

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

REVISION NO. 157 OF 2021

BETWEEN

DAWASCO APPLICANT

AND

ROBART MUGABE RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The applicant was aggrieved by the award of the Commission for Mediation and Arbitration for Ilala ("CMA") in Labor Dispute No. CMA/DSM/ILA/R.681/17/13 ("the Dispute") that was issued in favor of the respondent. She has lodged this application under the provisions of Section 91(1)(a), 91(2)(b),(c) and 94(1)(b)(i) of the Employment and Labour Relations Act, No. 6 of 2004 ("ELRA") and Rule 24(1),(2)(a)(b),(c),(d),(e),(f), Rule 24(3),(a),(b),(c),(d) and Rule 28(1)(c),(d),(e) of the Labour Court Rules, G.N. 106 of 2007 ("the Rules") whereby she is moving the court for the following orders:

1. That, this Honourable Court be pleased to call for the records of the Commission for Mediation and Arbitration at Dar es Salaam in Labour

Dispute No. CMA/DSM/ILA/R.681/17/13 before Hon. Mbeyale, R (Arbitrator) to examine the records, proceedings and award of the said Commission in order to satisfy itself on the legality and propriety of the proceedings and award in the said Labour Dispute.

2. That, this Honourable Court be pleased to quash the said proceedings, award and orders contained thereof and determine the rights of the Applicant
3. Any other relief(s) this Honourable Court may deem fit and just to grant.

The Chamber Summons was supported by an affidavit of one Ms. Florence Saivoye Yamat, a Principal Officer of the applicant, an affidavit that is dated 23rd April, 2021. The respondent opposed the application by filing a notice of opposition pursuant to Rule 24(4)(a)&(b) of the Rules, along with a counter affidavit of the respondent dated 23rd June, 2021.

In the Affidavit in support of the application, what the deponent termed as legal issues, which to me were grounds of revision, were as follows:

- (a) The Honourable Arbitrator erred in law and fact by granting condonation whilst the Respondent herein had not given sufficient reasons and had failed to account for the reasons of delay and degree of lateness.
- (b) The Honourable Arbitrator erred in law and fact by not upholding the objection raised by the Applicant pertaining Respondent's representation by one Counsel Simon Josephat who had a conflict of interest with Applicant.
- (c) The Honourable Arbitrator erred in law and fact by not upholding the objection raised by the Applicant that the Commission had no jurisdiction to entertain the matter.
- (d) The Honourable Arbitrator erred in law and fact by not considering that the Respondent absconded from work without apparent reasons.

Mr. Eliwinjuka Kitundu, learned Advocate, represented the applicant while Mr. Simon Josephat, learned advocate, represented the respondent. At the onset of his submissions, Mr. Kitundu prayed to abandon the first ground of revisions and submitted on the remaining three grounds.

I will start with the third ground of revision which touches the issue of jurisdiction of the CMA in determining the dispute. The applicant submitted that the CMA had no jurisdiction to entertain the matter because the respondent was a public servant thus subjected to comply with the remedies available under the Public Service Act, Cap. 298 R.E 2019 ("the PSA").

In reply, Mr. Josephat submitted Section 3 of the PSA does not confer jurisdiction to any forum, neither is it an overriding provision to supersede the relevant provision in respect of jurisdiction conferred by other respective statutes dealing with employer employee relationship. Citing Section 2 of the ELRA which provides for the applicability of the Act to all employees including those in Public Service of the Government of Tanzania Mainland; Mr. Josephat argued that the powers of the CMA have never been reduced, ousted or repealed by any statute. He concluded that the CMA had jurisdiction to entertain the matter.

On my part, I should not be detained much by this ground. According to the applicant's submission, the claim of misconduct by the respondent is alleged to have taken place in June 2016 and it was in September 2016 that the applicant was informed of the intended disciplinary action and the

subsequent correspondences. Now looking at the section of the law that the applicant is relying on to strip off the jurisdiction of the CMA, it is Section 32A of the PSA which was brought about by Misc. Amendments Act, No. 3 of 2016 which came into force on 18th November, 2016. The question will be whether the amendments will affect the respondent whose dispute and the alleged terminations occurred in September 2016, in other words, whether the amendments had a retrospective effect. This was answered by a recent decision of the Court of Appeal in the case of Joseph Khenani Vs. Nkasi Distric Council, (Civil Appeal 126 of 2019) [2022] TZCA 82 (23 February 2022); whereby while faced with the same situation, the Court cited the decision of the erstwhile Court of Appeal of East Africa in the case of Municipality of Mombasa v. Nyali Limited [1963] EA 371; had this to say:

"In the last case, for instance, we subscribed to the position taken by the erstwhile Court of Appeal of East Africa in Municipality of Mombasa v. Nyali Limited [1963] EA 371 that:

"Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by legislation. In seeking to ascertain the intention behind the

legislation the Courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention."

On the light of the above cited case, it is obvious that the amendments of the PSA that came into force on 18th November, 2016 did not have retrospective effect because if that was the intention of the legislature, the language would have been clearly so. The intention is not in the clear language used by the legislature in the amendments of the PSA. That being the case, the next question is what is the effect of the amendments to the respondent's case that was already filed at the CMA when the amendments came into force.

The above mentioned question was also answered in the cited case of **Joseph Khenani Vs. Nkasi District Council** (Supra) when the Court of Appeal held:

*"Flowing from the above, the question that we are called to consider and determine, we think, is whether the provisions of section 32A of the Public Service Act took away the vested right of the appellant to refer his complaint to the CMA which right he had at the time of referring his complaint to the CMA. We have already observed above that **this right would be inhibited by a subsequent enactment if it so provides expressly or by necessary intendment of Parliament or if it is purely procedural.***

In the case at hand, it is apparent that the appellant filed the complaint before the CMA when it was quite in order to do so without exhausting the remedies provided for in the Public Service Act. That was the law then. The requirement to exhaust all remedies under the Public 12 Service Act came later; when the matter the subject of this appeal was already in the CMA."

Having made that finding that the matter came before the enactment the Court of Appeal made a conclusive finding that the CMA had jurisdiction by holding that:

"That is, we do find in the interest of justice to subject the appellant to the dictates of section 32A of the Public Service Act which was in-existent the time he filed his complaint. We therefore find merit in Mr. Sahwi's contention that the provision was not applicable to the appellant and hence the authorities cited by the respondent are not applicable as well. We thus hold that the CMA had jurisdiction to entertain and hear the matter filed by the appellant before it."

The situation in the cited case is similar to what I am faced to determine in this revision. It is therefore my finding that since the dispute in this case was filed at the CMA before the amendments of the PSA came into force, the CMA had jurisdiction to entertain the matter. The ground lacks merits and it is dismissed.

Going to the second ground that the Honorable Arbitrator erred in law and fact by not upholding the objection raised by the Applicant pertaining Respondent's representation by one Counsel Simon Josephat

who had a conflict of interest with Applicant. Mr.Kitundu submitted that when the Respondent started his legal actions against the Applicant herein, he was represented by Counsel Simon Josephat who was once the Applicant's Company Secretary a very senior position that made him to be a custodian of all the Corporation documentations including the Respondent's confidential files. He argued hence, the advocate had conflict of interest with Applicant thus it was against the law for him to represent the Respondent. On the phrase "conflict of interest", Mr. Kitundu submitted that the term is defined under Regulation 3 of the Advocates (Professional Conduct and Etiquette) Regulations, 2018 ("the Advocates Regulations") to mean;

"A situation that has the potential to undermine the impartiality of an advocate, because of the possibility of a clash between the advocate's interest and the public interests..."

He then submitted that under the same Regulation, the term conflict of interest was also elaborated at Regulation 45(1) to mean;

"... A conflict of interest is one that would be likely to affect adversely the advocate's judgment or advice on behalf of, or loyalty to client or prospective client..."

That under Regulation 45(2), there is a prohibition that Advocate shall not act or continue to act in a matter where there is or is likely to be at conflict unless the advocate has the informed consent of each client or prospective client for whom the advocate proposes to act. He then elaborated that the respondent herein was employed by the Applicant (DAWASCO) at the position of Area Manager and at the Commission for Mediation and Arbitration (CMA) and even at this Honourable High Court he is represented by Saimon Josephat who was also formerly employed by the Applicant (DAWASCO) in the position of Company Secretary. That Advocate Simon Josephat was also terminated from his employment due to disciplinary issues and he had a Labour dispute with the Applicant, a dispute which at this juncture was decided in favour of the Applicant.

Mr. Katundu submitted further that Mr. Saimon Josephat was the former employee of the Applicant at the position of a Company Secretary-a very senior position at the chief Executive Officer's Department, he had access of all files both ordinary and confidential files including the Respondent's files. That once he even summoned the Respondent to appear for disciplinary matter vide Notice to attend disciplinary hearing before the Human Resource and Business Development Committee of the Board

(BHRBDC) dated 04.04.2015. This being the case, and citing Regulation 34 of the Advocates Regulations, he argued that the Respondent's Counsel had a sufficient conflict of interest which in law barred him to represent the Respondent in the present matter as the representation was and is still against the law thus illegal and the proceedings, Order and Ruling before commission for Mediation and Arbitration are null and void. To support this argument, he cited the cases of **Magweiga Munanka Samo And 2 Others Vs. Aloyce Kisenga Kimbori And Others, Land Case No. 80/2017**, High Court of Tanzania at Dar Es Salaam, where at page 6 of the typed Ruling, where the court cited the case of **Price Jefre Bolkiah vs KPMG (a firm) 1991 1 All ER 517 (199) 2 AC 22**; the Court had this to say;

"...The court can restrain the solicitor who has relevant confidential information or his firm, from acting for a client with an interest adverse to that of the former client unless it is satisfied that there is no real risk of disclosure..."

That the court went further and cited the case of **General Trading Co. Ltd Vs Skjevesland (2002) Ewca Civil 1567** where the court observed;

“The court had power under its inherent powers to prevent abuse of its procedure to restating an advocate from representing a party if it were satisfied that there was a real risk that his continued participation would lead to a situation where the order made at a trial would have to be set aside on Appeal...”

He concluded that Mr. Saimon Josephat being the former employee of the Applicant at the Senior Position as a Company Secretary with the access of all the Applicant's employees files including the Respondent's confidential files, had confidential information which in law barred him to represent the Respondent in this matter.

In reply, Mr. Josephat submitted that there is nothing in the cited Regulation 3 of the Advocates Regulations which underlines the impartiality of an advocate. That he is not an employee of the Applicant, and he has never represented the Applicant in the dispute against the Respondent. He therefore doesn't have interest which can clash with the interest of the public. He argued that nothing has been advanced by the Applicant from that quotation to identify the public interest visa vis the interest of the advocate and how the same can attract to undermine the impartiality to the extent of clash. Further that labour laws provides wide room to

safeguard the rights of employees by allowing them representation even by the co-worker, Trade Union or using co-workers as witness and nothing on such situation has ever been termed as conflict of interest.

On the cited Regulation 45(1) of the Advocates Regulations, he argued that the key areas in this regulation which can attract conflict of interest are not within the ambit of Regulation 45(1). That the Counsel for the Respondent is not in a position to affect his judgment or advice of, or loyalty client or prospective client or make judgment or advice the Applicant. He concluded that the argument of conflict of interest does not apply as there is no likelihood to be conflict of interest to prohibit to represent the Respondent in this matter.

On the cited case of **Magweiga Munanka Samo and 2 others Vs Aloyce Kisenga Kimbori & Others** (Supra) Mr. Josephat argued that in that case it was very obvious on the existence of conflict of interest as one of the Counsels in that cited Authority as well all other cases referred, represented the both parties at different stage or forum on the same issue. That in our case at hand, there is no abuse of procedure calling for the court to exercise its inherent powers to restrain an advocate from representing the party as there is no real risk. Further that this he doesn't

have confidential information of the Respondent. That disciplinary matters are not confidential information, neither is the Employee's and that the Respondent is not a competitor of the Applicant; his rights cannot be a possession of anybody to turn to confidential information.

Having considered the parties' submissions, I am in agreement with Mr. Katundu that indeed the Advocate had conflict of interest in representing the respondent herein at the CMA. Starting with the cited regulations 3 and 45(1) of the of the Advocates Regulations, they both to define who Mr. Josephat was with the respondent. For instance, the fact that Mr. Josephat was the Company Secretary of the applicant and was so during the time which the respondent was an employee of the applicant created a situation with a potential to undermine Mr. Josephat's impartiality. As evidence in these proceedings, this is the evidence in this case as there is already a clash between the advocate's interest and the public interests by Mr. Josephat representing a client against the interest of a public office that he has served. This is further elaborated in Regulation 45(1) which I find the advocate to have contravened.

I must emphasize that Advocates are required to act with high level of integrity and one of crucial measures of integrity is one's ability to

realize that there is conflict of interest and refrain from acting on anything with a or that may create a situation of conflict of interest. Being a former employer of the applicant would have called for an advocate to refrain from acting in adverse of the employer. This is also provided for under the provisions of Regulation 34 of the Advocates Regulations which provides that;

"...an advocate formerly in the service of any government or public agency who possess information about a person has duty not to represent any client, other than the advocate's former public employer whose interests are adverse to the person about whom the advocate possess information in circumstances in which the information could be used to the material disadvantage of such person..."

Since it is undisputed that Mr. Josephat was a company secretary of the applicant, a high level position which ac correctly argued by Mr. Katundu, makes him enjoy unlimited access to all information of the employer, then it was against the Rule 34 that he went and appeared in court adverse of the interest of the employer. The rule only allows an advocate formerly in the service of any government or public agency,

possessing information about a person which in this case it is undisputed that the advocate had information about the respondent, to represent on his former public employer whose interests are adverse to the person about whom the advocate possess information in circumstances in which the information could be used to the material disadvantage of such person duty.

In conclusion, I find that the advocate Samwel Josephat had conflict of interest in representing the respondent herein against his former employer who is the applicant herein. In the cited case of **Magweiga Munanka Samo and 2 others Vs Aloyce Kisenga Kimbori & Others** (Supra) the Court cited the case of **General Trading Co. Ltd Vs Skjevesland (2002) EWCA Civil 1567** where it was held:

"The court had power under its inherent powers to prevent abuse of its procedure to restraining an advocate from representing a party if it were satisfied that there was a real risk that his continued participation would lead to a situation where the order made at a trial would have to be set aside on Appeal..."

In this case, given the situation of Advocate Josephat's established conflict of interest, we cannot rule out the possibility of this matter being set aside on appeal therefore I use my inherent powers to prevent abuse of court's procedures by declaring that the respondent's advocate cannot represent the respondent on the applicant's adverse interest.

On those findings, I allow the second ground of revision. Having had the conflict of interest, his representation of the respondent at the CMA and in this court is an abuse of court process. Owing to that, the proceedings of the CMA are hereby quashed and the subsequent award set aside. The matter is remitted back to the CMA to be heard denovo before another arbitrator with competent jurisdiction to determine the matter. Even in these subsequent proceedings, Mr. Josephat is barred from representing the respondent.

Dated at Dar-es-salaam this 21st day of April, 2022.



A handwritten signature in blue ink, appearing to be "S.M. Maghimbi", is written over a horizontal dotted line.

S.M. MAGHIMBI
JUDGE