IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 80 OF 2022

BETWEEN

TANZANIA ZAMBIA RAILWAY AUTHORITY(TAZARA) ..... 1ST APPLICANT

THE ATTORNEY GENERAL ..... 2ND APPLICANT

AND

SALUM NYIKA ..... RESPONDENT

RULING

S.M. MAGHIMBI, J:

At the Commission for Mediation and Arbitration for Ilala (CMA) the respondent herein lodged a Labour Dispute No. CMA /DSM/TMK/190/2021 ("the dispute") against the applicant herein. In his CMA Form No.1 which initiates a dispute at the CMA, the respondent also sought for condonation of time and the subsequent condonation form was filled as required under clause 7 of the form. The CMA heard the parties and was satisfied with the reason for the delay and continued to grant the condonation. The dispute was subsequently ordered to proceed on the 01st day of March, 2022. The applicant herein was aggrieved by the order of the CMA and has lodged this revision under the provisions of Section 91(1)(a), 91(2)(c) 94(1)(e) of the

Employment and Labour Relations Act, Cap. 366 R.E 2019 ("ELRA") and Rule 24(1), 24(2)(a)(b)(c)(d)(e) & (f) and 24(3) (a)(b)(c) & (d) and 28(1)(c),(d) and (e) and Rule 50 of the Labour Court Rules GN. No. 106 of 2007 ("the Rules") and Section 51 and 52(1) of the Labour Institution Act, Cap. 300 R.E 2019 ("LIA") seeking for the following orders:

1. That this Honourable Court be pleased to call for and examine the records of the proceedings and a Ruling of the Commission for Mediation and Arbitration (Hon. Ngalika, E) dated 09th February, 2022 in Labour Dispute No. CMA /DSM/TMK/190/2021, for the purpose of satisfying itself as to the correctness, legality or propriety of the said decision and revise the same accordingly.
2. Any other Orders that this Honourable Court may deem fit and just to grant.

On the 20th day of April, 2022 when the matter came for mention, I asked Mr. Joshua Webiro, learned State Attorney representing the applicant, to address the Court on the competence or otherwise of their application pursuant to Rule 50 of the Labor Court Rules, GN. No. 106/2007 ("the Rules"). The respondent was represented by Mr. Thomas Brashi, learned Counsel.

In his submissions to support the application, Mr. Webiro maintained that the application is competent and is not in contravention of Rule 50 of the Rules; his argument was that the ruling and order sought to be challenged is not an interlocutory order. That Rule 50 bars revision on interlocutory orders but the one they seek to challenge is a final order. He supported his submissions by citing the decision of the Court of Appeal in a case of **Tanzania Posts Corporation vs Jeremiah Mwandi (Civil Appeal 474 of 2020) [2021] TZCA 311 (16 July 2021)** whereby in that decision at page 40, the Court provided for the test to be applied in order to ascertain whether the order to be challenged is final or an interlocutory one.

Mr. Webiro went on submitting that this test is nature of the order test and is divided into two limbs, the first one is what were the remedies or reliefs being sought in the subordinate Court and the second test is whether all such rights a remedies conclusively determined. When I asked him which reliefs were sought by the respondent in the CMA Form No. 1, he pointed out that in the matter before me, the reliefs sought by the respondent was condonation of time, however, as per CMA Form No. 1, the reliefs sought included payment of all terminal benefits. That the CMA Form No. 2 was for condonation of time. He hence argued that the order being challenged is

final because as per his understanding, all the reliefs sought by applicant were granted.

His conclusion was that by nature of order test, the remedies/reliefs sought by the applicant were already granted conclusively and that because the respondent was praying for condonation and the ruling was delivered by the CMA, then the order being challenged is not interlocutory but rather final. That the application before this Court is competent and not in contravention of Rule 50 of the Rules.

In reply, Mr. Brashi submitted that in the spirit of Rule 50 of the Rules which makes it a bar for any appeal, review or revision on interlocutory matters; the application is incompetent before this Hon. Court. That the ruling that is challenged by the applicant is in regard to the application for condonation of time which was filed along with the CMA form No. 1 and the ruling in it did not result to the finality of the matter. He argued that in any case, under that rule, there is no loser as it did not result to a decree capable of being executed.

He went on submitting that for several times this Court has made decisions in regard to the application of this nature, he then cited the

decisions of this Court at Mwanza **in Labour Revision No. 62/2019 between Equity Bank (T) Ltd Vs. AbuHussein J. Mvungi** (unreported) whereby Hon. Tiganga, J, in deciding on application against a ruling for condonation, held that the application for revision on a ruling for condonation of time is based by law and practice of the Court. Mr. Brashi further cited the case of **Board of Trustees of NSSF Vs. Pauline Matunda, Rev. No. 514/2019** in which again, this Court after considering many decisions including decisions of the Court of Appeal, held that application for revision against an and or interlocutory matter has no space in this Court or any other Court.

Mr. Brashi submitted further that in the decision of the case of **Board of Trustees of NSSF**, this Court had a comment that the general rule under provision of Rule 50 of the Rules can only be dispensed with where it has been discovered that there was miscarriage of justice on the ruling in question. That very unfortunate there is no such allegation, the applicants are only aggrieved by the ruling in its totality on a note that the CMA was not entitled to make a ruling in four of the respondent.

On the last point of Mr. Webiro's submissions that the ruling on condonation had a finality effect, Mr. Brashi replied that in the two cases that he referred to in this case, the court had good time to define what amounts to interlocutory matter and that Form No. 2 was not filed in isolation of Form No. 1 and the respondent did not go to the CMA in deponent of Form No. 2. That instead, it is Form No.2 which depended on Form No. 1 and on that base there was no right of parties determined in Form No. 2 except the extension of time. For that regard, he argued that it cannot be said the application for condonation was a final determination of the dispute between the applicant and the respondent. He then quoted the content of the last para of the ruling which is challenged, at page 6:

> *"Hivyo bila kujali muda alichelewa lakini kwa kuzingatia sababu ya kuchelewa na uzito wa suala lenyewe. Tume inayakubali maombi haya na shauri hili litaendelea kusikilizwa kwa hatua ya usuluhishi tarehe 01/3/2022 saa 5 asubuhi".*

Mr. Brashi then submitted that taking the conclusion of the CMA that *"shauri litaendelea"*, it means a continuation of proceedings so it cannot be said there is a final determination of the matter. He concluded by praying

that this application be dismissed and that the court has discretionary power to issue costs if it pleased.

In rejoinder, Mr. Webiro reiterated his position that the ruling/decision being challenged is not interlocutory but a final decision. On Mr. Brashi's submission that CMA Form No. 2 was depending on CMA F1, his submission was that the two forms are separate and they don't depend on each other. That if we are to take Mr. Brashi's argument then it is CMA No. 1 which depends on CMA No. 2 cause without condoning time, then the CMA cannot proceed to determine reliefs sought in the CMA Form No. 1. It can only proceed with CMA Form No. 1 after determining reliefs sought in CMA No. 2. That if we go by that, it is CMA Form No. 1 that depends on CMA No. 2, because once condonation is sought, one has to file both CMA F1 & F.2 and the CMA No. 1 will depend on the out came of CMA No. 2.

On the cited decision of this court by Mr. Brashi, Mr. Webiro's submission was that the decisions are just persuasive and not binding to me. That the decision of the Court of Appeal cited was delivered on 16/07/2021 arguing that if this decision was out by the time the Court delivered their decision, then the position of this Court would have been different by

applying the nature of the order test which is a new development advanced by the Court of Appeal. He then reiterated on submission in chief that the application before me is competent and not in contravention of Rule 50 of the Rules.

Having heard the parties' submissions, I will first start to see if the revision before me which is filed under Section 91 is proper. I have noted that the current application is lodged under several provisions and Rules including the provisions of Section 94(1) of ELRA. The Section provides:

> *"91.-(1) Any party* ***to an arbitration award*** *made under section 88(10)who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for a decision to set aside the arbitration award"*

On the cited provision, a revision lies from a decision of the CMA emanating from an arbitral award made under Section 88(10) of the ELRA. Before me is a revision against application not only is it interlocutory, but it also did not emanate from an arbitral award.

The above notwithstanding, for the reasons I shall elaborate, I am in agreement with Mr. Brashi that the application beforehand emanates from an interlocutory order of the CMA hence incompetent. I have noted Mr.

Webiro's submission line with the decision of the Court of Appeal in the case of **Tanzania Posts Corporation vs Jeremiah Mwandi (Civil Appeal 474 of 2020) [2021] TZCA 311 (16 July 2021)** whereby the Court provided for the nature of order test to be applied in order to ascertain whether the order to be challenged is final or an interlocutory one. That the test is divided into two limbs, one; the remedies or reliefs being sought in the subordinate Court and two; is whether all such rights and were remedies conclusively determined. His argument was that in the current case the reliefs sought by respondent was condonation of time. When I asked him to address me on the reliefs sought under CMA Form No. 1 which initiates the proceedings at the CMA, his reply was that the reliefs sought included payment of all terminal benefits. He was however quick to point out that the CMA Form No. 2 filed by the applicant was for condonation of time hence argued the order being challenged is final because as per his understanding, all the reliefs sought by applicant were granted conclusively.

In reply, Mr. Brashi argued that Form No. 2 was not filed in isolation of Form No. 1 and the respondent did not go to the CMA in deponent of Form No. 2. That instead, it is Form No.2 which depended on Form No. 1 and on that base there was no right of parties determined in Form No. 2

except the extension of time. For that regard, he argued that it cannot be said that the application for condonation was a final determination of the dispute between the applicant and the respondent.

I had asked Mr. Webiro to address me on the reliefs sought in CMA Form No. 1 because pursuant to Section 86 of the Act, disputes referred to the Commission shall be in the prescribed form. The form that initiated a dispute is provided for under Rule 34.-(1) of the Employment and Labour Relations (General) Regulations, 2017 ("the Regulations") which prescribes that the forms set out in the Third Schedule to the Regulations shall be used in all matters to which they refer on. It is on the same Regulations that the third Schedule to the Regulations under the heading referral of a dispute to the commission for mediation and arbitration that the form is prescribed. Therefore what determines the nature of the dispute and the reliefs that seek for at the CMA where issues of termination of employment and benefits are concerned is the CMA Form No. 1.

Going to the records of the CMA, the nature of the dispute that was lodged at the CMA by the Form No. 1 is non-payment of terminal. Therefore what would form the final determination of the matter will be only two issues,

whether the respondent is entitled to the reliefs claimed or whether the dispute is non-meritious. Therefore despite the tests prescribed by the Court of Appeal in the cited case of **Tanzania Posts Corporation** (Supra) which I fully subscribe to, however, with respect the case is not applicable in our case at hand, or rather it fails the tests prescribed by the Court of Appeal. The Court prescribed two tests. Starting with the first test on the remedies or reliefs being sought in the subordinate Court, as I have elaborated, at the CMA, the applicant lodged a dispute claiming to be paid his unpaid terminal benefits. These are the orders that determine the finality of dispute, and since these had not been determined, the rights of the parties were not determined.

As for the second test, whether all such rights and were remedies conclusively determined, Mr. Webiro is attempting to convince the court that by granting condonation, the rights of the parties were conclusively determined. With respect, I find the learned State Attorney to have misled himself. What rights of parties are determined by order extending time? As per the **Board of Trustees of NSSF** case cited (Supra) and order extending time only open doors for the parties to come and table their case for determination. It occurs when by reasons which have to convince the court

(in this case the CMA), the party was barred by limitation of time to bring the dispute and hence had to apply for the condonation. In no way that the order *finally* determines the rights of the parties; it is just an interlocutory order. Had the CMA had made a finding that no sufficient reason were adduced for condonation and proceeded to dismiss the dispute, then in that case, there would have been a finality on determination of the rights of the parties and only then would the right to file revision arose.

Mr. Webiro attempted to separate the two CMA Form No.1 and CMA Form No. 2 so as to establish that these are two different matters and the ruling finally determined the rights of the parties. On this point, I am in agreement with Mr. Brashi that Form No. 2 was not filed in isolation of Form No. 1 and the respondent did not go to the CMA in deponent of Form No. 2. There is no situation where one may file a dispute via CMA Form No. 2. It is rather incidental to the CMA Form No.1 where the party thinks the dispute has been filed outside the prescribed time. Therefore unless the condonation is dismissed where the applicant's right would finally be barred from determination, granting of the condonation is nothing but an interlocutory order falling under the prohibition provided for under Rule 50 of the Rules.

That said, the application before me is incompetent as it is barred by Rule 50 of the Rules, having emanated from an interlocutory order of the CMA. Consequently, this application is hereby struck out with an order that the parties go back to the CMA to proceed with mediation.

Dated at Dar es Salaam this 27th day of April, 2022.

.....

S.M. MAGHIMBI
JUDGE