IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

LABOUR REVISION NO. 1 OF 2022

BODI YA WADHAMINI EFATHA MINISTRY ..... APPLICANT

VERSUS

NELSON NYAMWIHULA ..... RESPONDENT

(Revision Application from the award of the Commission for Mediation and Arbitration for Rukwa at Sumbawanga)
(Ngaruka. O., Arbitrator)
Dated 14th day of March 2022
In
(Labour Dispute No. CMA/RK/SMB/28/2021)

RULING

Date: 19/08 & 30/09/2022

NKWABI, J.:

A preliminary objection was raised by the respondent against the application for revision preferred by the applicant. The applicant was unhappy with the award issued by the Commission for Mediation and Arbitration which ordered her to pay the respondent T.shs 27,265,384/= within 14 days of the award for unlawful termination of employment and other reliefs contained in the award. The applicant filed this application for revision in this Court to resist the award.

The notice of preliminary objection has two limbs as follows:

1. That, the affidavit supporting the application is incurably defective as it contains a defective verification clause.
2. That, the affidavit supporting the application is bad in law for containing a jurat of attestation that offends the provisions of section 8 of the Notary Public and Commissioner for Oaths Act, Cap. 12 R.E. 2019.

I ordered the preliminary objection be disposed of by way of written submissions. The parties duly filed their respective submissions. The respondent had his submission drawn and filed by his personal representative, one Justinian Herman Bashange. The applicant's submission was drawn and filed by Mr. Elias M. Machibya, learned advocate. I proceed to determine the preliminary objection by starting to consider the 1st limb.

It was the contention of the respondent that the verification clause is incurably defective. It offends Order XIX Rule 3 (1) of the Civil Procedure Code, 1966 Cap. 33 R.E. 2019 which provides that:

> *"Affidavits shall be confined to such facts the deponent is able of his own knowledge to prove ..."*

The respondent strenuously maintained that it is very questionable that the deponent verily verifies the information given by one Vivian Mmari the said principal officer of the applicant who does not appear anywhere in the Commission for Mediation and Arbitration proceedings and award. It is thus, he urged this Court to find such information to be hearsay and should not be entertained as per **Paul Mwankyuse v. Ntukusya Kagwema & 8 Others,** Miscellaneous Land Application No. 75 of 2019 H.C. (unreported). He also cited **Samwel Kimaro v. Hilda Didas,** Civil Application No. 20 of 2012 CAT (unreported).

He added, the deponent failed to make a distinction between the information from records and information given by Vivian Mmari. He cited the case of **Salim Vuai v. Registrar of Cooperative Societies and 3 Others** [1995] T.L.R. 75 where it was stated:

> *"Where an affidavit is based on information, it should not be acted by any court, unless the sources are specified."*

It was also a strong contention of the respondent that there is no name of the deponent in the verification clause and urged that it is not enough to show the qualification of the deponent, i.e. ***ADVOCATE FOR THE APPLICANT*** while the law requires the name be mentioned and not fixing

a signature only. He cited for that position the case of **Paul Mwankyuse v. Ntukusya Kagwema & 8 Others** (supra).

In reply to the above submission, Mr. Elias Machibya maintained that the respondent has misconceived the application of the law because the deponent indicated two sources on the paragraphs which are complained about which are the 3rd, 5th, 6th, 7th and 8th which are the court record and the principal officer of the applicant. He added, even where the affidavit is found to contain a verification clause which is offensive, that is not fatal and the applicant may be allowed to amend it. For that position, he cited the case of **Jamal S. Mkumba & Another v. AG.,** Civil Application No. 240/01 of 2019 CAT (unreported).

In rejoinder submission, the respondent reiterated the submission in chief and posed a question that, "What would have been the motive of the deponent to believe in the hearsay information while the deponent had access to the same reliable information from the Commission for Mediation and Arbitration records?

I have seriously considered the submissions of both parties in respect of the first limb of the legal point of objection and I am of a firm view that the

objection lacks merits. It is further my view that the verification clause is clear as opposed to what the respondent is claiming the Court will decide on hearsay evidence, if the evidence in the affidavit were hearsay evidence that is not to be decided at this stage. It will be decided when the revision will be decided on merit.

Truly, the Court of Appeal of Tanzania pronounced itself how a deponent should verify the contents of the affidavit in the case of **Anatol Peter Rwebangira v. The Principal Secretary, Ministry of Defence and National Service and the Attorney General,** Civil Application No. 548/04 of 2018 CAT (unreported) where in it was ruled that:

> *"It is thus settled law that, if the facts contained in the affidavit are based on knowledge, then it can be safely verified as such. However, the law does not allow a blanket or rather a general verification that facts contained in the entire affidavit are on what is true according to the knowledge, belief and information without specifying the respective paragraphs."*

In this revision application, the source of information is clearly stated, of course, a counsel may read the record of the Commission for Mediation and Arbitration and still wish to get information from his client. Further, as to the complaint that the name of the deponent is not indicated, only the signature, I am of the view that that omission is not fatal as the name appears at the beginning of the affidavit as well as in the jurat of attestation. I may also add that the omission may be cured by amendment. Even if the affidavit were defective the Court is empowered to order or permit amendment of the affidavit. See **Sanyou Services Station Ltd v. BP Tanzania Ltd [Now Puma Energy (T) Ltd,** Civil Application No. 185/17 of 2018 CAT (unreported) where it was stated:

> *"I wish to emphasize that from the foregoing, it can safely be concluded that the Court's powers to grant leave to a deponent to amend a defective affidavit, are discretionary and wide enough to cover a situation where a point of preliminary objection has been raised and even where the affidavit has no verification clause. Undoubtedly, as the rule goes, the discretion has to be exercised judiciously. On the advent of the overriding objective rule introduced by the*

Written Laws (Miscellaneous Amendments) (No. 3, Act, 2018, the need of exercising the discretion is all the more relevant. Turning to the affidavit in question, it seems to me that what I have before me is a case of wrong numbering of the affidavit indicating the first paragraph as number 6 instead of Number 1, then going about to verify the paragraphs whose numbers are wrong. Again, some of the paragraphs, Number 10 to 13 have not been verified. Does this justify striking out of the application? I ask myself? I think it does not. I find the decision and reasoning in ***DOL Invest International*** *(supra), well grounded. True, rules of procedure should be followed as rightly submitted by Mr. Rwazo but not without some sense of reasoning and justice."*

In the premises, I hold that the affidavit in support of the application is not fatally defective on the verification clause as the respondent wants to impress upon me. The first limb of preliminary objection is ruled baseless. It is overruled.

The next question, that I have been invited by the respondent to consider and determine is whether the affidavit supporting the application is bad in law for containing a jurat of attestation that offends the provisions of section 8 of the Notary Public and Commissioner for Oaths Act, Cap. 12 R.E. 2019.

The respondent vigorously contended, in submission in chief, that the jurat of attestation on the affidavit bears no name of the Commissioner who sworn in the deponent. It is also silent on how the Commissioner for Oaths knew the deponent either personally or identified to the Commissioner. It is thus, he urged that the affidavit is defective. He referred me to the decision in **Samwel Kimaro v. Hilda Didas,** (supra) where the Court of Appeal defined the jurat of attestation as:

> *"The clause written at the foot of the affidavit stating when, where and before whom such affidavit was sworn."*

He contended, there is neither specification of the qualification of the Commissioner nor his/her address bearing in mind that the rubber stamp is not part of the authenticity obligations. He prayed the affidavit of Elias Michael Machibya be declared incurably defective thus bad in law. He prayed finally the application be struck out with costs.

Reacting to the above submission, Mr. Machibya argued that no law is violated. The jurat indicates the place and date of attestation. The name of the Commissioner for Oaths is fixed in the stamp as Jacqueline Michael Mwenzegule.

As to the claim that the Commissioner for Oaths did not indicate how she knew the deponent, Mr. Machibya pointed out that that is an afterthought as it was not indicated in the notice of preliminary objection, it is a surprise to the applicant. Mr. Machibya prayed the preliminary objection be dismissed with costs.

Reinforcing his arguments in rejoinder submission, the respondent insisted that the affidavit bears no name of the Commissioner for Oaths who sworn in the deponent and that the Commissioner of Oaths did not indicate how he knew Elias Michael Machibya. He claimed that the rubber stamp is not a legal requirement, not part of the affidavit and can be fixed by any unqualified person. He insisted on his prayer that the application be struck out with costs.

I have carefully considered the second limb of legal point of objection and find it unmerited. I have looked at the jurat of attestation and I am of the

view that the same is in accordance with the law. The jurat states clearly that the deponent was personally known to the Commissioner for Oaths and the name of the Commissioner for Oaths one Jacquiline Mwezegule is indicated in the jurat of attestation apart from being fixed in the stamp of the Commissioner of Oaths. The case cited by the respondent in the rejoinder submission namely **Valerian Chrispin Mlay v. Nathan Alex,** Misc. Civil Application No. 34 of 2018 HC (unreported) is distinguishable for the reason that in that case, the Commissioner for Oaths had not signed, but in this case the Commissioner for Oaths signed. As to whether the stamp is not that of the Commissioner for Oaths, or that it could be affixed by an unqualified person, that is to be ascertained by calling evidence, so, it does not qualify to be determined at a preliminary objection stage. Further to that the jurat of attestation contains the qualification of the Commissioner for Oaths.

Turning to the complaint in respect of lack of board resolution, admittedly, that was not envisaged in the notice of preliminary objection. Even if it were envisaged, in my view, that does not amount to a preliminary objection as it will require ascertainment of evidence/facts.

In the premises and based on the above discussion, all the limbs of the preliminary objection are overruled with costs.

It is so ordered.

J. F. NKWABI

JUDGE

30/09/2022