IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 210 OF 2020

(Arising from the decision of the Commission for Mediation and Arbitration of DSM at Ilala) (Hon. I. Adam: Arbitrator) dated 26th day of January 2021 in Labour Dispute No. CMA/DSM/ILA/R. 830/13

BETWEEN

AMBROSE K.V. OKODE.....APPLICANT

VERSUS

M/S TANZANIA TELECOMMUNICATION

COMPANY LIMITED (TTCL).....RESPONDENT

JUDGEMENT

13th April 2022 & 29th April, 2022

K. T. R. MTEULE, J.

This Revision application emanates from the ruling of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/ILA/R. 830/13 which was filed there in by the Applicant Ambrose Okode. In this application, this Court is asked to call for CMA records, revise and set aside the ruling of the CMA.

In brief, the Applicant was employed by the Respondent as a Telephonist since 1973. He was suspended in 1998 on an allegation of misusing TZS 96,000. It is not disputed that the said sum of money was recovered by the Respondent from the Applicant.

Dissatisfied with the employer's decision to terminate the employment, on 14th February 1998 the Applicant tabled the matter before Tabora Conciliation Board, which decided in his favour by issuing the order of reinstatement. Being aggrieved by the Board's decision the employer referred the matter to the Minister. The Minister confirmed the decision of the Conciliation Board. Consequently, on 11th October 2013, after a long unsuccessful battle in courts, the respondent is alleged to have terminated the Applicant's employment by paying the Applicant twelve months salaries instead of reinstatement and without paying the salary arrears. For that reason, the applicant filed a dispute at CMA claiming for re-instatement, arrears of unpaid wages and compensation for mental and financial torture due to the alleged termination of 2013. Upon determination of a preliminary objection raised by the Respondent, the CMA dismissed the application for want of jurisdiction. This decision triggered this application for revision.

The applicant advanced two legal issues of revision as stated at paragraph 14 of his affidavit as follows:-

i) That the trial arbitrator erred in law and fact when he dismissed the case on ground of jurisdiction without taking into account that the complainant was terminated in

November 2013 and without payment of all dues in accordance with Form No. 8 which is the Minister's Decision.

ii) That the trial arbitrator erred in law and facts by not taking into account form No.8, Minister Decision issued in 2009 and that the payment of 12 months' salary was done in November 2013.

When this application was called for hearing, both parties were represented. Mr. Emmanuel Mkonyi, State Attorney, appeared for the Respondent while Mr. Godwin Ernest Ndonde, Personal Representative appeared for the applicant.

Arguing in support of the applicant's application, Mr. Godwin submitted that the Minister ordered reinstalment under **Section 27 of the Security of Employment Act**. In his view, the application of Section 27 (2) of the Security of Employment Act of 1975 by the Minister did not provide an opportunity for the employer to pay the employee 12 months' salaries. He argued that, the opportunity to pay the salaries is only available if the Minister would have applied Section 40 (a) (iv) of Act No. 1 of 1975. He stated that the Applicant was to be reinstated to his employment.

Mr. Godwin is of further view that the applicant's application is not time barred for being filed on 22nd November 2013 as per Rule 10 of the Labour Institutions (Mediation and Arbitration) GN. No. 64 of 2004.

The Applicant's Counsel thus prayed for the CMA ruling to be set aside and the applicant to be paid salaries from 1998 the date he was terminated up to 11th October 2013 when he was paid 12 months salaries.

In resisting the application Mr. Mkonyi submitted that the decision of the Minister was already there when the matter was in the CMA, and it just needed execution without further debate in the CMA. In his view, the Applicant ought to have gone to the District Court which used to be clothed with the jurisdiction to execute the decision of the Minister.

Mr. Mkonyi submitted that in this application, the employer implemented the decision of paying the employee in accordance with Section 40 (5) of the Security of Employment Act, which gives the employer an option to reinstate the employee within 30 days, failure of which the employer was to compensate the employee. He added that if there could be any execution in the District Court and the

Employer executes contrary to what is ordered then the applicant could be in a position to bring the Application in this Court under Rule 26 (1) of the Labour Court Rules.

Mr. Mkonyi argued that CMA was barred from proceeding with the matter which was already decided by the Minister in 2009. He added that **Section 9 of the Civil Procedure Code Cap 33 R.E 2019** prevent the Court to entertain any suit in which parties are the same or decision was already made by the Court of competent jurisdiction on the same matter.

Mr. Mkonyi averred that Act No. 6 of 2004 provided saving provision under the 3rd Schedule and 4th Schedule, which guided how to deal with cases and executions which were pending in Court. He averred that the said 4th Schedule at Item No. 8 (1) stated that all cases which under the Conciliation Board were to continue for 3 years until 2010. On that basis he is of the view that there was no reason for the applicant to file the matter in CMA while the law had already provided extension of time for the matter to proceed in District Court.

It was further submitted that the arbitrator was right in holding that the dispute was res judicata, this is because the decision of the Minister rendered it functus officio.

In rejoinder Mr. Godwin argued that the Applicant failed to execute the decision of the minister because it was being challenged by the respondent at the High Court through **Civil Application No. 34 of 2010** against Attorney General, Labour Commissioner and the Minister.

Having cautiously gone through the CMA records, the facts deponed in the affidavit and counter affidavit and the submissions of the parties this Court finds that the issues for determination are:-

i) Whether the Applicant has established sufficient grounds to warrant revision and setting aside of the decision of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/ILA/R. 830/13

ii) To what reliefs are parties entitled?

In addressing the above issues, I will start with the first one as to **whether the Applicant established sufficient grounds to warrant revising and setting aside the CMA ruling**. To answer this issue, I will tackle the legal issues raised in the applicant's affidavit. Starting with the first one concerning the jurisdiction of the CMA, the trial arbitrator dismissed the dispute on the ground that the CMA had no jurisdiction since the matter was res judicata. The

Applicant is challenging this holding which disregarded the fact that the applicant was terminated in November 2013 and without payment of all his dues in accordance with Form No. 8 which is the Minister's decision. Having gone through the ruling of the CMA, I have noted that the arbitrator based her decision on the reason that the matter was res judicata in accordance with **Section 9 of the Civil Procedure Code (Cap 33 R.E 2002) (CPC)** as it was already decided by the Conciliation Board and appealed to the Minister where it was finally determined.

Was the matter in the CMA res-judicatar? This question needs to be addressed to resolve the framed issue. The doctrine of res judicator is governed by **Section 9 of the CPC** which provides:-

> *"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court".*

This principle is further enshrined in the case of **Paniellotta versus Gabriel Tanaki & Others** [2003] TLR 312, where it was deliberated that five things must be considered for the doctrine of res judicata to operate, the said ingredients are as follows:-

(i) The former suit must have been tbetween the same litigants or parties.

(ii) The subject matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and subsequently in issue in the former suit either actually or constructively.

(iii) The party in the subsequent suit must have litigated under the same title in the former suit.

(iv) The matter must have been heard and finally decided.

(v) That the former suit must have been decided by a court of competent jurisdiction.

The CMA Form No. 1 reveals that the Applicant's claim before CMA related to unfair termination and other terminal benefits from 1999 to 2013 when the Applicant alleged to have been terminated. What was decided by the Conciliation Board of Tabora and later confirmed by the Minister on Appeal was a challenged wrongful termination of employment which took place in 1998. In my view, the termination of

1998 and the termination of 2013 if confirmed, are two distinct causes of action which should have been treated distinctly. This means the subject matter directly and substantially in issue in the matter before the CMA is not the same matter which was directly and subsequently in issue in the matter which was decided by the Tabora reconciliation Board and the Minister on Appeal. The former concerns a termination alleged to have been issued in 2013 which is presumed to have taken place after reinstatement while the latter is the termination of 1999 which is already decided. This being the case, the issue of res judicata do not arise in this kind of a situation. Since the matter was not res judicator, then the Arbitrator erred in holding that the CMA did not have jurisdiction.

Having found that the arbitrator erred in finding that the matter was res judicator, in my view this is a sufficient ground to warrant revision of the Decision of the CMA. I see no reason to labour on the other legal issue from the affidavit. The framed issue No. 1 is therefore answered affirmatively that the Applicant has established sufficient ground to warrant the revision of the decision of the CMA.

On the issue of remedies, it is my considered view that the appropriate measure for this matter is to revert it to the CMA to be

heard on merit. Consequently, I hereby revise the CMA decision in Labour Dispute No. CMA/DSM/ILA/R.830/13 and set aside the proceedings and the decision thereon, and order that the matter to be heard afresh. No order as to costs. It is so ordered.

Dated at Dar es Salaam this 29th day of April, 2022.

KATARINA REVOCATI MTEULE

JUDGE

29/04/2022