IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

APPLICATION FOR REVISION NO. 27 OF 2023

(Originating from labour dispute no .CMA/DSM/ILA/423/21)

BETWEEN

ABIJAN GIDEON YUNUS .....APPLICANT

AND

MOKU SECURITY SERVICES LIMITED.....RESPONDENT

CORRECTED JUDGEMENT

OPIYO, J.

The facts constituting background of this matter are that, the applicant was employed by the respondent from 01st July, 2021 as a Security Guard until 02nd October, 2021 when he was terminated. Applicant being aggrieved by that filed a Labour dispute at CMA, No. CMA/DSM/ILA/423/21. In the dispute he was claiming for compensation for unfair Labour Practice. During the arbitration the respondent raised the objection that the matter was contrary to section 35 of the Employment and Labour Relations Act, Cap 366 R.E 2019 and rule 10 (1) of the Employment and Labour Relation

(Code of Good Practice) Rules, G.N No.42 of 2007. The objection was sustained leading to the dismissal of the application. Being aggrieved, the applicant preferred this revision application on the following grounds:-

(a) That honorable Arbitrator erred in law and facts in entertaining a preliminary objection which did not qualify the test of what amounts to preliminary objection.

(b) That honorable Arbitrator erred in law and facts for entertaining a preliminary objection which combined two points of law.

(c) That honorable Arbitrator error in law and facts to decide that Applicant did not deserve to complain for unfair termination while Applicant did not complained for unfair termination.

The matter was heard by way of written submissions. Edward Simkoko, Legal Secretary (TASIWU) represented the applicant while the respondent appeared through Mr. Joseph M. Msengezi, Learned Counsel. In support of this application the prayer to adopt the facts in the Affidavit of Abijan Gideon Yunus, the applicant herein, was the

first to be made. And then, Mr. Simkoko submitted that the preliminary objection that was raised by the respondent at CMA did not have the qualities of preliminary objection because it went to the merits of the case and it needed evidence to prove. He argued that, it is a well settled principle that preliminary objection must be on pure point of law and not matters which required evidence to substantiate in terms of the position in the case of **Mukisa Biscuit Manufacture Co. Ltd Verses West End Distributors Ltd (1969) EA 696.** Thus, it was an error on part of CMA to sustain the preliminary objection which was not on pure point of law as it needed evidence to prove.

On ground two that the Arbitrator erred in law and facts in entertaining a preliminary objection which combined two points of law, his submission is that the preliminary objection raised by respondent was ambiguous because it contained two different provision having different meanings. That section 35 Employment and Labour Relation Act Cap 366 R.E 2019 is on an Employee who worked under six months but Rule 10(1) of Employment and Labour Relation (Code of Good Practice) Rules, G.N No.42 concerns an

employee under probation. To him, the two provisions of law provide different meanings but respondent combined them together. This show that Respondent was not sure what he disputed in relation to the applicant's application.

Lastly, on ground number three that the Arbitrator erred in law and facts in deciding that applicant did not deserve to complain for unfair termination while applicant did not complain for unfair termination; he contended that, the applicant in reality complained about unfair labour practice not unfair termination as held by the arbitrator. Thus, his claim for unfair labour practice was quiet in order, what could have been not in order was if he had applied for unfair termination which is prohibited under the cited provision of law. He violated no law by so claiming, he contended. He therefore, prayed for the application to be granted and the decision of the CMA be accordingly revised.

The respondent was quick to make a reply through her Counsel, one Joseph Msengezi. He submitted that, their objection was on pure point of law as it required no proof by evidence or additional facts.

He argued that the preliminary objection were capable of disposing the matter preliminarily without the court having to resort to ascertaining any fact from elsewhere apart from looking at the pleading alone. He cited the case of **Eco Bank Tanzania Ltd Vs. Double Company Ltd and others**, Civil Case No. 109 of 2021 (HC) Mruma, J to substantiate his argument. From there he argued that their preliminary objection was not contrary to what was held in **Mukisa Biscuits case** cited by the applicant as it has always been on pure point of law if it is to the effect that the applicant's application is offending specific provision of law as they cited.

In responding to the second ground of revision, the respondent submitted that the preliminary objection raised by Respondent was clear and unequivocal, that no ambiguity could be associated with it. It is clear that, section 35 of Employment and Labour Relation Act (supra) forbids the employee who has worked for less than six months from claim for unfair termination and Rule 10(1) of Employment and Labour Relation (Code of Good Practice) Rules (supra) provides for probationary employee under six months of

employment. To him, these two provisions provide the same thing in the sense that, both probationary employees and employees who have worked under six months are denied to claim for unfair termination. Therefore, there is no any ambiguous meaning in the two provisions as the law is clear and context well understood.

In relation to the third ground for the revision, Mr. Msengezi submitted that the applicant claimed for unfair termination contrary to the law. He argued that, although in his submission the applicant hides himself in bush of unfair labour practice, but the applicant complaints was contrary to the law as it was on unfair termination. The applicant intends to mislead and confuse this Honourable Court because in complainant claims attached to CMA F-1) he indicated the dates of termination of applicant which is 02nd October, 2021. This implies necessarily that the applicant claims is for unfair termination and not unfair labour practices.

He submitted further that from the contract of employment as attached by applicant himself in statement of claim, it is stipulated that the end of contract was 30th September, 2021. But, the applicant

submission is confusing to the court because in his claims, the applicant avers that the contract was terminated while in his employment contract the contract was of three months which was ending on 30th September, 2021, he submits. That, according to the applicant's claim the employment was terminated on 2nd October, 2021 while the same already ended on 30th September, 2021 according to contract of his employment. To him this is a source of confusion to the court by the applicant. He added that, the applicant also claimed some of remedies which are granted only to employee who are found to have been unfairly terminated which in this matter is not applicable because the applicant can never claim remedies for unfair termination under the law, particularly section 40 of Employment and Labour Relations Act (supra).

The parties' submissions have been fully considered. The determination on the first ground is as to whether the respondent's preliminary objection at CMA qualified as such for being on pure point of law. In order to be an objection capable of being determined by the court at a preliminary stage it has to be on a pure point of law. In the case of **Mukisa Biscuit Manufacturing Co. Ltd v**

East End Distributors Ltd (1969) EA 696 appreciated by both parties it was held that it was held that:-

> *"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection.* ***A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.*** *The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop' (emphasis supplied)*

The objection that was raised at CMA by the respondent was that the applicant's application at CMA was in violation of section 35 of the Employment and Labour relations Act and rule 10 of the GN no. 42 of 2007. The applicant argued in opposition that the above preliminary objection was not on pure point of law to be entertained as it required some facts to be ascertained. This fact is highly contested by Mr. Msengezi who submitted that, the above preliminary objection

is on pure point of law. On this I agree with Mr. Msengezi because the objection in question was directed to have been in breach of a specific provision of law, therefore, its determination requires no facts to be ascertained as insinuated by Mr. Simkoko. It is on a pure point of law and not requiring any evidence to prove. Raising objection that makes reference to the specific provision of law is on pure point of law as it is not inviting facts or evidence in relation to proving it. In our case the objection was that the application was contrary to section 35 of the ELRA and rule 10 of GN no. 42 of 2007. In determination of this preliminary objection, no requirement of ascertainment of any facts or evidence is expected in such kind objection to make it not being on pure point of law. The first ground is therefore dismissed.

The gist of the second ground is that the Arbitrator erred entertaining objection which combined two distinct points of law having different meanings. Mr. Simkoko argued that while 35 of Cap 366 RE 2019 is talking of employee who worked under six months Rule 10(1) of G.N No.42 concerns an employee who is under probation.

On the other hand Mr. Msengezi viewed that their objection was vibrant and clear as no ambiguity could be associated with it. To him the two provisions connote the same thing as both forbid the employee who has worked for less than six months from claim for unfair termination. Closer examination of the two provisions alleged to have been violated in the preliminary objection supports the contention by Mr. Simkoko. For ease reference the two provisions are reproduced. Rule 10 (1) of GN No 42 of 2007 provides that

> *"all employees who are under probationary period of not less than 6 months, their termination procedure shall be provided under the guidelines..."*

And section 35 of Cap 366 provides that:-

> *"The provisions of this Sub-Part shall not apply to an employee with less than 6 months' employment with the same employer, whether under one or more contracts".*

Examining the above two provisions from the naked eyes they connote different things as argued by Mr. Simkoko. Section 35 deals with unfair termination of employment. What the above provision connotes is categorically excluding application of that part to an

employee with less than 6 months' employment with the same employer, whether under one or more contracts. While rule 10 provides for how the termination procedure of employees who are under probationary period of not less than six months should be. Undeniably, they are distinct to be argued on the same line of argument as one talks of employee under six months employment while the other talks of employee under probationary for over six months (not less than). As the applicant was an employee of less than six months, only section 35 could have been relevant to his circumstances. He cannot be affected with provision affecting probationary employees for more than six months at the same time. Trying to forge a preliminary objection on both as similar provisions brings contradiction and confusion as to which line of argument the objector intended to pursue. This ground therefore has merit.

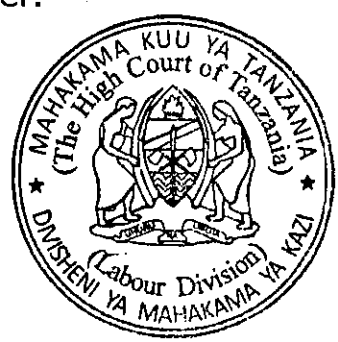
On ground three, as argued by the respondent's counsel, section 35 above prohibits an employee who has been in employment for less than six months from being eligible to claim for unfair termination. In this ground Mr. Simkoko submitted that the applicant did not apply for unfair termination to be falling under the trap of the above

prohibitory section as it has wrongly been determined by the arbitrator. He submits that, his claim is on unfair labour practices which are allowed for all sorts of employees regardless of duration in employment. The issue is now whether the applicant's claim is unfair termination prohibited under section 35 as held by the arbitrator.

Examination of CMA F. 1 shows that the applicant had applied for unfair labour practices rather than unfair termination as it was argued in the preliminary objection at the CMA. One wonders on how the issue on unfair termination came by to be discussed while form no. 1 was very clear on the applicant's claim to be unfair labour practices. The respondent counsel tries to justify his objection by stating that looking at some reliefs prayed by the applicant and mentioning the date of termination, it is obviously he is claiming for unfair termination. It may be true that at the end of the day it will be found that he indeed filed for unfair termination in disguise of unfair labour practices, but that unveiling, if any, is not possible to be done at the preliminary stage as it goes to the merit of the matter. It has to be determined after evidence is presented. If the respondent's objection required that court determine it after the evidence is

produced it would still be caught in the web of not being on a pure point of law but on facts requiring ascertainment prior to. Therefore, in my considered view, it was wrong on part of CMA to treat the application as being on unfair termination hence affected by provision of section 35 while it was clearly indicated to be on unfair labour practices at the preliminary stage. It is the applicant's testimony that would have shown that he had applied for something different from what he indicated in the application form to reach that conclusion. Determining so before the testimonies amounts to prediction of applicant's application not to be what he claims it is.

Based on the above the two grounds have merit, they are allowed. The award by the CMA is quashed and set aside. The file shall be remitted back to the CMA for trial of the application on merits before a different arbitrator. I make no order as to costs, this being a labour matter.



M. P. OPIYO,

JUDGE

13/6/2023