

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

MISCELLANEOUS APPLICATION NO. 88 OF 2022

BETWEEN

IMPALA TERMINALS TANZANIA LIMITED APPLICANT

AND

ELIPIDIUS CONCORDIO NKOKERWA RESPONDENT

RULING

*Date of last order: 29/04/2022
Date of Ruling: 18/5/2022*

B. E. K. Mganga, J.

Applicant was an employer of the Respondent. It happened that their relationship did not go well as a result, on 9th September 2020, the respondent filed Labour dispute No. CMA/DSM/TEM/326/2020 at Temeke. In the Form referring a dispute to the Commission for Mediation and Arbitration (CMA F1), respondent indicated that the dispute arose on 7th September 2020. Applicant raised a preliminary objection that the dispute was time barred and at the hearing of the said preliminary tendered a letter showing that respondent was terminated on 30th March 2020. At CMA it was submitted on behalf of the respondent that the disciplinary hearing

committee made its decision on 19th March 2020, terminating employment of the respondent. At CMA it was submitted further on behalf of the respondent that, on 3rd April 2020, respondent appealed against the decision of the disciplinary hearing committee and waited the result thereof, but on 7th September 2020, he was informed orally that his appeal was dismissed. Based on submissions of the parties and the letter tendered by the applicant (employer), on 9th November 2020, Ngalika, E, Mediator, delivered a ruling that the dispute was time barred, struck it out and directed the respondent to follow the procedure.

In the affidavit in support of the application, Gilbert Mushi, counsel for the applicant deponed in paragraphs 3.1 and 3.4 as follows: -

"3.1 THAT, the respondent was employed by the applicant on 2014 (sic) until 30th March 2020 when he was terminated for gross misconduct (testing positive for alcohol and not adhering to the respondent (sic) policy and procedures after testing positive on the breathalyzer.

3.4 THAT, on 19th September 2020 the applicant filed with condonation a new referral claiming that he was given leave to do so, dissatisfied with the procedure the applicant on 11th October 2020 unsuccessfully filed (sic) a preliminary objection on point of law that the referral s (sic) time barred and on January filed a preliminary objection to the effect that the commission had no powers to hear and determine the matter and the referral was misplaced. However, these preliminary objections were orally dismissed without availing the parties opportunity to be heard and its ruling and proceedings were never supplied to the parties up to do date."

In the verification clause, the deponent stated that all is true to the best of his own knowledge.

When the application was called for hearing, Mr. Gilbert Mushi, learned counsel for the applicant submitted that the delay was not due to negligence of the applicant. He went on that, the arbitrator struck out the dispute that was time barred instead of dismissing it. He submitted further that, after striking out the dispute, applicant believed that no dispute will be filed at CMA, but it was thereafter filed. Counsel submitted further that; the new dispute was filed at CMA on 19th November 2020. Mr. Mushi went on that, on 26th January 2021, applicant filed a preliminary objection that CMA had no jurisdiction but on the date of hearing of the preliminary objection, applicant failed to appear, the preliminary objection was dismissed and granted condonation. He submitted further that, he does not know as to when condonation was granted. Mr. Mushi conceded that the ruling that is the subject of this application was delivered on 9th November 2020, and that applicant filed this application on 10th March 2022 that is after one year and five months i.e., 17 months thereafter.

Mr. Mushi submitted further that, there is illegality on the ruling and subsequent proceedings. That, the Mediator struck out the referral that

was time barred instead of dismissing it hence there is possible chances of success and cited the case of ***Juto Ally V. Lukas Komba & Another, Civil Application No. 484/17 of 2019***, CAT (unreported) to cement on his argument that illegality is a good ground for extension of time.

Before concluding his submissions, the court asked him to submit on competence of this application because in the verification clause the deponent verified that all is true to the best of his knowledge while the affidavit showing that some facts are not to his personal knowledge. Responding on the issue raised by the court, counsel for the applicant conceded that he was not present at the time respondent was tested for alcohol, but he was quick to submit that although he verified that all are to his personal knowledge, that does not make the verification clause defective. During his submission, counsel for the applicant, changed the direction by submitting that he was involved in the process of testing respondent which is why he verified that all is true to the best of his knowledge. He however conceded that there is no even a single paragraph in the affidavit showing that he was involved in that process. He submitted in the alternative that even if the court finds that he was not involved in

the process, the only remedy is to expunge paragraph 3.14 and that in so doing the application will be competent.

On the other hand, Dismas Raphael, learned counsel for the respondent submitted that the ruling that is the subject of this application was delivered on 9th November 2020, as a result, respondent was allowed to file an application for condonation. That, on 19th November 2020, respondent filed a new dispute with an application for condonation. Counsel submitted that applicant was served with the new application on 18th November 2020.

Mr. Raphael submitted that, the application is before this Court unprocedural and went on that, there is a Labour dispute that is going on at CMA between the parties. He went on that; applicant has filed this application prematurely because she was supposed to wait conclusion of the dispute and raise it as a ground of revision. Counsel for the respondent argued further that, applicant is trying to catch the straws because she did not enter appearance at CMA, as a result, the dispute was ordered to proceed ex parte.

Counsel for the respondent went on that, the ruling was delivered in 2020 and argued that litigation must come to conclusion. Counsel argued

further that, even where there is illegality, it is supposed to be brought in Court timely. Mr. Raphael went on that, if this application will be granted, applicant will file revision at the same time the dispute at CMA will also be going on hearing hence duplication of matters.

Responding to the issue raised by the court, counsel for the respondent cited the case of ***Tanzania Breweries Ltd v. Herman Minja, Civil Application No. 18 of 2019***, CAT (unreported) to cement on his argument that in an affidavit, an advocate is supposed to state matters relating to proceedings he was involved as of personal knowledge, but the rest remains to be from information. Counsel for the respondent submitted that the application at hand is incompetent.

In rejoinder, Mr. Mushi counsel for the applicant conceded that it is true that there is a pending dispute at CMA, and it is at a stage of framing issues. He was quick to submit that, once there is illegality, time must be extended regardless of lapse of time. Counsel for the applicant concluded that there is nothing in the counter affidavit proving what was submitted by counsel for the respondent that the application is premature.

I have given due consideration to submissions of the parties and both the affidavit in support of the application and the counter affidavit resisting

this application. I have further considered submissions of counsel on the issue raised by the court on competence of this application.

I should from the outset, point out that, submission by counsel for the applicant that the arbitrator struck out the dispute that was time barred instead of dismissing it, and that, applicant believed that no dispute will be filed at CMA are not in the affidavit in support of the application. This also applies to the submissions that the new dispute was filed at CMA on 19th November 2020; that on 26th January 2021 applicant filed a preliminary objection that CMA had no jurisdiction but on the date of hearing of the preliminary objection, applicant failed to appear; the preliminary objection was dismissed and granted condonation. Also, the submissions by counsel for the respondent that, respondent was allowed to file an application for condonation as a result, on 19th November 2020, he filed a new dispute with an application for condonation; and that, applicant was served with the new application on 18th November 2020 are not in the counter affidavit. In my view, all that were not stated either in the affidavit or the counter affidavit are mere submissions from the bar and not evidence hence not worth to be considered. I will therefore ignore them in this ruling.

Both parties have conceded that verification clause is defective because, Mr. Gilbert Mushi, counsel for the applicant, has verified all matters to be in his knowledge while some are not, especially paragraph 3.1 that led to termination of employment of the respondent. This makes the affidavit defective. In terms of Rule 24(1) and (3) of the Labour Court Rules, GN. No. 106 of 2007, the application before the court is by the notice of application supported by an affidavit. Since the affidavit in support of the application is defective, the whole application becomes incompetent. In short, there is no application before the court to be considered. For the foregoing, I hereby struck it out.

Dated at Dar es Salaam this 18th May 2022.



B. E. K. Mganga
JUDGE

Ruling delivered on this 18th May 2022 in the presence of Gilbert Mushi, advocate for the applicant and Dismas Raphael, Advocate for the respondent.



B. E. K. Mganga
JUDGE