2007. The Rules provides in rule 11(3) for grounds upon which a party may seek for condonation.

The respondent argued that on the issue of sickness the court found that the applicant did not avail sufficient evidence. The ground for the Commission decision is that applicant's pictures showing him with a bandage lying on a bed was not sufficient evidence to prove that he was sick at the time to refer the dispute to the CMA and that he travelled for

reason of sickness. He stated that travelling document is irrelevant and baseless. The applicant was supposed to prove before CMA that he failed to refer the dispute within time for the reason that he was sick.

On the second ground of revision regarding on going communication between the applicant and the respondent, he submitted that negotiations or promise have never been a reason to condone time. He was of the view that the power of the Court to condone is discretionary and should be judiciously exercised. To support his argument he referred the case of **General Guards & Officers Cleaner Vs. Chacaha Masuri& 29 Others 2011-2012 LCCD 19 and the case of Leons Barongo Vs. Sayona Drinks Ltd 2013 LCCD 29**

On third ground that applicant used 21 days seeking for legal advice after returning to Tanzania, he argued that the issue that the applicant has used 21 days for legal advice, is also misconceived. The law require one to account for each day of delay from the date time had lapsed. Therefore the applicant should not be misguided to account only for days since he came back to Tanzania. He further argued that even if we consider the 21 days, the applicant has not stated that in the affidavit and there is no where in the application where it was mentioned the advice was sought from.

In rejoinder the applicant reiterated his submission in chief but respond on the issue of applicant's application before CMA that there was a delay of 30 days, while Rule 10(2) of the Labour Institutions (Mediation and Arbitration) Rules, GN No.67 of 2007, provides for 60 days. He was of the view that the delay implied degree of lateness.

After carefully examined both parties' submissions and considering CMA records the main issue to be determined is following;

a) Whether the applicant provided good cause to be granted condonation by the Commission.

Rule 31 of the Labour Institution (Mediation and Arbitration) Guidelines, Rules GN. 64 of 2007 provides that, I quote:-

"Rule 31-The Commission may condone any failure to comply with the time frame in these rules on good cause.

The evidence from the records shows that the applicant resigned from employment on 31/08/2016 and on 10/09/2016 the respondent issued No Objection Certificate. The certificate states that Mr. Maurizio Mian has been working with the respondent from 1/09/2015 up to

31/08/2016. The certificate shows complete no objection on the applicant to continue his job with any organization. On 23/11/2016 the applicant referred the complaint to the CMA. In my opinion the date when no objection certificate was issue by the respondent is the date when the dispute arose.

Rule 10 of GN. NO.64 of 2007 provides for the time to refer disputes before the CMA. The rule reads as follows:-

> ***Rule 10 (1) Disputes about the fairness of an employee's termination of employment must be referred to the commission within thirty days from the date of termination or the date the employer made a final decision to terminate or uphold the decision to terminate.***
>
> ***(2) All other disputes must be referred to the commission within sixty days from the date when the dispute arises.***

From the above provision, as the present dispute is not about the termination of the employment, it falls under rule 10(2). This means that it

was supposed to be referred to the commission within sixty days from the date when the dispute arises. As I have already find that the dispute arose on 10/09/2016, by referring the dispute to the Commission on 23/11/2016 the applicant was out of prescribed time for almost 13 days. Therefore, I am of the same opinion with the arbitrator that the delay was for 13 days which is more than 10 days as the CMA Award provides.

The applicant submitted that there 3 reasons that hindered him to act timely and file his claims before the Commission within prescribed time. Those reasons were sickness, ongoing efforts to settle the matter out of court and seeking legal advice.

Then, he submitted on the first ground that the Commission erred in fact and law for failure to accord weight to the attachment that were appended to applicant's affidavit in support of the application before the Commission as the arbitrator pointed out in the award that the applicant did not produce sick sheet or doctors report to prove that he was sick. In contention the respondent submitted that the applicant did not avail sufficient evidence to prove that he was sick at the time he failed to refer the dispute to the CMA and that he travelled for reason of sickness.

I agree with the respondent that the applicant have duty to prove that he was sick at the time he failed to refer the dispute to the CMA. The record shows that the applicant attached copies of pictures of him taken at hospital. I'm of the opinion that the pictures does not prove that he was sick. Sickness is a good cause for the delay to file a dispute within prescribed time, but the same have to be proved. The applicant pictures taken in hospital does not provide any details concerning his sickness which may help the Commission and this Court to find that the sickness was the reason for the delay. There is no proof as to when he was in the hospital and the sickness he suffered.

This Court in the case of **Fredrick Mdimu Vs. Cultural Heritage Ltd, Revision No. 19 of 2011, High Court Labour, Division at Dar Es Salaam,** held that "Sickness is a good cause for delaying to file matters within the given time. However the same has to be proved and not merely alleged. If the applicant was treated at the hospital why did he not produce treatment sheet or reports to support his ground?"

Persuaded by the above cited case, it is my opinion that the applicant have a duty to prove his alleged facts and it was not the duty of the Commission or the respondent to request for the proof of his treatment.

Thus, I find that the applicant failed to prove that he was sick and that the sickness delayed him to refer the dispute before the Commission within prescribed period.

On the reason that the applicant was settling the matter out of Court, the applicant submitted that the applicant on his affidavit swore that for the whole period after he left the country he communicated with the respondent through e-mails sent to the respondent CEO, namely Vicent Massawe. He went further by producing such e-mails and attached them as annexure D, and this fact was neither denied nor disputed by the respondent. The respondent contested the submission by the applicant stating that negotiations or promise have never been a reason to condone time.

The evidence on record shows that the applicant did write several e – mails to respondent CEO and as submitted by the applicant the fact was not disputed. However, the record show that there was no reply from the respondent. For that reason, it is my opinion that this can't be said that there was communication on the claim of pending salaries between the applicant and the respondent. The record shows that it was only the applicant who was writing to the respondent without receiving the reply

from the respondent. Despite of that, communicating or negotiation between parties is not a good cause for the delay. What has to be proved is the way the communication or negotiation have caused the applicant to delay referring the dispute on time. In the present case there is no evidence in record to show how communication especially applicants e mail to respondent CEO have caused the delay.

On the third reason for the delay that it occurred while the applicant was seeking for legal advice, it was submitted by the applicant that the Hon. Arbitrator failed to grasp what is stated in a sworn affidavit that immediately after getting back to Tanzania the applicant sought for legal assistance. He argued that counting from 02nd November 2016 to 23rd November 2016 when he filed the matter before CMA is just 21 days which is quite reasonable time contrary to the decision of the CMA. In contention the respondent submitted that the law requires one to account for each day of delay from the date time had lapsed.

The evidence in record shows that the applicant returned to Tanzania on 02/11/2016. By that time the period for referring the dispute to the CMA have not lapsed. It was within the time prescribed by the law. The sixty days provided by the law for referring the disputes to the CMA

expired on 10/ 11/ 2016. Therefore, by the time the dispute was referred to the Commission it was out of time for almost 13 days.

In the submission the applicant have stated that after returning back to Tanzania he did seek legal assistance from lawyer on how to recover the said pending salaries. But there is no evidence on record to show as to when he went to the lawyer and the name of the lawyer (s) whom he went for assistance. As rightly held by the arbitrator in the CMA award, in the application for condonation the applicant have to account for each day of the delay.

It was observed by the Court of Appeal of Tanzania, in the case of **Daudi Haga v. Jenitha Abdan Machanju,** Civil reference No. 19 of 2006, Court of Appeal at Tabora, (Unreported), that;

> ***"A person seeking for an extension of time had to prove on every single day for delay to enable the court to exercise its discretionary power."***

Therefore, it is the duty of the applicant in the application for extension of time to prove on every single day for delay to enable the court to exercise its discretionary power. In the present case the applicant has

failed to account for the delay on each single day after expiry of the prescribed time.

In the circumstances of this case, I find nothing to fault the ruling of the CMA. The application lacks merit, and is hereby accordingly dismissed.

A. E. Mwipopo
JUDGE
24/04/2020

Date: 24/04/2020

Coram: Hon. A. E. Mwipopo, J

Applicant:

For Applicant: Mr. Nashon Nkungu, Advocate for the applicant

Respondent:

For Respondent: Mr. Nashon Nkungu, Advocate holding brief for Mr. Nickson Matata, Advocate for the respondent

CC: Neema

Court: The Judgment was delivered in the presence of Mr. Nashon Nkungu, Advocate for the Applicant who also holding brief for Mr. Nickson Matata, Advocate for the respondent this 24/04/2020.

A. E. Mwipopo
JUDGE
24/04/2020