IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

LABOUR REVISION NO. 8 OF 2021

(C/O Mpanda CMA/KTV/MPN/09/2021)

(NGARUKA, O. ARBITRATOR)

ALPHONCE DIONEZIO BONIPHACE ..... APPLICANT

VERSUS

SHIRIKA LA UPENDO NA SADAKA ..... RESPONDENT

RULING

Date: 10/01 & 02/02/2022

Nkwabi, J.:

The applicant lodged a labour dispute in the Commission for Mediation and Arbitration. Mediation failed, as a result, the matter went to arbitration. After hearing both parties, the Commission for Mediation and Arbitration dismissed the labour dispute. The applicant was a "Brother" commonly known in Kiswahili as "Bruda", served in Shirika la Upendo na Sadaka, the respondent, for a considerable time. His labour dispute, was all about a claim of T.shs 10,200,000/= being for arrears of subsistence allowances for the period he had served the Respondent.

Discontented with the dismissal of his labour dispute, the applicant lodged this application for revision. In the wake thereof it met a preliminary objection on points of law as follows:

1. That the affidavit in support of the Application is incurably defective.
2. That the application is bad and hence not maintainable for skipping to refer the mandatory enabling provisions of the law.
3. That the application is bad in law for skipping the mandatory format of the law required in the applications of this kind.

It is due to the above preliminary objection, the respondent prays for the application be struck out with an order pertaining to costs.

Parties were ordered to address the preliminary objection by way of written submissions. The applicant fended for himself while the respondent was duly represented by Ms. Sekela Amulike, learned counsel.

The applicant, a layman as he is, gave an omnibus reply to the legal points of objection to the effect that the three points raised by the counsel for the respondent are pointless ... Sr. Consolata is fearing to appear personally to answer the allegations against her.

The respondent did not file a rejoinder, perhaps, because the applicant had nothing in substance to counter the submission in chief made by the counsel for the respondent. On my part, I will deal with one legal point of objection after the other.

I begin with the first limb of the preliminary objection on which the learned counsel for the respondent argued, with some force, to the effect that the affidavit in support of application is incurably defective since it violates the mandatory provisions of Rule 24(3) (a) (b) (c) and (d) of the Labour Court Rules, 2007, as it does not state the names, description and addresses of the parties, it does not state the statement of the material facts in a chronological order, it failed to include a statement of legal issues as well as the reliefs sought by the applicant. She further maintained that the affidavit violates Rule 24(4) and the jurat of attestation is improper, as such, the affidavit is incurably defective. The jurat of attestation misses to state whether the commissioner of Oaths knew the deponent personally or the deponent was identified to him. The omission violates the Oaths and Statutory Declaration Act Cap 34. R.E. 2019, Ms. Amulike stressed.

I have considered this leg of preliminary objection, with respect to Ms. Amulike, I am of the view that the same does not qualify to be a preliminary point of objection as there are matters which ought to be ascertained. Even if it is accepted as a preliminary legal point of objection, the next question is how the respondent would be prejudiced with the anomaly. Ms. Amulike did not go further and elaborate how a miscarriage of justice could be occasioned by the omission. Further, reliefs are to be found in the chamber summons. It would appear to me that the first limb of the preliminary objection is misplaced.

As to the complaint in respect of the jurat of attestation, I am aware of **Zuberi Mussa v. Shinyanga Town Council. Civil Application No. 100 of 2004** (CAT) where it was stated:

> *"There is no gainsaying that the jurat of attestation is an essential ingredient of any affidavit. What the jurat should contain is conspicuously spelt out in s. 8 of the Act. As Mr. Muna correctly submitted the commissioners for oaths cannot, with impunity, decide to pick and choose what to include and what to omit in the jurat. He must duly conform with the requirements of the law..."*

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We are unhesitatingly of the view that the principle laid down in these cases to the effect that the requirement in this country that the place where and the date when an oath or affidavit is taken or made must be shown in the jurat of attestation is a statutory one which must be complied with and not a dispensable technical requirement is now deeply rooted in our jurisprudence. Every affidavit, therefore, which does not conform with the statutory requirements of s. 8 of the Act shall be treated as incurably defective until such time when the courts will be given a statutory leeway ...."

It would appear to me, that by the introduction of the overriding objective principle by an Act of the Parliament, the anomaly could be acquiesced as per the authorities I will indicate later on in this ruling. This is because, it is difficult to see how the respondent was prejudiced with the anomaly. The parties are the same and the respondent does not dispute the signature of the applicant found at the jurat of attestation. The first legal point of objection therefore fails for lack of merits.

Next for my consideration and determination is the legal objection preferred to the effect that the application is bad and hence not maintainable for skipping to refer the mandatory enabling provisions of the law. Ms. Amulike contended with explosively that the applicant ought to have adhered to the enabling provisions which give power to him to seek the relief the applicant is seeking. By the applicant citing, in his chamber summons, that the application for revision was made under section 91(1) (1) (a) and 91 (2) 94(1) (b) (i) of the Employment and Labour Relations Act No. 6 of 2004 as amended by the Written Laws (Miscellaneous amendments) No. 3 read together with rules 24 (1) (2) (a)(b)(c)(d) 28(1) (c) (d) (e) of the Labour Court Rules 2 – 7 Government Notice No. 106(d)(e) of the Labour Court Rules, 2007 Government Notice No. 106 (d) (e) of the Labour Court Rules is wrong.

She argued, vide the above indicated provisions of the law, the court has been wrongly moved as the applicant cited wrong provisions of the law and he failed to cite the exact provision in the chamber summons. She elaborated that the applicant cited section 91(2) without specification either section

91(2)(a), 91(2)(b) or 91(2)(c). Ms. Amulike backed her argument with **Leonard Magesa v M/S Olam (T) Ltd, Civil Appeal No. 117 of 2014,** CAT (unreported) where it was observed:

> *"It is now settled law that failure to properly move the court renders the application incompetent. On number of occasions this court has stated that a court can only be moved to hear and determine an application if a proper provision of the law is cited."*

I have considered this limb of the preliminary objection, in my conviction, and with the greatest respect to Ms. Amulike, the same is meritless. The reason for my finding is that the decision she is relying upon, was delivered by the Court of Appeal prior to the enactment of the principle of overriding objective. Decisions of the very Court of Appeal of Tanzania in several cases seem to have relaxed its stance found in **Leonard Magesa's** case (supra). In **Samwel Munsiro v Chacha Mwikwabe,** Civil Application No. 539/08 of 2019, CAT, dated 27/03/2020 (unreported) the Court of Appeal was moved to extend time within which to apply for a certificate on point of law. The Court proceeded to grant extension of time after observing among other things:

"I need to point out at this stage that this being a second bite, the Court would have been properly moved where the application would have been anchored on Rule 10 of the Rules, together with Rule 45A (1) (c) of the Rules, the provision under which a second chance/bite is provided. However, the omission is inconsequential in view of the provisions of Rule 48 (1) of the rules ..."

Further, in **OTTU on behalf of P. L. Asenga & 106 others v AMI (Tanzania) Ltd,** Civil Application No. 20 of 2014 (CAT) dated 12/4/2019 and delivered on 18/04/2019, (unreported), the Court of Appeal in dealing with the objection on point of law to the effect that:-

In view of Rule 48 (1) of the Tanzania Court of Appeal Rules, 2009 the applicants' application is incurably defective for non-citation of the specific rule under which it is brought.

The Court summarized the submission of the respondent's complaint in the following words:-

"Citing all eight provisions, including Rule 4(2)(b) and 4(2)(c) of the Rules, which do not even apply to support any of the prayers sought

in the Applicant's notice of motion, ***amounts to wrong citation which renders an application incompetent."***

The Court, then held:

> *For our part, we ask ourselves: Is it necessary, in the first place, to invoke the principle of overriding objective in the Circumstances of the case at hand? With respect, we think not for, as we have hinted upon, the applicants seek directions, interpretation and review under various provisions of Rule 4 and 66 of the Rules. The cited provisions of Rule 66, in our view, sufficiently address the quest for review, whereas we similarly think that the refereed provisions of Rule 4 of the Rules sufficiently cater for the applicants' request for directions and/or interpretation ..., we find the preliminary objection which complains of wrong citation to be without a semblance of merit and the same is accordingly, overruled.*

I hope, had the learned counsel for the respondent seen the above case laws that I have referred to herein above, she would have given a second thought and would have resisted the urge to raise the legal point of objection. In effect, the same does not prejudice the respondent in any way. The legal

point of objection that the court has been wrongly moved as the applicant cited wrong provisions of the law and he failed to cite the exact provision in the chamber summons does not find purchase with me. Therefore, the complaint that the applicant cited section 91(2) without specification either section 91(2)(a), 91(2)(b) or 91(2)(c) is meritless and the same crumbles to the ground.

The last legal point of objection for my consideration and determination is that the application is bad in law for skipping the mandatory format of the law required in the applications of this kind.

Ms. Amulike asserted on the 3rd legal point of objection that skipping the mandatory format of the law for filing suits of this kind under rule 24(2) of the Labour Courts Rules, 2007 form number 4 found on the schedule to the rules, she urged this court to conclude that this court was wrongly moved as such it cannot entertain the application.

Ms. Amulike opined, even the overriding objective principle brought up with the enactment of the Written Laws (Miscellaneous Amendments) Act No. 3

of 2018 would not serve this application. She referred this court to **Njake Enterprises Limited v. Blue Rock Limited & Another, Civil Appeal No. 69/2017** CAT (unreported) where it was stated:

> *"The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms ..."*

She also cited **Martin D. Kumalija & 117 others v. Iron and Steel Ltd," Civil Application No. 70/18 of 2018,** CAT (unreported):

> *"... while this principle is vehicle for attainment of substantive justice, it will not help a party circumvent the mandatory rules of the court ..."*

Ms. Amulike would not rest her submission there, she implored me to follow my decision in **Albert M. Chabruma and Others v China Railway Seventh Group Co. Ltd Labour Revision No. 9 of 2020** in which my decision relied on **Mondorosi village Council & 2 Others v Tanzania Breweries Limited & 4 Others, Civil Appeal No. 66/2017** CAT (unreported) to the effect that overriding objective principle cannot be applied blindly against mandatory provisions of procedural law which go to the foundation of the case.

No doubt, courts in Tanzania will not apply blindly the overriding objective principle against mandatory provisions of procedural law which go to the foundation of cases just as was stated in the case of **Mondorosi village Council** (supra). However, I am not persuaded by Ms. Amulike's argument. In the first place, the way the legal objection is framed in this case it is all about form or format. Secondly, the complained anomaly does not prejudice the respondent. Thirdly and above all, with the greatest respect to Ms. Amulike, the cited decisions of the Court of Appeal of Tanzania, she tries to rely to back up her argument are inapplicable in the circumstances of this case. I observe that the overriding objective principle has been accepted in fit cases like in **Yakobo Magoiga Gichere v Peninah Yusuph,** Civil Appeal No. 55 of 2017 CAT (unreported):

> *With the advent of the principle of Overriding Objective brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [ACT No. 8 of 2018] which now requires the courts to deal with cases justly, and to have regard to substantive justice, section 45 of the Land Disputes Courts Act should be given more prominence to cut back on over-reliance on procedural technicalities.*

Likewise in **Commissioner General Tanzania Revenue Authority v JSC Atomredmetzoloto (ARMZ),** Consolidated Civil Appeal No. 78 of 2018 & No. 79 of 2018 CAT (unreported):

Where it was contented that the appellant had contravened the provisions of Rule 96 (1) of the Court of Appeal Rules it was held:

> *Upon our mature consideration, we think that this is a case where the Court should have due regard to the need to achieve substantive justice in line with Rule 2 of the Rules as it is our well considered view that the shortcomings we have pointed out should not lead to the drastic action of invalidating the entire record of appeal. Thus, in the spirit of the overriding objective of the Court we, accordingly, grant leave to the appellant to lodge the omitted copies of written submissions under Rule 96 (6) within twenty one (21) days from the date of this Ruling.*

See also **Jovet Tanzania Ltd v Bavaria N. V.,** Civil Application No. 207 of 2018 CAT (unreported) and **Yusuph Nyabunya Nyatururya v Mega Speed Liner Ltd & Another,** Civil Appeal No. 85 of 2019 CAT (unreported).

In **Yusuph Nyatururya's** case (supra), the P.O. was that the appeal was incompetent for want of proper judgment and decree as well as for want of proper certificate of delay:

> *Ordinarily and under normal circumstances, with these irregularities the appeal would have been struck out. However, with the introduction of the principle of overriding objective which is geared towards expeditious and timely resolution of all matters, under section 3A of the Appellate Jurisdiction Act, Cap. 141 R.E. 202 (the AJA), as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 (Act, No. 8 of 2018), we are hesitant to do so. This is due to the fact that, in the case at hand, among others, it is obvious that, the pointed out anomaly was not occasioned by the appellant. We are equally settled that, the respondents were not prejudiced by the said anomaly, as the judgment which was pronounced and delivered is the same judgment composed and duly signed by the presiding judge. In this regard and in order to meet the ends of justice, we find this to be an opportune moment to invoke the overriding objective principle and allow the appellant to correct the*

identified anomaly by filing a supplementary record with the proper and duly signed judgment and decree of the High Court in accordance with the law ...

I find that in the circumstances of this case, the overriding objective principle is applicable, I accordingly apply it. The applicant may as such amend the anomaly if he so wishes.

Ms. Amulike's invitation to this court to uphold the preliminary objection on points of law and dismiss Labour Revision No. 8 of 2021 does not find purchase with me. To the contrary, the preliminary objection on all three legal points of objection is overruled. I make no orders as to costs as this is a labour matter.

It is so ordered.

DATED at **SUMBAWANGA** this 2nd day of February, 2022

J. F. Nkwabi

JUDGE