

THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION APPLICATION NO. 439 OF 2021

(Arising from the Ruling of Hon. M. Chengula, Mediator, dated 24/9/2021 in Labour dispute No. CMA/DSM/ILA/205/21 at Ilala)

BETWEEN

ZAITUNI MZAVA APPLICANT

AND

WAMBI LUBE OIL DISTRIBUTOR LTD RESPONDENT

JUDGMENT

Date of the last order: 06/06/2022

Date of Judgment: 17/06/2022

B. E. K. Mganga, J.

Applicant was employed by the respondent in the position of accountant. It happened that their relationship did not go well, as a result, on 24th June 2021, applicant filed labour complaint No. CMA/DSM/ILA/205/21 before the Commission for Mediation and Arbitration henceforth CMA at Ilala claiming to be reinstated or be paid TZS 669,997,500/= . In the CMA F1, applicant indicated that the dispute arose on 18th June 2021.

On 10th August 2021, respondent filed a notice of preliminary objection that the dispute was time barred. Having heard submissions of both sides, on 24th September 2021, Hon. M. Chengula, Mediator, delivered a ruling upholding the preliminary objection that the dispute was time barred and consequently dismissing it. Aggrieved by the said ruling, applicant filed this application seek the court to revise it. In the affidavit supporting the notice of application, applicant raised three grounds namely: -

- 1. That, the Honorable Mediator erred in law and facts to decide the dispute was time barred while respondent did not prove when and how she informed me about my employment termination.*
- 2. That, the Honorable erred in law and facts to decide that Respondent terminated applicant after conducting disciplinary hearing while respondent did not provide any minutes that applicant attended disciplinary hearing.*
- 3. That, Honorable Mediator erred in law and facts to entertain the preliminary objection raised by the respondent while it was based on the issues entitled to be determined during hearing merit of the dispute.*

When the application was called for hearing, Mr. Edward Simkoko from TASIWU appeared and argued for and on behalf of the applicant while Daudi Mzeri, learned counsel appeared and argued for and on behalf of the respondent.

In arguing the 1st ground of revision, Mr. Simkoko submitted that the arbitrator erred to hold that the dispute was time barred while applicant was notified on 18th June 2021 that her employment was terminated. He went on that applicant was served with a letter of termination through Post Box owned by another person in Morogoro and that she was not informed over the phone though respondent has her phone number. Mr. Simkoko submitted further that having received the said termination letter, on 21st June 2021 applicant filed CMA F1 showing that the dispute arose on 18th June 2021. He went on that the letter terminating employment of the applicant is dated 9th February 2021 and that it was posted on 17th March 2021 at Pugu Road Dar es Salaam to Morogoro. In his submissions, he conceded that service by post is complete after the letter is posted. He was quick to submit that the letter was posted in the post address that applicant used only at the time of recruitment and not thereafter. He added that Applicant became aware of termination on 18th June 2021 and that in terms of Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007, the date of termination is the date applicant was notified.

In the 2nd ground i.e., that Mediator erred to hold that applicant was terminated after disciplinary hearing, Mr. Simkoko submitted that, there are no minutes of the disciplinary hearing to support the holding of the Mediator. He argued that the matter was supposed to proceed on hearing and parties adduce evidence in relation to the absence or participation of applicant in disciplinary hearing.

On the 3rd ground, namely, that the Mediator erred in law to determine the preliminary objection that was supposed to be determined by evidence, Mr. Simkoko submitted that applicant was suspended on 14th December 2020 and was not called back in Office until when she was terminated. He therefore prayed the application be granted.

Responding to submissions made on behalf of the applicant, Mr. Mzeri, learned counsel for the respondent, submitted that the application was time barred. He however conceded that apart from what is recorded in CMA F1, there is no document showing the date applicant was terminated. He however was quick to submit that at CMA, respondent tendered termination letter showing that applicant was terminated on 9th February 2021. In his submissions, counsel for the respondent conceded that he is the one who tendered the said termination letter. He submitted that the

said letter is evidence and proof of the date of termination. When he was shown the CMA record by the court, he gladly conceded that the said letter is not in CMA record hence not part of CMA proceedings. He also conceded that in the counter affidavits filed by the respondent both before CMA and in this court, there is no paragraph showing date of termination of employment of the applicant. He also conceded that according to the applicant's affidavit, she was notified on 17th March 2021 that she has been terminated from employment. with all these, counsel for the respondent maintained that the application was time barred and prayed the application be dismissed.

I have considered submissions of the parties in this application and find that the only issue is whether there was material on the record to justify the dismissal of the dispute on ground that it was time barred or not. I have read the CMA record, as correctly conceded by counsel for the respondent, apart from the said CMA F1, there is no evidence showing as to when applicant was terminated or notified date of termination of her employment. It was submitted by counsel for the respondent that he is the one who tendered at CMA the letter terminating employment of the applicant at the time of arguing the preliminary objection that was raised

by the respondent. In my view, the said termination letter is evidence as conceded by counsel for the respondent, hence it cannot be tendered at the time of disposing the preliminary objection. More so, there is an issue of competence of tendering that letter and right of the applicant to cross examine the person who tendered it. In other words, the issue is whether, counsel who tendered the said termination letter (if it was tendered) was competent to tendered it as evidence. In my view, he was not. Even if it is assumed that that he was competent, was the applicant afforded right to cross examine the person who tendered it? The answer is in the negative. I therefore safely conclude that if the said letter was tendered, it was done without affording applicant right to be heard that is a fundament right. I have failed to conclude that the letter showing date of termination was tendered because it is not part of the CMA record as conceded by counsel for the respondent. Since it is not part of the CMA record, there is no proof that the dispute arose on a different date other than the one applicant indicated in the CMA F1.

The issue as when applicant was terminated attracted evidence as correctly submitted by Mr. Simkoko, the personal representative of the applicant and conceded by counsel for the respondent who submitted that

he tendered termination letter as evidence. It has been held several times by this Court and the Court of Appeal that a preliminary objection cannot be disposed by evidence. There is a litany of case laws to that position including the case of ***Shose Sinare v. Stanbic Bank Tanzania Ltd and Another***, Civil Appeal No. 89 of 2020 CAT (unreported), ***Yohana Maganjira & 31 Others v. Tanzania Leaf Tobacco Company Ltd***, Misc. Labour Application No. 3 of 2019, ***Britam Insurance Tanzania Ltd v. Ezekiel Kingongogo & Another***, Civil Appeal No. 125 of 2021, CAT and ***Ibrahim Abdallah (the Administrator of the Estate of the late Hamisi Mwalimu) v. Selemani Hamisi (the Administrator of the Estate of the late Hamisi Abdallah)***, Civil Appeal No. 314 of 2020 CAT (unreported) to mention but a few. In ***Shose's case*** (supra) and ***Britam Insurance's case*** (supra) it was held that a preliminary objection does not need support from evidence. In ***Shose's case*** (supra), the Court of Appeal quoted its earlier decision in the case of ***The Soitsambu Village Council. v. Tanzania Breweries Ltd and Another***, Civil Appeal No. 105 OF 2011 (unreported) wherein it held that: -

"A preliminary objection must be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate such facts, such an issue cannot be raised as a preliminary objection on a point

of law. The court must therefore insist on the adoption of the proper procedure for entertaining applications for preliminary objections. It will treat as a preliminary objection only those points that are pure law, unstained by facts or evidence, especially disputed points of fact or evidence. The objector should not condescend to the affidavits or other documents accompanying the pleadings to support the objection such as exhibits."

Guided by the aforementioned case laws, I hold that the Mediator erred to dispose the preliminary objection raised by the respondent allegedly based on evidence that was tendered by counsel for the respondent. As I have pointed hereinabove, the date of termination of employment of the applicant was attracting evidence to be adduced. More so, as to when applicant was notified or became aware that her employment has been terminated is an issue that requires evidence. In other words, these are issues that cannot be disposed by preliminary objection. It can be recalled that counsel for the respondent submitted that he is the one who tendered termination letter of the applicant during submissions, but the said letter is not part of the documents in the CMA record, as such, it cannot be acted upon for two reasons. One, it was tendered in violation of the law and in denial of the applicant's right to be heard. Two, it is not in the CMA record as correctly conceded by counsel for the respondent. For these two reasons, I hereby hold that the arbitrator erred to dismiss the complaint by

the applicant allegedly that it was time barred. The mediator was supposed to allow the parties to go to arbitration stage if there was no possibility of settling the dispute. This would have enabled the parties to bring evidence relating *inter-alia* the date of termination and the date when applicant became aware that her employment has been terminated.

For the foregoing, I allow the application and order that parties should go back to CMA so that the dispute can be heard on merit. After hearing evidence of both sides, the arbitrator will be able to decide whether the dispute was filed within time or not and make an appropriate order.

Dated at Dar es Salaam this 17th June 2022.



B. E. K. Mganga
JUDGE

Judgment delivered on this 17th June 2022 in the presence of Zaituni Mzava, the applicant and Daudi Mzeri, Advocate for the respondent.



B. E. K. Mganga
JUDGE