

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

REVISION NO. 515 OF 2019

BETWEEN

GEOFREY MWAKAGENDA APPLICANT

VERSUS

STANLIB TANZANIA LIMITED RESPONDENT

JUDGEMENT

Date of Last Order: 04/05/2021

Date of Judgement: 26/05/2021

Aboud, J.

The applicant, filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (herein CMA) delivered on 06/05/2019 by Hon. Gerald J, Arbitrator in labour dispute No. CMA/DSM/ILA/R.1260/17/138. The application is made under section 91 (1) (a) (b), 91 (2) (a) (b) (c) and section 94 (1) (b) (i) of the Employment and Labour Relations Act [CAP 366 RE 2019] (herein referred as the Act), Rule 24 (1) 24 (2) (a) (b) (c) (d) (e) (f) 24 (3) (a) (b) (c) (d) and Rule 28 (1) (c) (d) (e) of the Labour Court Rules GN. No. 106 of 2007 (herein referred as the Labour Court

Rules).The applicant moved the Court to determine the following grounds:-

- i. That the Honourable Arbitrator arrived at a flawed decision by ruling that the applicant's affidavit was incurably defective.
- ii. That the Arbitrator erred in law by using the old precedent to wit the case of Darusi Gidahosi V. Republic, Criminal Appeal No. 01 of 2011 in deciding the preliminary objection without considering there is a current Court of Appeal decision to wit Elifazi Nyatega and 3 others V. Ciprian Mining Limited, Civ. Appeal No. 44/08 of 2017 overruling Darusi Gidahosi's decision.

Arguing in support of the application Ms. Oliver Mkanzabhi stated that, the brief background of the dispute was that the applicant was employed as the Managing Director of the respondent with a permanent contract from 10/06/2015 until when he was terminated on the ground of operational requirement. It was submitted that as the Managing Director of the Company the applicant's remuneration was Tshs. 15,525,000/= before statutory deductions. She stated that on 01/11/2017 the applicant received a notice of termination from the respondent due to operational requirement.

It was further submitted that the said termination was followed by settlement agreement in which the respondent agreed to pay the applicant Tshs. 185,170,796/=, the amount which was to be paid by 16/11/2017. The Learned Counsel submitted that for the reasons known to the respondent alone he refused to pay the applicant the agreed amount and left him with no other choice than to file a complaint at the CMA.

It was submitted that, on the first day of hearing Hon. Gerald, Arbitrator dismissed the matter for non-appearance of the applicant's Advocate despite the fact that the said Advocate never missed the Arbitration session except on that date. It was also submitted that on the nonappearance day the missed Advocate was appearing for the High Court session in Mtwara in the case between **Bahari Oil Fields Services V. Peter Wilson**, Lab. Rev. No. 02 of 2018 which was scheduled for hearing as well as Misc. Lab. Applc No. 06 of 2018 between the same parties which was also scheduled for hearing before Hon. Kahyoza.

The Learned Counsel went on to submit that the applicant's Advocate informed the CMA of her absence by a letter and that the Legal officer submitted the copy of the relevant letter to the CMA. She

said, following that dismissal the applicant filed an application to restore the matter with Ref. No. CMA/DSM/ILA/R.1260/17/138. She stated that on 04/11/2017 the respondent raised the objection that the affidavit in support of the applicant's application for restoration is incurably defective as it contravenes section 8 of the Notary and Commissioner for Oath Act [CAP 12 RE 2002] (herein CAP 12 RE 2002).

It was further submitted that, the Arbitrator erred both in law and fact in deciding the preliminary objection while there is a current Court of Appeal decision which overrule Darusi's case (supra). It was argued that Hon. Mwarija's decision which is the most recent in Elfazi's case (supra) decided that it is mandatory required by the law that an authority who administer Oath or affidavit has to insert his/her name in the affidavit failure of that renders the affidavit incurably defective. On the basis of his submission, the Learned Counsel prayed for this Court to overrule the Arbitrator's decision and allow the application.

Responding to the application Mr. Francis Kamuzora submitted that this application originates from a striking out of the application for extension of time within which to restore a referral. He stated that the application was struck out on the basis of preliminary objection being that the affidavit in support of the applicant's application contravened

section 8 of CAP 12 RE 2002. It was submitted that, according to the amendment it brought new requirement under section 8 that requires the person who is receiving the oath that is the Commissioner for Oath should insert his name in the jurat. It was argued that the Darusi's case (supra) confirmed that established principle as it appears at page 8 of the relevant judgement.

It was also submitted that, the case of **Elfazi** (supra) did not overrule the **Darusi's** case (supra) neither distinguished the two cases. The Learned Counsel argued that the decision of Hon. Mwarija, JR as a single Judge would not overrule the decision of the bench of panel of three Judges in Darusi's case (supra).

It was further submitted that, the decision of **Paul Paul Makaranga V. Republic**, MZA Criminal Appeal No. 3 of 2010 is making reference to another Court of appeal case that is **DPP V. Dadoli Kapufi & another**, Criminal Application No. 11 of 2008. He argued that according to those decisions the contents of an affidavit are that, there must be a declaration of facts by a deponent, a verification clause, a jurat, signatures of the deponent and the person before whom the oath is administered. He stated that according to the

list it is clear that the jurat does not include the part which starts by words before me.

It was strongly submitted that according to section 8 of CAP 12 RE 2002, the name of the person administering the oath should be within the jurat and that was the basis for the decision of the Arbitrator. He therefore prayed for the application to be dismissed.

In rejoinder Ms. Oliver Mkanzabhi submitted that the case of **DPP V. Dodoli Kapufi** (supra) at page 2 stated essential ingredients of any valid affidavit. She therefore submitted that the affidavit at the CMA was correct and did not contravene section 8 of CAP 12 RE 2002 as amended. She therefore prayed for the application to be allowed.

Having considered the rival submissions by the parties I find the court is called upon to determine whether the Arbitrator was correct to find that the applicant's affidavit in support of the application for extension of time was defective.

As stated above, the applicant's application for extension of time to file an application for restoration was struck out by the Arbitrator for being accompanied by defective affidavit which contravened section 8 of the Miscellaneous Amendment Act No. 02 of 2016. The Arbitrator in

his decision also referred the decision of **Darusi Gidahosi** (supra). For easy of reference, I hereunder quote the alleged contravened provision:-

'Every Notary Public and Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall insert his name and state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made'.

The above provision has been construed in the case of **Elfazi Nyatega** (supra) where it was stated that the provision states clearly that the name of the attesting officer shall be inserted in the jurat of attestation. In the referred case the Court went on to quote the meaning of jurat as defined in **Osborn's Concise Law Dictionary**, 8th Ed, Sweet & Maxwell (London) 1993 which means:-

'A memorandum at the end of an affidavit stating where and when the affidavit was sworn, followed by the signature and description of the person before whom it was made'.

The court went on to state that:-

'From this definition it is clear that the name of the attesting officer constitutes part of his description'.

I had a glance on the applicant's affidavit filed at the CMA which shows the same was attested by Ms. Yvonne T. Mvanda, the said name together with her descriptions are inserted at the end of the jurat of attestation. In my view the name of the attesting officer and his/her descriptions also forms part of the jurat of attestation as it is in the decision quoted above. Therefore, on the basis of the above discussion it is my view that the Arbitrator misinterpreted the provision of the law to found the applicant's affidavit filed at the CMA was defective.

I have considered the cases cited by the Learned Counsel for the parties, indeed the case of **Elfazi Nyatega** (supra) is the latest one which was delivered on October, 2018 as rightly submitted by the applicant's Counsel. I also fully agree with the Learned Counsel for the respondent that the case of **Elfazi Nyatega** did not overrule the case of Dadoli (supra). Infact, the case of **Elfazi Nyatega** (supra) interpreted the case of Darusi Gidahosi (supra) where the Court stated that:-

'There is nowhere stated in that case, that the name must be inserted in the part of the affidavit suggested by him. What was underscored in that case, is that the name of the attesting officer must appear in the jurat of attestation.'

As a result, I find the Arbitrator misinterpreted the provision of the law to hold that the applicant's affidavit was defective. On the basis of the above discussion it is clear that the applicant's affidavit at the CMA was correct and proper. Consequently, the Arbitrator's decision is hereby quashed and set aside, the matter is remitted back to the CMA to proceed on merit. The application is allowed.

It is so ordered.



I.D. Aboud

JUDGE

26/05/2021