

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

REVISION NO. 111 OF 2022

(Originating from Labour Dispute No. CMA/DSM/ILA/R.824/17)

BETWEEN

THE BOARD OF TRUSTEES OF NATIONAL

SOCIAL SECURITY FUND 1ST APPLICANT

ATTORNEY GENERAL 2ND APPLICANT

VERSUS

PAULINE MTUNDA RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The applicant lodged the current application under the provisions of Section 91(1)(a) and 2(a),(b),(c) and 94(1)(b)(i) of the Employment and Labour Relations Act, 2004 (ELRA), Rule24(1)(2)(a)(b)(c)(d)(e) and (f), Rule 24 (3)(a)(b)(c)(d), Rule28(1)(a)(b)(c) and (d) of the Labour Court Rules, G.N. No. 106 of 2007 ("the Rules"). The Applicant is moving the court for an order in the following terms:

1. That this Honorable Court be pleased to revise the proceedings in dispute CMA/DSM/ILA/R.824/17 before this Honourable Court against the Award of the Commission for Mediation and

Arbitration dated 4th March, 2022 delivered by Arbitrator, Lucia Chacha and make an order quashing the award given therein as the CMA had no jurisdiction to entertain the matter.

2. Any other order(s) as this Honourable Court deems fit and just to grant.

The application was supported by an affidavit of Ms. Adelaida Ernest, learned State Attorney from the Office of the Solicitor General, dated 14th April, 2022. Before this court, the respondent appeared in person and unrepresented while the applicant was represented by Ms. Adelaida Ernest, learned State Attorney. The application was disposed by way of written submissions.

Brief background of the dispute is that the Respondent was employed by the 1st Applicant on 15th July, 1997 as Auditor III and promoted to several positions. On 11th July, 2017 he was terminated while holding the position of the Director of Internal Audit. On the 07th August 2017 the Respondent filed Labour Dispute No. CMA/DSM/ILA/R.824/17 ("the Dispute") before the Commission for Mediation and Arbitration for Ilala ("CMA"), claiming for unfair termination. Sometimes in 2018, the Applicant raised Preliminary Objection on point of law that the Commission has no

jurisdiction to entertain the dispute. On 16th February, 2018, the CMA overruled the objection and held that it had jurisdiction. Aggrieved by the decision, the Applicant filed in this Court a Revision No. 514/2019 and on the 07th July, 2020, this court ruled that the Revision was prematurely filed. The matter was remitted back to the CMA to proceed on merits and subsequently, the Arbitrator rendered an award in favor of the Respondent holding that the termination of the respondent was unfair both substantively and procedurally. The 1st applicant was ordered to pay the respondent compensation to the tune of Tshs. 1,277,398,854.20 as terminal benefits. Dissatisfied by the award, the applicant has lodged the current application raising the following grounds:

1. That, the Commission for Mediation and Arbitration was incorrectly and illegally procured on 4th March 2022 basing on the ground that the Applicant adjourned the matter severally without reasons.
2. That, adjournment of the matter was not done negligently by the Applicant as stated above under paragraph(9).
3. That the Commission grossly erred in law and fact by exercising its discretion of not admitting Applicant's prayer.

4. That the award and orders therein are unlawful, illogical, irrational and improperly procured for failure to analyze clearly the law applicable and evidence on record.
5. The Application which originated from the CMA is incompetent for contravening Section 32A of Public Service Act of 2002 as amended in written laws (Misc. Amendment) Act No. 3/2016, hence on 04/03/2022 the CMA determined on the matter which it had no jurisdiction, consequently both proceedings and the Award need to be quashed/nullified.

I will start with the fifth legal issue that the Application which originated from the CMA is incompetent for contravening Section 32A of Public Service Act, 2002 as amended in written laws (Misc. Amendment) Act No. 3/2016 and R.E 2019 ("PSA") in which the applicant alleged that the CMA had no jurisdiction to entertain the matter. I have started with this issue because it goes to the root of the competence of the CMA to entertain the dispute as it had no jurisdiction.

In her submission to support this ground, Ms. Ernest submitted that the CMA had no jurisdiction to entertain the matter because the applicant is established by an Act of Parliament, namely the National Social Security

Fund Act, Cap. 50 R.E 2018 to provide social security services to members from private and informal sectors. That the Board of Trustees of the National Social Security Fund is a legal person in law capable of suing and being sued.

She submitted further that Section 9(3) the Public Service Act provide for coverage of the Act to the public servant including the respondent. That Section 9 (3)(e) of the same Act provides that the Commission shall cater for public servant including those in the executive agencies and the public institutions service. Further that from the definition of the words 'public servant' and public service office' under section 3 of the Public Service Act [Cap 298 R.E 2019], the employees of the NSSF are public servants and the Public Service Act applies to the Respondent as public servants.

Ms. Ernest went on submitting that Section 10 of the PSA provides for functions of the Public Service Commission which includes, but not limited to, receive and act on the complaints from public servants and take measure in relation to any executives in the Services and to receive and act on appeals from the decisions of other delegates and disciplinary authorities. That in terms of Section 32A of the PSA, a public servant is

barred from initiating any civil legal proceedings in any court of law unless he/she has exhausted all remedies provided under the PSA.

Mr. Ernest submitted further that the law imposes a mandatory duty upon the Public Servants to exhaust all remedies available under the Public Service Act before seeking remedies under labour laws.

Coming to the case at hand, Ms. Ernest submitted that the Respondent claims relates to unfair termination and the fate of interest therein, a claim which has to be determined by the Public Service Commission. Thus, the Respondent ought to have referred the matter to the Public Service Commission She supported her argument by citing a recent case of **Tanzania Posts Corporation Vs Dominic A. Kalangi Civil Appeal No. 12 of 2022**, (Unreported) whereby the Court of Appeal held on page 7, first paragraph that: -

"In the premises, it can hardly be gain said that having been established by an Act of Parliament and been wholly or substantially owned by the Government."

She submitted that The Board of Trustees of the National Social Security Fund is also a public service institution whose principal duties among others, is to provide the public with the social security services

to members from private and informal sectors. That the Respondent being employed by a public service institution, was a public servant and was bound by Section 32A of the PSA introduced by Written Laws (Miscellaneous Amendments) (No. 3) Act, 2016 GN No. 48 of 18th November, 2016, therefore, the Respondent's labour disputes filed in August, 2017 at CMA ought to have been referred to the Public Service Commission in terms of section 25 of the PSA.

She submitted further that on the basis of Section 32A of the PSA, the CMA is further precluded from entertaining labour disputes involving public servants as rightly held by the Court of Appeal of Tanzania on page 8 paragraph 3 of **Tanzania Posts Corporation**.

In conclusion, basing on the position in the decision of the Court of Appeal of Tanzania, her prayer is that the Revision Application No. 111 of 2022 be allowed, by revising and setting aside the CMA Award dated 4th March, 2022 which is null and void for lack of jurisdiction.

In reply, the respondent submitted that the CMA had jurisdiction to entertain the Respondent's application filed before the CMA. His first argument was that the law governing relationship between the employer and employee is the Employment and Labour Relations Act 2004. That

Section 2(1) of the Act includes the employee in the Public Service of the Government of Mainland. He argued that under the provisions all employment matters that touch on public services are triable by the Commission, save for those employed under the defence forces, police force, prison services and national service. That the cited provisions also provide for the intention of the Parliament to cure all employment problems in public service of the government of Mainland Tanzania and shows clearly by excluding some employees/services that are not governed by the ELRA.

He submitted further that the CMA is established under Section 14(1) (a) the Labour Institutions Act No. 7 of 2004, to mediate or arbitrate any labour matter filed before it by an aggrieved party, provided there is employer-employee relationship as the matter at issue which is the issue of employer-employee relationship. That the ELRA was enacted amidst the presence of the Public Service Act to foster social Justice which call for industrial harmony and setting employment standards. On the other hand, submitted the respondent, the Public Service Act is an Act to constitute Public Service of the United Republic, provide, for its functions and obligations and establish the Public service commission and provides for matters related to it.

It follows therefore that, the CMA and Labour Court are not disciplinary hearing bodies, but rather for mediation, arbitration and adjudication for purposes of meeting industrial harmony compared to the Public Service Commission. Therefore the CMA takes precedence over the Public Service Commission on matters related to employment. He then argued that the amendment of the PSA neither ousted the applicability of EALR 2004 in labour matters that touches on the public service nor amend the ELRA especially, Section 2 of the said Act . The Employment and Labour Relations Act is a principle law to deal with employment matters and it was enacted after the enactment of the PSA and its 2003 Regulations. The provision of Section 2(1) of the ELRA mandatorily provides for the employees to apply ELRA in case of any labour dispute and had it been the government has an intention of bringing all public service employees to observe procedures provided for under the 2003 Regulations made under the Public Service Act of 2002 the said parent Act could have so provided for. However, this is not the case and the ELRA has never been amended despite the amendment of the Public Service Act in 2016 which matter takes precedent over 2003 Regulations which was made under the Public Service Act and therefore, the said Regulations cannot apply in the

circumstances of this application because the intention of the Legislature is clearly stipulated in the applicable labour law (ELRA) above cited.

On my part, I need not be detained much by this issue. Under the PSA, a public servant is defined as:

*“public servant” for the purpose of this Act means a **person holding or acting in a public service office;**”*

The public office is defined as:

“Public Service Office” for the purpose of this Act means-

*(a) a paid public office in the United Republic **charged with the formulation of Government policy and delivery of public services** other than-*

- (i) a parliamentary office;*
- (ii) an office of a member of a council, board, panel, committee or other similar body whether or not corporate, established by or under any written law;*
- (iii) **an office the emoluments of which are payable at an hourly rate, daily rate or term contract;***
- (iv) an office of a judge or other judicial office;*
- (v) an office in the police force or prisons service”*

(b) any office declared by or under any other written law to be a public service office;

Therefore in order for the respondent to qualify as public servant, it must be established that the applicant is a public office either charged with formulation of Government policy or delivery of public service. As argued by Ms. Ernest above, the Applicant is established by an Act of Parliament, namely the National Social Security Fund Act, Cap. 50 R.E 2018, to provide social security services to members from private and informal sectors. Further to that, Act No. 18 of 2007 introduced subsection 2 of Section 30 of the PSA which further defines a Public Servant to include servant working in all government institutions. The Section reads:

*(1) Servants in the **Executive Agencies and Government Institutions** shall be governed by provisions of the laws establishing the respective executive agency or institutions.*

(2) Without prejudice to subsection (1) Public Servants referred under this section shall also be governed by provisions of this Act.

On the above cited provisions, the applicant being a public institution, and by the definition of the term 'public servant' under section 3 of the PSA, the respondent was a public servant hence the provisions of the PSA are applicable in this case. Further to that, as gathered from the submissions of both parties and the records of this revision, it is undisputed that the hence that he was a public servant. It is also undisputed that the respondent was terminated in July 2017 a termination which aggrieved him. Now, following recent amendments of the PSA, which came to force on 18th November, 2016, there was introduced a new Section, Section 32A which provides:

"A public servant shall, prior to seeking remedies provided for in labour laws, exhaust all remedies as provided for under this Act."

*The above provision was well elaborated by the court of appeal in the cited case of **Tanzania Posts Corporation Vs Dominic A. Kalangi Civil Appeal No. 12 of 2022** where the Court held:*

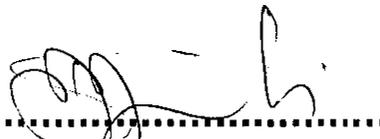
"...it is unambiguously clear that all disciplinary matters or disputes involving public servants are exclusively within the domain of the Public Service Commission whose decision is appealable to the

President. As correctly submitted by Ms Kinyasi and as amply demonstrated above, the CMA has no jurisdiction to adjudicate upon such matters”

In regard to the above position and the provisions of Section 32A of the PSA, the respondent being a Public Servant and the dispute before the CMA being a dispute of unfair termination of employment, the CMA had no jurisdiction to entertain the matter. Consequently all the proceedings and the subsequent award of the CMA are hereby nullified.

Dated at Dar es Salaam this 09th day of September, 2022.




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S.M. MAGHIMBI
JUDGE