IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 315 OF 2020

BETWEEN

ATHUMAN SHABAN ATHUMAN & 30 ..... APPLICANTS

VERSUS

TANZANIA BUILDING AGENCY ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The application is lodged under the provisions of section 94 (1) (e) of the Employment and Labour Relations Act No 6 of 2004 (ELRA) read together with Rule 24(1), Rule 24 (2) (a), (b), (c), (d), (e) & (f) and Rule 24 (3) (a), (b), (c) & (d) read together with Rule 28 (1) (a), (b), (c), (d)& (e) and Rule 55 (1) and Rule 55(2) of the Labour Court Rules G.N. 106 of 2007 ("The Rules"). The Applicants apply for an order in the following items:

(i) THAT, this Honourable Court be pleased to call for and examine the proceedings and the subsequent ruling of the Commission for Mediation and Arbitration at Dar es Salaam in labour dispute No. CMA/DSM /KIN/R.81/20, issued on 18th day of August, 2020

for appropriateness of the said decision and the ruling issued therein.

(ii) THAT the Honourable Court may be pleased to call for their court to examine the Commission for Arbitration and Mediation's proceedings in the Labour dispute No.CMA/DSM-/KIN/R.81/20, issued on 18th day of August, 2020 and set aside and revise it on the grounds that there has been an errors Material to the merits of the disputes.

(iii) Upon setting aside and revising the said proceedings this Honourable Court be pleased to make orders as follows:

(a) The Commission for Arbitration and Mediation has jurisdiction to determine any disputes referred to it in terms of any labour laws.

(b) The commission has not controlled of any person or any authority.

(c) The Respondent is the government agency (employer) has governed by the Commission in the labour matters.

(iv) Any other relief which the Honorable Court may deem fit and just to grant.

By leave of this court, three applicants namely Athuman Shaban Athuman, Ally Abdrahaman Mindu and Vitalis Chanjale Gustavon are suing on behalf of the other Applicants. The Notice of application has been taken out on the grounds and reasons set forth in the joint Affidavit of the Applicants representatives. In this court, the Applicants are represented by Mr. Michael Deograthias Mgombozi from the Tanzania Union of Private Security Employees (TUPSE) while the respondent was represented by Mr. Elias Mwenda and Mr. Farajani Mwasanyamba, both State Attorneys from the office of the Solicitor General and the respondent's office respectively. The brief background of the matter is that the Applicants were employed by the Respondent on renewable term contracts of one year each. The applicants were retrenched from their employment on the 07th August, 2019. Aggrieved by the said termination, the Applicants' representative sent complainants to the Respondent claiming for salary arrears, in vain. Subsequently, the applicants lodged a dispute to the CMA, a dispute which was dismissed by the CMA on the ground that it lacked jurisdiction to entertain the matter hence this revision on the following grounds:

(i) That, the Arbitrator erred in law and facts for failing to properly interpret the labour law and the Public Service Act.

(ii) That, the Arbitrator erred in law to note that in any conflict between the labour law and any other written law relating to employment standards, the standards stipulated under the labour law shall prevail.

(iii) That, the Arbitrator erred in law and fact reaching to a conclusion and did not rule that the Government and an executive agency is employer who is governed by the Commission in the labour matters.

(iv) That, The Arbitrator erred in law and facts for failure to consider the Applicants Submission and the case law adduced by the Applicants.

(v) That, the Arbitrator erred in law and facts for reaching to a ruling which did not consider the Applicants replying written submission adduced during in the submissions.

(vi) THAT, the Arbitrator erred in law and fact for failing to realize the lies presented by the Applicants in the reply written submission.

(vii) The Arbitrator erred in law and facts for not giving reasons for this decision as required by the law, if the employment and labour relations Act is govern by the public service act to determine the labour dispute referred to the commission.

(viii) THAT, the Arbitrator erred in law and facts for issuing an Ruling which is incompetent and incapable of determining rights of the Applicants.

On those grounds, the applicants raised the following legal issues:

(i) Whether the arbitration Ruling issued by the CMA on 18th August of 2020 was biased on substance based on fundamental rights of works and procedural law?

(ii) Whether the Commission for mediation and arbitration has no jurisdiction to determine the dispute referred?

(iii) Whether or not the Commission for Mediation and Arbitration has jurisdiction powers to dismiss the dispute referred, if has no jurisdiction to determine the dispute referred to?

(iv) Whether the employment and labour relations Act is governed by the public service act to determine the labour dispute referred to the commission.

(v) Whether the reliefs not given to the Applicants to be heard in the arbitration Ruling are legally justifiable.

The applicants hence prayed that this court set aside the Commission Ruling dated 18th August of 2020 and remitting back to the Commission, the labour dispute to proceed with arbitration.

On the date of the hearing, Mr. Mgombozi started his submissions by praying that the affidavit in support of the application dated 09/08/2021 be adopted to form part of the submissions in this matter. He then submitted that the arbitrator misdirected herself by dismissing the dispute on ground that the CMA did not have jurisdiction to hear dispute before it. He then went to the interpretation set in the ELRA under Section 2(1) which explains which employees are not a subject of that law, that the Section provides:

"(1) This Act shall apply to all employees including those in the public service of the Government of Tanzania in Mainland Tanzania but shall not apply to members, whether temporary or permanent, in the service of:

(i) the Tanzania Peoples Defence Forces;

(ii) the Police Force;

(iii) the Prisons Service;"

He the argued that the applicants herein are not a subject of that Section, therefore it was lawful for the applicants to lodge the application before the CMA. He then submitted that the CMA was established u/s 14 of the Labor Institutions Act, Cap 300 R.E 2019 ("LIA") and its functions included to determine disputes of employment and labor, hence the CMA had jurisdiction to entertain the matter as it was a dispute in relation to labor which is the core function of the CMA.

Mr. Mgombozi went on submitting that the CMA also erred in misinterpreting the Section 4 which defines the word employer to include a person or a Government institution and the Association of Employers, while the Section mentioned the Government as employer and that the duty of the Commission is to arbitrate the dispute arising between the employer and the employee. It was hence erroneous for the CMA to dismiss the application.

He submitted further that in his award, the CMA cited the Public Service Act, Cap. 298 R.E 2019 ("The PSA") which was an error because Section 102A of the ELRA explains when there is a conflict of labor disputes or employment standards, then the ELRA shall prevail. He argued thus, the CMA misdirected itself by giving a wrong interpretation while he was supposed to give a definition on whether the employees who were watchmen in that

institution were Public Servants or not. He argued that the contracts of employment were short term contracts of one year each of which were renewable hence the applicants could not be governed by the PSA. That the law which the CMA relied on to dismiss the dispute was not binding to the applicants.

Mr. Mgombozi submitted further that, the above notwithstanding, the Section 2 of the LIA is clear that all labor disputes shall be dealt with in that law, citing the decisions of the Court of Appeal in the case of Yusuf Hamisi Mushi & Another vs Abubakari Khalid Hajj & Others (Civil Application 55 of 2020) [2021] TZCA 589 (18 October 2021); whereby it was held that when there is a contradiction of laws, the court should stick to that section of the law which declares that right. He then argued that the CMA erred in not finding that there is a contradiction of the law which leads to the current revision. His prayer was that the court set aside this award because it has denied the applicants a right to be heard.

In reply, Mr. Mwenda submitted that the CMA was correct in deciding that they had no jurisdiction because of the following reasons; first of all the dispute tabled before the CMA was involving a Government institution called TBA, which is an executive Agency of the Government therefore people who

work for the Agency are civil servants because that is a public institution. He submitted further that the procedure of dealing with disputes involving Civil Servants is well elaborated in the law under Section 32A of PSA. The Section provides that a Public Servant should, prior to seeking remedies at the CMA, exhaust remedies provided for under the Act. Further that Section 31(2) of the same law provides that employees of the executive agencies are also governed by the PSA.

Mr. Mwenda submitted further that under Section 34A of the same law, it has been explained that in a case that there is any inconsistence between the provision of this Act and any other law governing executive agencies, then the provisions of that Act prevails. That this law is clear in case of any contradictions then it is the PSA that will prevail therefore looking at those Sections and the controversy that has occurred, the arbitrator referred to this law which requires the court to fulfill the condition under Section 32A of the PSA, something which was not done. He argued that because that never occurred, that is why the CMA found that it had no jurisdiction to proceed with the dispute.

He then made reference to the dispute like the one at hand which existed in the case of **National Hosuing Corporation Vs. Evodius**

Mutabuzi where on page 16-17 the court ordered that before the Civil Servant proceeds to seek remedies, they must exhaust available remedies under the PSA. He hence emphasized that the CMA was correct in its finding and since these were public servants under Section 3 of the Public Service Act. That there are several types of public servants so long as they are working under the Public Institutions even for a specific task. Further that even if the applicants were in short term contracts, they were still public servants and that is why in their termination letter, all benefits listed are the ones involving public servants.

On the cited case of Court of Appeal by Mr. Mgombozi, Mr. Mwenda argued that the case is distinguishable because it has no relation with what is before this court, it is only concerned with a right to appeal and the decision is that if there is a specific provision in the main Act, it is the one that should be followed. He concluded that the CMA was correct in reaching its decision and prayed that this revision application which has no merits, should be dismissed.

Having considered the submissions of the parties, the issue in controversy before me is whether the applicants were public servant pursuant to the PSA to be bound by Section 32A of the same Act in so far as

the issue of exhausting the available remedies is concerned. The definition of a Public servant in relation to the jurisdiction of the CMA is defined under Public Service Act, Cap. 298 R.E 2019 ('The PSA") where a public servant is defined as:

"public servant" for the purpose of this Act means a person holding or acting in a public service office;"

The public office is defined as:

"Public Service Office" for the purpose of this Act means-

(a) a paid public office in the United Republic charged with the formulation of Government policy and delivery of public services other than-

(i) a parliamentary office;

(ii) an office of a member of a council, board, panel, committee or other similar body whether or not corporate, established by or under any written law;

(iii) an office the emoluments of which are payable at an hourly rate, daily rate or term contract;

(iv) an office of a judge or other judicial office;

(v) an office in the police force or prisons service"

(b) any office declared by or under any other written law to be a public service office;"

It is undisputed that the respondent is an Executive Agency established under the Executive Agencies Act, and indeed a Public Office. However, the issue is the term of contract of employment which the applicants were in with the respondent. As shown in the undisputed pleadings and submissions of parties, the applicants were watchmen of the respondent employed in **one year term contract** which was renewable. Therefore the definition of the employment relationship between the applicants and the respondent falls under the exception of the definition of Public Service Office under Clause (iii) of the definition which excludes persons holding office the emoluments of which are payable at an hourly rate, daily rate or ***term contract***.

The exception of Public Service Office is the a paid public office in the United Republic charged with the formulation of Government policy and delivery of public services **other than an office** the emoluments of which are payable at an hourly rate, daily rate or term contract. It is clear that the applicants' contracts were term contracts of one year renewable hence they do not fall under the definition of the Public Servants. Therefore for the purpose of a definition of a Public Servant in relation to the Public Service

Office, the applicants contracts (hence office for the purpose of their contract) was in term contracts hence are not bound with the provisions of Section 32A of the PSA. As correctly argued by Mr. Mgombozi, the CMA fell into error by determining that the applicants were public servants whom, under the provisions of Section 32A of PSA, were to seek for other remedies before approaching the CMA. This is because the CMA had jurisdiction to entertain the matter.

I have noted Mr. Mgombozi's other argument, that having found that the CMA had no jurisdiction, it was not supposed to dismiss the dispute but to strike it out. Here I think Mr. Mgombozi has misled himself because jurisdiction is a creature of statute and once the court or any quasi-judicial body finds that it has no jurisdiction to entertain the matter, it is not something which will be created in the near future by any other thing than the same statute. If you have no jurisdiction under the statute, then it cannot be created anyhow meaning that the dispute cannot be left to stand in that same court/quasi-judicial body. Dismissal is therefore the right remedy and not striking out. A matter is only struck out when there are some errors to be corrected so that it can be properly re-filed again. As for the case of jurisdiction, it means if the court is not clothed with jurisdiction, it cannot be

created by any correction of the matter or refilling the same dispute, it stands to be dismissed so that it can be filed in a court with the competent jurisdiction to try it. On this point, the CMA did not error in having found that it had no jurisdiction, to dismiss the dispute. The ground therefore lacks merits and it is hereby dismissed.

Having made those findings, the revision is allowed to the extent explained, the CMA had jurisdiction to entertain the matter. The ruling of the CMA is therefore set aside, the dispute is remitted back to the CMA to be heard on merits.

Dated at Dar-es-salaam this 07th day of March, 2022.

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S.M. MAGHIMBI
JUDGE