

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

CONSOLIDATED REVISION NO. 125 OF 2021

BETWEEN

**THE GOVERNING BODY OF THE
COLLEGE OF BUSINESS EDUCATION.....APPLICANT**

VERSUS

BITON CARSON MWENISONGOLE.....RESPONDENT

AND

REVISION NO. 130 OF 2021

BETWEEN

BITON CARSON MWENISONGOLE.....APPLICANT

VERSUS

**THE GOVERNING BODY OF THE
COLLEGE OF BUSINESS EDUCATION.....RESPONDENT**

*(Arising from Labour Dispute No. CMA/DSM/ILA/1020/18 from the Commission for
Mediation and Arbitration of Dar es Salaam Zone - Ilala)*

RULING

25th April 2022 & 11th May 2022

K. T. R. MTEULE, J.

This Ruling concerns consolidated Revision Applications No. 125 and 130 arising from the decision of Hon. MASSAY, A., the Arbitrator, which was delivered on 4th day of September, 2020 in Labour Dispute No. CMA/DSM/ILALA/1020/18 in the Commission for Mediation and Arbitration (CMA) at Dar Es Salaam Ilala. The dispute was referred to the Commission by the employee **BITON CARSON**

MWENISONGOLE against the employer, **THE GOVERNING BODY OF THE COLLEGE OF BUSINESS EDUCATION** (Employer) following the employer's decision to terminate the employee's employment.

A brief historical background of the dispute is extracted from applicants' affidavit, the respondent's counter affidavit, the parties' submissions and the CMA record as stated hereunder. **Mr. MWENISONGOLE** was an Assistant Tutor of the Applicant who was terminated on 08th May, 2015 for an alleged misconduct of committing negligence which resulted into a loss to their employer to the tune of TZS 16,750,000.00. Following the termination, **Mr. MWENISONGOLE** referred the dispute to the Commission for Mediation and Arbitration which delivered the award in his favor, on the reason that the procedure for termination was not adhered to. The commission ordered the employer to pay him 12 months salaries as compensation. The total sum awarded was **TZS 34,680,000.00**. Both parties were not satisfied with the CMA's Award consequently, they both filed revision applications in this Court. **Mr. MWENISONGOLE** filed **Revision No. 125 of 2021** while the employer **THE GOVERNING BODY OF THE COLLEGE OF BUSINESS**

EDUCATION, filed **Revision No. 130 of 2021**. For convenience purposes, the two Revision Applications were consolidated by this court following parties' prayer.

On 25th April, 2022 the Court raised a point of law *suo moto* and called upon the parties to address it as to whether it is clothed with jurisdiction to entertain the matter since the respondent is a government entity. This point of jurisdiction together with the point of law relating to time limitation which was raised by the respondent through a Preliminary Objection on 03rd March, 2022 were argued all together by a way of written submissions. Ms. Adelaida Ernest, State Attorney appeared and argued on behalf of the employer while Mr. Stephan Mboje, Advocate appeared and argued on behalf of the employee. I thank both parties for complying with the Court's schedule in filing the submissions and the industrious work done with research. All the submissions are valued, and they will be taken on board in considering the two points of law raised in these consolidated revision applications.

Starting with the jurisdiction, Ms. Adelaide Ernest submitted that the applicant is fully government owned college operating under the Ministry Responsible for commerce which was established by the

College of Business Education Act Cap 315 R.E 2002 and among its principal duties is to provide training on business related profession. She submitted that in this regard, the Applicant is a public service institution and the respondent being its employee, means that he was a public servant and was bound by **Section 32 A of the Public Service Act, No. 48 of 2016** which demands a public servant to exhaust all remedies under the Act, before seeking redress provided under labour laws. Supporting her submission, she cited the case of **Tanzania Posts Corporation versus Dominic A. Kalangi**, Civil Appeal No. 12 of 2022, Court of Appeal of Tanzania, (unreported) quoting the following words:-

"n the premises, it can hardly be gainsaid that, having been established by an Act of Parliament and being wholly or substantially owned by the Government, the Tanzania Posts Corporation is a public service institution...."

Basing on Section 32A, Ms Adelaida is of the view that CMA is precluded from entertaining labour disputes involving public servants. She stated that the Court of Appeal of Tanzania has a settled position that the question of jurisdiction is to be detected at the time of filing the dispute in Court or at CMA as was held in the case of **Farida F.**

Mbarak and Another v. Domina Kagaruki, Civil Reference No. 145 of 2019, Court of Appeal of Tanzania, unreported.

Ms. Adelaide averred that when the respondent filed his labour dispute in September 2018, the law on how to deal with labour dispute involving public servants was already amended since 18th November 2016 with the introduction of **Section 32A of the Public Service Act, Cap 298 R.E 2019**. Insisting her position, she cited several cases including the case of **Ismail Rashid v. Mariam Msati**, Civil Appeal No. 75 of 2015 (unreported).

Regarding time limitation, Ms. Adelaide submitted that the CMA award was delivered on 19th February, 2021 and both parties were served with a copy of the award on the same day. She further submitted that by filing his application No 130 of 2021 on 06th April 2021, the Applicant contravened Section 91 (1) of the Employment and Labour Relations Act, Cap 366 R.E 2019 under which the application ought to have been filed on 1st April, 2021. In her view, there was a delay of 5 days, and on such basis the respondent's assertion that he filed the matter timely vide electronic filing system without any printout to prove the same lacks merits. Bolstering her position, she cited the case of **Geita Gold Mining Limited v.**

Christian Christopher, Labour Revision No. 90 of 2020, at Mwanza, (unreported).

Ms. Adelaide argued that the only remedy for time barred application is dismissal as was held in the case of **Barclays Bank Tanzania Limited v. Phylisia Hussein Mcheni**, Civil Appeal No. 19 of 2016.

In reply Mr. Stephan Mboje submitted that even if the Court has to deal with this preliminary objection for the second time regarding the jurisdiction of the Commission for Mediation and Arbitration, he insisted that the cause of action arose on 8th May, 2015 as rightly narrated by the opponent Counsel at page 1 of her submission and during that time when the respondent was terminated, the new law, the **Written Law (Amendments Act) No. 3 of 2016** was not in force as that law started to operate on 18th November 2016.

Mr. Stephan Mboje argued that since the cause of action arose before the new amendment of Section 32A, therefore the respondent won't be affected by the said amendments as he was covered by **Section 31 (1) of the Public Service Act**, R.E 2019 which directs servant in the Executive Agencies and Government Institution to be governed by provision of laws establishing the respective executive agency or institution. Supporting his argument, he cited the case of **The Board**

of Trustees of the Republic Service Pension Fund (PSPF) v. Jalia Mayanja, Labour Div., Revision No. 248 of 20017. He added that applying new law collides with the principle of retrospectivity, as was held in the case of **Joseph Khenan v. Nkasi District Council**, Civil Appeal No. 126 of 2019, at Mbeya, (unreported).

On second point of law relating to time limit Mr. Stephan Mboje submitted that the respondent filed his Revision Application No. 130 of 2021 on time as per the new requirement of the law and that the applicant has complied with all the requirement of the law that the application must be filed online and admitted by the Registrar. To back up his stand he referred this Court in the case of **GG Construction Ltd v. George Johansen T/I Magefa Timber Supply**, Misc. Application No. 33 of 2020, High Court of Tanzania, at Shinyanga, (unreported).

It was further argued by Mr. Stephan Mboje that according to the submission of Ms. Adelaide at paragraph 3 of page 7 employee ought to have filed his Revision No. 130 of 2021 on or before 1st April 2021. He reiterated that he filed his revision on 31st March 2021 before the midnight of the same date as per **Rule 21 (1) of the Judicature and Application of Laws (Electronic Filing) Rules**, GN. No. 148

of 2018.

From the submissions and CMA record, this Court is called upon to determine the following issues:-

- i) Whether the Commission for Mediation and Arbitration had jurisdiction to entertain the matter?
- ii) Whether Revision Applications No. 130 of 2021 was filed out of time?

In dealing with the first point of law concerning the jurisdiction, the applicant stated that CMA had no jurisdiction for two reasons, one; its principal duty is to provide training (education) and second, is that the dispute was filed afresh in 2018 and for that reason he is of the view that the respondent is covered by Section 32A of the Public Service Act, GN. No. 48 of 2016. Disputing, the Respondent argued that since the dispute arose in 2015, then Section 32A of the Public Service Act, G.N No. 48 of 2016 does not apply in this matter.

Basing on disputed provision this Court finds it worth to reproduce same, Section 32A of the Public Service Act, GN. No. 48 of 2016 which provides:-

32A, "A public servant shall, prior to seeking remedies provided for in labour laws, exhaust all remedies as provided for under

this Act.”

From the above authority, it is well-known that the disputed provision came into operation on 18th November, 2016. The record available reveal that the termination dispute arose on 08th May, 2015 as per termination notice, therefore recollection of Labour Dispute No. CMA/DSM/ILA/R. 246/15 which attracted filing of fresh application in 2018 does not remove or change the notion that respondent was terminated in 2015.

Since the issue of filing application falls under procedural and not substantive right, the Court is guided by certain rules of construction, then I am of the view that does not Section 32A of the Public Service Act, GN. No. 48 of 2016 attract the operation of retrospective effect principle as the same impose new obligation or duty. The same position was discussed in the case of **Joseph Khenani v. Nkasi District Council**, Civil Appeal No. 126 of 2019, at Mbeya, (unreported) by citing the case of **Yew Bon Tew v. Kendaran Bas Mara** (1983) 1 AC 553 as was cited by the respondent's Counsel. In this respect, the dispute which arose in 2015 cannot be covered by a law enacted in 2016.

Therefore, basing on the foregoing, it is established principle that the determination of time starts when the dispute arose and not when the matter was filed at the CMA or in this Court. In such circumstances I have to say that the respondent is not covered by Section 32A of the Public Service Act GN. No. 48 of 2016.

In addressing the second issue concerning timeliness of Revision Application No. 130 of 2021 the relevant provision is Section 91 (1) of the Employment and Labour Relation Act, Cap 366 R.E 2019 which directs that any application for revision must be filed in this Court within 42 days from the date of the service of the impugned decision to the Applicant. The record available shows that the intended ruling sought to be revised was issued on 19th February, 2016 and the applicant in Revision Application No. 130 of 2021 was served with the said decision on the same date of 19th February, 2016. The Applicant filed Revision Application No. 130 of 2021 on 06th April, 2021 while the same was supposed to be filed on 31st March, 2021 according to the rule cited above.

In the submission, the applicant stated that he filed the application timely through on 31st March, 2021. In his view, counting starts from the date when the matter was entered in the system. However, the

report from JSDS was not produced and at the same time, the record of Revision Application No. 130 of 2021 is endorsed to shows that the date of filing is 6th April, 2021 and not 31st March, 2021 as claimed by the Applicant. The applicant challenged this assertion for missing evidence from JSDS to prove it. The applicant ought to have proved that the application was registered in the JSDS on 31st March, 2021 and not on 06th April as endorsed in the application. In absence of this prove, the court will rely on the record of the application which is available in the court file. By the face of that record, it is apparent that the application was filed on 6th April, 2021, which is 6 days after the due date, therefore it was lodged out of time. The applicant therefore ought to have obtained the leave of the court to allow the application out of time. Since it is not disputed that the application was filed without a leave of the court, then it cannot be sustained as it is time barred.

Guided by the jurisprudence in **Barclays Bank Tanzania Limited v. Phylisia Hussein Mcheni** cited supra, the available remedy for a matter filed out of time without the leave of the court is to strike it out.

In the upshot, it is the finding of this Court that since the dispute

arose before the amendment of the Public Service Act in November 2016, the CMA had jurisdiction. On the other hand, I uphold the Preliminary objection in Revision Application No. 130 of 2021 and dismiss the said Application for being time barred. I further order that Revision Application No. 125 shall proceed to be determined on merits. It is so ordered.

Dated at Dar es Salaam this 11th day of May, 2022.



Kj
KATARINA REVOCATI MTEULE

JUDGE

11/05/2022

Labour