THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 391 OF 2021

BETWEEN

ANTHONY JOHN KAZEMBE..... ..... APPLICANT

AND

INTER TESTING SERVICES (EA) (PTY) LTD .....RESPONDENT

RULING

Last order 16/02/2022
Date of ruling 25/02/2022

B.E.K. Mganga, J

On 17th April 2001, the respondent employed the applicant as a chemist. Employment relationship between the two came to end on 19th April 2019 when applicant was served with a termination letter for failure to participate in retrenchment process. Applicant was aggrieved by the said termination as a result he filed labour dispute No. CMA/DSM/TEM/218/19/104/19 before the Commission for Mediation and Arbitration henceforth CMA. On 6th September 2021, Hon. M. Batenga, arbitrator, issued an award ordering the respondent to pay the applicant TZS 14,761,138.27 as severance pay and TZS 5,482,708.50 being one month salary in lieu of notice as he found that termination was fair both

substantively and procedurally. Being further aggrieved by the said award, on 11th October 2021, applicant filed this application for revision on ground that:-

1. *The arbitrator grossly erred in law and fact by misdirecting himself in respect of the cause of action and based the award on retrenchment instead of unfair termination.*
2. *The arbitrator grossly erred in law and fact by failure to raise issues that could have resolved the dispute.*
3. *The arbitrator grossly erred in law and fact by failure to make a finding on each issue framed by the parties.*
4. *The arbitrator grossly erred in law by basing his decision on the issue he raised suo moto in respect of procedure for termination without affording the applicant right to be heard.*
5. *The arbitrator erred in law and fact by failure to evaluate evidence and issued an award without reasons thereof.*

On 2nd December 2021, respondent filed both the notice of opposition and a counter affidavit. Apart from that, respondent filed also a notice of preliminary objection on point of law that :-

1. *The application is incompetent for failure to file a mandatory notice of intention to seek revision contrary to Regulation 34(1) of the Employment and Labour Relations (General) Regulations GN. No. 47 of 2017.*

Arguing the said preliminary objection, Mr. Lwijiso Ndelwa, Advocate assisted by Francisco Kaijage Bantu, advocate for the respondent,

submitted that the application is incompetent for failure by the applicant to file a mandatory notice of intention to seek revision contrary to Regulation 34(1) of the Employment and Labour Relations (General) Regulations GN. No. 47 of 2017. Mr. Ndelwa argued that the said Rule requires applicant, prior to filing revision application before this court, to file at CMA, a notice of revision (CMA F. 10). Mr. Ndelwa, submitted further that, failure to file the said notice makes this application incompetent liable to be struck out. In support of his submission, counsel for the respondent cited High Court decisions in the cases of ***Unilever Tea Tanzania Limited v. Paul Basondole,*** Labour Revision No. 14 of 2020 and ***Arafa Benjamin Mbilikila v. NMB Bank PLC,*** Revision No. 438 of 2020 both unreported.

Responding to the submissions made on behalf of the respondent, Mr. Baraka Lweeka, counsel for the applicant submitted that, the said Rule 34(1) of GN. 47 of 2017,(supra), relates to forms while revision applications are governed by Rule 24 of the Labour Court Rules, GN. No. 106 of 2007. Counsel for the applicant submitted that Rule 24 of the Labour Court Rules, GN. No. 106 of 2007 requires an applicant to file chamber summons, notice of application and an affidavit, which were complied with by the applicant. Counsel for the applicant argued that

the application is properly before the court and cited the High Court decision in the case of ***Frednand Nsakuzi v. Diretor General PCCB,*** Revision No. 07 of 2018 (unreported) to support his argument. Counsel for the applicant argued further that, failure to file the notice to seek revision did not occasion injustice to the respondent and prayed the court to apply the overriding objective principle. In support of his prayer to apply the overriding objective principle, counsel for the applicant relied on the High court decision in the case of ***Alphonce Dionezio Boniphace v. Shirika la Upendo na Sadaka,*** labour Revision No. 8 of 2021 (unreported). In concluding his submission, counsel for the applicant cited Rule 55(2) of the Labour Court Rules and prayed the preliminary objection be dismissed.

In a brief rejoinder, Mr.Ndelwa, counsel for the respondent submitted that ***Boniphace's case,*** (supra), is distinguishable and cannot apply in the facts of this application. Counsel for the respondent concluded that the overriding objective principle, cannot be used to circumvent the mandatory provisions of the law.

From the above submissions of both parties, the rival issue is whether it is mandatory to file at CMA a notice to seek revision prior to filing revision application before this court or not. It was submitted by counsel

for the respondent that notice to seek revision is mandatory to be filed at CMA prior to filing revision application to this court and that failure to file it makes the revision application incompetent liable to be struck out. On the other hand, it was submitted by counsel for the applicant that application for revision is governed by Rule 24 of the Labour Court Rules GN. No 106 of 2007 and that failure to file at CMA the notice to seek revision is inconsequential. With due respect to counsel for the applicant, Rule 24 of the Labour Court Rules, GN. No. 106 of 2007 does not govern applications for revision, but is a general Rule applicable to all applications made before this court. In revision application, the applicant has to cite the said Rule 24 and 28 both of GN. No. 106 of 2007 and section 91(1)(a) of the Employment and Labour Relations Act [Cap. 366 R. E. 2019]. Rule 34(1) of GN. No. 47 of 2017, (supra), was made by the Minister under section 98(1) of the Employment and Labour Relations Act [Cap. 366 R. E. 2019] and uses the word shall connoting mandatory. In terms of section of 53(2) of the Interpretation of the Laws Act [Cap. 1 R. E. 2019]. The said section provides:-

> *"53(2) Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."*

In my view, the notice to seek revision is like a notice of appeal in both Civil and Criminal cases, in which case, its absence makes the appeal incompetent. Failure of the applicant to file at CMA a notice to seek revision, cannot be regarded as inconsequential to the revision application before this court. In my view, the notice to seek a revision is a call to the CMA and the arbitrator that the award is contested, and that should make necessary arrangements such as typing proceedings and forward the record to the Court for revision. Failure to file at CMA a notice to seek revision, implies that there is no further contentions between the parties and that the dispute has been put to rest hence no need of forwarding the CMA record to the Court. Argument that failure to file the notice to seek revision is inconsequential, in my view, is like submitting that failure to file a notice of appeal in criminal or civil cases is inconsequential, which is not the position of the law. In my view, failure of the applicant to file the notice to seek revision makes the application for revision to be incompetent. I therefore associate myself with the reasoning of my learned brother Mlyambina, J, in ***Basondele's case,*** (supra), and learned sister Maghimbi, J, in ***Mbilikila's case,*** (supra), that failure to file a notice to seek revision makes the application for revision incompetent.

It was submitted by counsel for the applicant that, failure to file the notice to seek revision did not occasion injustice to the respondent and prayed the court to apply the overriding objective principle. This submission was countered in rejoinder by counsel for the respondent that overriding objective principle, cannot be used to circumvent the mandatory provisions of the law. I respectfully agree with the submission by counsel for the respondent as that is the position given by the Court of Appeal in the case of ***Martin D. Kumalija & 117 Others v. Iron and Steel Ltd***, Civil Application No. 70/18 of 2018, (unreported) and ***SGS Societe Generale De Surveillance SA and Another v. VIP Engineering & Marketing Limited and Another***, Civil Appeal No. 14 of 2017 (unreported). In ***Kumalija's case***, (supra), the Court of Appeal held:-

> *"...While this principle is a vehicle for attainment of substantive justice, it will not help a party to circumvent the mandatory rules of the Court. We are loath to accept Mr.Seka's prayer because doing so would bless the respondent's inaction and render superfluous the rules of the Court that the respondent thrashed so brazenly".*

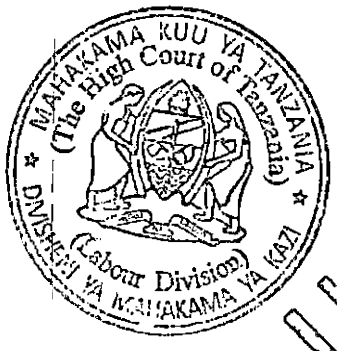
In ***VIP's case***, (supra), the Court of Appeal held that:-

> *"...We also find that the overriding objective principle cannot apply in the circumstances of this case since its introduction in the written Laws (Miscellaneous Amendments) (No. 3) Act, 2017 (Act No. 8 of 2017) was not*

meant to enable parties to circumvent the mandatory rules of the Court or turn blind to the mandatory provisions of the procedural law which go to the foundation of the case."

From submissions of the parties and CMA record, it is clear applicant did not file at CMA a notice to seek revision prior filing this application. For all what I have explained hereinabove, I struck out this application for being incompetent.

Dated at Dar es Salaam this 25th day of February 2022.



B.E.K. Mganga
JUDGE