IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RUTAKANGWA, J.A., KIMARO, J.A., And LUANDA, J.A.)

CIVIL APPLICATION NO. 151 OF 2008

CHAMA CHA WALIMU TANZANIA.....APPLICANT
VERSUS
THE ATTORNEY GENERAL.....RESPONDENT

(Application for Revision from the Proceedings and Ruling of the High Court of Tanzania (Labour Division) at Dar es salaam)

(Mandia, J.)

Dated the 13th day of October, 2008
in
Application No. 19 of 2008

RULING OF THE COURT

4TH NOVEMBER, 2008 & 13TH NOVEMBER, 2008

RUTAKANGWA, J.A.:

This is an application for revision. It is brought by Notice of Motion under section 4(3) and (5) of the Appellate Jurisdiction Act, Cap 141, henceforth the Act, and Rule 45 of the Tanzania Court of Appeal Rules, 1979, (hereinafter, the Rules).

The applicant, Chama cha Walimu Tanzania, or C.W.T., through Mr. Mabere Marando, and Mr. Gabriel Mnyele, learned advocates, is seeking revision of the proceedings in Application No. 19 of 2008 in the Labour Division of the High Court of Tanzania, henceforth the

Labour Court. The application was instituted against it by the respondent herein, the Attorney General of the Government of the United Republic of Tanzania. Among the grounds cited in the notice of motion for moving the Court to exercise its revisional jurisdiction are that the Labour Court:-

i. entertained the said application without jurisdiction;

ii. entertained the application which was not properly before it;

iii. heard the application and granted the order prayed for therein without affording the applicant opportunity to present its case by way of a counter affidavit, thereby denying it the right to be heard; and

iv. relied on extraneous matters that were not on record in granting an injunction, and without specifying as to whether it was permanent or temporary.

The respondent has vehemently opposed the application. Mr. Donald Chidowu, learned Principal State Attorney, appeared before us to resist the application.

To facilitate a quick appreciation of the reasons behind this application, a brief background is necessary. The affidavital evidence on record and the proceedings before the Labour Court, provide this background.

The applicant is a trade union, duly registered under the provisions of the Employment and Labour Relations Act, 2004 [No.6], henceforth the Employment Act. It has about 156,923 members who are employed in the teaching profession nationwide. For quite some time the applicant, on behalf of its members, has locked horns with the government of the United Republic of Tanzania (the government hereinafter) over a number of issues concerning the welfare of its members. On 4th February, 2008, the applicant declared a trade dispute with the government. On 18th August, 2008 it issued a strike notice of sixty (60) days. The said notice was issued pursuant to the mandatory requirements of section 26 (2) (d) of the Public Service (Negotiating Machinery) Act, 2003 (No. 19), henceforth Act No. 19 of 2003. The strike, according to the notice, was to start on 15th October, 2008.

Subsequent to the said strike notice, the two parties together with other stakeholders, between 26th August, 2008 and 4th October, 2008, held four meetings with a view to settle the dispute by way of negotiations. The meetings did not fully resolve the impasse.

On 9th October 2008, the ***Majira*** newspaper published that the teachers were to strike effective from 15th October, 2008. It was quoting one Gratian Mukoba, the applicant's President, as the source of that information.

Believing that the threatened strike was illegal and malicious, the Attorney General, on 10th October 2008, instituted the earlier mentioned application under a certificate of urgency. The application was by chamber summons and the respondent (applicant then) was seeking the following orders:-

"1. That this Honourable Court be pleased to grant ***an order for permanent injunction,*** restraining the Respondent and their (sic) members from calling for and/ or participating in the planned strike to be held on 15th October, 2008.

2. That this Honourable Court be pleased to give such further orders and directions in these proceedings as it shall deem appropriate.

3. Costs of this Application be paid by the Respondents." [Emphasis is ours].

The Labour Court was moved to grant these reliefs or orders under "Rule 94(1) (f) (11) of the Employment and Labour Relations Act No. 6 of 2004, rules 24 (11) (a); 24(11) (c), 55(1) and 55(2) of Labour Court Rules Government Notice No. 106 of 2007."

The Labour Court issued a ***summons for mediation*** on 13th October, 2008. The mediation was to take place on the same day at 12.00 noon. Our perusal of the Labour Court original record has revealed that of the four top officials of the C.W.T. who were to be served with copies of the court summons and chambers summons, only two were served. These were Mwl. Ezekiel T. Oluoch [the Deputy Secretary General] and one Leonard Haule, who were served at 11.43 a.m. and 11.47 a.m. respectively. The President and Secretary General of C.W.T. were not served.

Mediation, however, did not take place because the parties were not represented by officials with authority to mediate. The Registrar sent the court record to "Justice Mandia for directions" on the same day. Before Mandia, J., Mr. Senguji, learned Principal State Attorney, appeared for the Attorney General, being assisted by Ms Barke Sahel, learned Senior State Attorney. For the respondent C.W.T., Mr. Mnyele, learned advocate, entered appearance.

What was supposed to be an appearance to receive directions turned out to be an appearance for the hearing of the application. Both counsel for the respondent herein submitted that the C.W.T. had called out a strike without complying fully with the provisions of s. 26(2) of Act No. 19 of 2003. They accordingly urged the learned Judge to grant, on the basis of the enabling provisions cited in the chamber summons, ***"their application for a temporary injunction",*** while they continued with negotiations. We have to observe in passing here that there was no application for a temporary injunction.

Mr. Mnyele resisted the prayer. To him the prayer was being made prematurely as they were yet to file a counter - affidavit. He

also submitted that the said court had no jurisdiction to entertain the application as it had been wrongly instituted under the provisions of the Employment Act when the appropriate legislation was Act No. 19 of 2003. He accordingly pressed that the application be ***"thrown out for want of jurisdiction"*** or, in the alternative, before the sought injunction was granted, they be afforded opportunity to file a counter – affidavit as they had only been summoned for mediation.

In his short rejoinder Mr. Senguji argued that the Court had exclusive jurisdiction over the matter under the enabling provisions cited and the respondent had no automatic right to file a counter-affidavit.

In his ruling, the learned judge held that the court was seized with jurisdiction to hear and determine the matter. He then proceeded to consider the averments contained in the affidavit of one Mathias Kabunduguru, filed in support of the chamber summons, and its various annextures. After considering the principles enunciated in the case of ***ATTILIO V. MBOWE*** (1969) HCD 284 on the grant of injunctions, he granted the injunction sought in the chamber summons.

Both counsel submitted at length either in support of or in opposition to each one of these four points of objection. Mr. Chidowu adamantly argued that the application is incompetent and should be struck out. He cited to us a number of decisions by this Court in support of his position on each point. Mr. Mnyele was equally forceful and resourceful in urging us to find each point to be misconceived in law. He, too, referred us to a number of decisions by the Court to bolster his arguments. We shall begin our discussion with the first point of objection as listed above.

As already shown in this ruling, the respondent went before the Labour Court seeking a permanent injunction to restrain the applicant and its members ***"from calling for and/or participating in the planned strike to be held on 15th October 2008".*** We have already demonstrated how the learned High Court Judge heard the respondents on his application even before the applicant had filed its counter - affidavit.

Indeed, Mr. Senguji had pressed the High Court to grant the orders sought forthwith, because as he put it, ***"a counter – affidavit is not granted automatically".*** We cannot restrain

ourselves from observing that his was an unfortunate proposition, as rule 24(4) of the Labour Court Rules grants an automatic right to a respondent to file ***"a notice of opposition, a counter affidavit or both"*** within ***"fifteen days from the day on which the application is served on the party concerned".*** This clear provision of the law notwithstanding, the learned judge essentially heard the respondent on the merits and subsequently ruled as follows:-

> *"After all is said and done, this court finds that* ***there has been made out a good case by the applicant in support of the orders prayed for in the application.*** *The respondent CHAMA CHA WALIMU TANZANIA (C.W.T.)* ***are hereby restrained from calling for and/or participating in the planned strike to be held on 15th October, 2008.*** *In view of the limited time available, the two parties to this matter* ***should each make an immediate announcement in the media of the grant of this injunction."*** *[Emphasis is ours].*

The issue here is whether this injunction was an interlocutory one or had the effect of finally determining the application before the Labour Court. In law, an injunction is said to be interlocutory when granted in an interlocutory application and continues until a certain defined period. It aims at preserving the ***status quo*** until, say, the final determination of the main application or suit. According to BLACK'S LAW DICTIONARY, 8TH edition, at page 800:-

> *"A temporary injunction is issued before or during trial to prevent an irreparable injury from accruing before the court has a chance to decide the case".*

The form which such an injunctive order takes is well explained in ***KERR ON INJUNCTIONS***, 6th edition, by J.M. Patterson, at page 648 as follows:-

> *".....Under the former practice the form usually adopted was 'until the hearing of the cause'. Under the present practice it is 'until judgment in this action', or 'until further order', to show that the injunction is not to extend beyond the date when judgment is given, unless then continued, nor until*

judgment if discharged previously by order of the Court."

Mr. Mnyele strenuously argued that the injunction order given by the Labour Court on 13/10/2008 was an interlocutory one and so they could not appeal in view of the mandatory provisions of s. 5(2)(d) of the Act. However, he argued, they have found it proper to proceed by way of revision because their complaint is not against the injunction order. They are challenging the regularity of the proceedings in the Labour Court, which he said, were irregularly conducted as the grounds in the notice of motion show.

On his part, Mr. Chidowu, who was admittedly equivocal, argued that the respondent had moved the High Court to grant an injunction restraining the applicant and its members from calling for and/or participating in the planned strike. Since the application was granted, he stressed, the applicants, if aggrieved, ought to have appealed. He cited to us the decision of this Court in the case of ***J.H. KOMBA, ESQ,EX-EMPLOYEE, E.A. COMMUNITY V THE REGIONAL REVENUE OFFCER, ARUSHA & TWO OTHERS,*** AR,

Civil Application No. 3 of 2002 (unreported), in support of his submissions.

We have carefully considered all the arguments presented to us on the issue. We have dispassionately read the ruling of the Labour Court and the order extracted therefrom in the light of the order sought in the chamber summons. We are of the firm view that the order issued was not interlocutory. It had the effect of conclusively determining the application. The respondent was unreservedly granted what he was seeking in the chamber summons, as the applicant and its members were unequivocally restrained from "calling for and/or participating in the planned strike". There was no other issue remaining to be determined by the Labour Court. Both in form and substance the issued injunction order carries the hallmarks of finality, as it was not granted pending any further action being taken in those proceedings. That is why no order to file a counter – affidavit was given. The applicant, therefore, had an automatic right of appeal to this Court under section 57 of the Labour Institutions Act, 2005. The grounds of complaint shown in the notice of motion,

in our settled view, all being points of law, would have been taken up as grounds of appeal.

It is settled law that except under exceptional circumstances a party to proceedings in the High Court cannot invoke the revisional jurisdiction of this Court as an alternative to the appellate jurisdiction of the Court, unless it is shown that the appellate process had been blocked by judicial process. See, for instance, ***HALAIS PRO-CHEMIE V. WELLA A.G.*** [1996] T.L.R. 269 (CA). No such circumstances have been shown here. We accordingly uphold this particular point of preliminary objection, and hold that the application for revision is incompetent.

In view of our holding on the first point of objection, it is obvious that the second point does not hold water. Indeed, the two points would have fittingly been raised in the alternative. Regarding the other two points, we find no pressing need here to canvass them. However, in order to avoid a recurrence of the same mistake, we only wish to observe quickly that this Court had been properly moved under section 4(3) of the Act. See, for instance, this Court's decisions in ***OLMESHUKI KISAMBU V. CHRISTOPHER***

NAING'OLA, Civil Revision No. 1 of 2000, ***AUGUSTINO L. MREMA V. R.,*** Cr. Appeal NO. 61 OF 1988, ***HARISH A. JINA*** By his Attorney ***AJAR PATEL V. ABDULRAZAK JUSSA SULEIMANI,*** ZNZ Civil Application No. 2 of 2003 (all unreported).

Normally, having ruled the application to be incompetent we would have proceeded to strike it out forthwith. However, because of a fatal illegality which is patent on the face of the Labour Court's record, we shall refrain from following that path. We shall now show why.

While urging us to strike out this application on the ground of wrong citation of the enabling provisions of the law, Mr. Chidowu correctly submitted that it is settled law that such citation and/or non-citation renders the relevant proceeding incompetent. He fortified his argument by citing the decision of this Court in the case of ***EDWARD BACHWA & THREE OTHERS V. THE ATTORNEY GENERAL & ANOTHER,*** Civil Application No. 128 of 2008 (unreported).

In response to a question posed by the Court, Mr. Chidowu candidly admitted that this principle of law applies to all courts. His attention was then drawn to the facts that the application before the Labour Court had been taken under "Rule 94(1) (f) (ii) of the Employment and Labour Relations Act No. 6 of 2004" as the main enabling provision and that the said Employment Act has no such provision. He admitted forthwith that that was wrong citation and given the stance of the law, the Labour Court had been wrongly moved to issue the injunction.

Indeed the learned trial judge was aware of this irregularity. He, however, disregarded it and took it upon himself to rectify it without being moved, by holding in the ruling thus:-

> *".....Section 94(1) (f) (ii) is the one granting this court powers to entertain injunctions. The applicant must have meant section 94 (1) (f) (ii) and not rule 94(1) (f) (ii)....."*

After so surmising, the learned trial judge determined the application by granting the orders sought in the chamber summons, as already shown.

As rightly admitted by Mr. Chidowu and supported by both counsel for the applicant, non-citation and/or wrong citation of an enabling provision render the proceeding incompetent. Decisions by this Court in which this principle of law has been enunciated are now legendary. Most of them are cited in the case of ***EDWARD BACHWA V. THE ATTOTNEY GENERAL*** (supra). To that list may be added:.

(i) ***FABIAN AKONAAY V. MATHIAS DAWITE,*** *Civil Application No. 11 of 2003(unreported) and*

(ii) ***HARISH JINA V. U.A.J. SULEIMAN*** *(supra).*

In ***HARISH JINA'S*** Case, where an inapplicable section was cited, the Court categorically stated that citing a wholly inapplicable provision of the law, was a worse situation than citing a correct section but a wrong sub-section. As if providing, in anticipation, an answer to our current problem, the Court said:-

".....it may well have been a typographical error as pleaded by Mr. Patel, but if that was so, he ought to have sought to correct the error before the.....matter came for hearing".

It is the duty of a party and not that of the court to correct his pleading and/or documents relied on. If it were otherwise we would not avoid being reproached with putting aside our mantle of impartiality.

It may also be worthwhile pointing out here that the gravity of the error in omitting either to cite the enabling provision or citing a wrong one was succinctly stated by this Court in the case of ***CHINA HENAN INTERNATIONAL CO-OPERATION GROUP V. SALVAND K.A. RWEGASIRA,*** Civil Application No. 22 of 2005 (unreported). The Court said:-

".....Here the omission in citing the proper provision of the rule relating to a reference and worse still the error in citing a wrong and inapplicable rule in support of the application is not in our view, a technicality

falling within the scope and purview of Article 107A(2) (e) of the Constitution. ***It is a matter which goes to the very root of the matter. We reject (the) contention that the error was technical'.*** *[Emphasis is ours].*

That being the clear position of the law, the learned trial judge ought to have struck out the application before him.

But would the respondent's application before the Labour Court have been saved by citing section 94(1) (f) (ii) of the Employment Act as the enabling provision? Our considered answer to this pertinent question, after studying the entire Act, is in the negative. Let us first look at this provision itself. It provides as follows:

"94.-(1) Subject to the Constitution of the United Republic of Tanzania, 1977, the Labour Court shall have exclusive jurisdiction over the application, interpretation and implementation of the provisions of this Act and to decide-

(a) appeals from the decisions of Registrar made under Part IV;

(b) reviews and revisions of -

(i) arbitrator's awards made under this Part;

(ii) decisions of the Essential Services Committee made under Part VI;

(c) reviews of decisions, codes, guidelines, or regulations made by the Minister under this Act;

(d) complaints, other than those that are to be decided by arbitration under the provisions of this Act;

(e) any dispute reserved for decision by the Labour Court under this Act; and

(f) applications including -

(i) a declaratory order in respect of any provision of this Act, or

(ii) an injunction."

It is clear from its plain language that the section was never intended to be an enabling provision for instituting any proceeding before the Labour Court. Falling under Part VII Sub – Part C, which is headed ***"Adjudication"*** it only spells out the powers of the Labour Court. All the same, in our considered opinion, the Labour Court cannot exercise these wide powers randomly or as and when it wishes. Being judicial powers, it can only exercise them when

properly moved and/or when the person wanting it to exercise them has a right conferred on him to do so either under this Employment Act itself or under any other written law. But, in our settled view, that right does not emanate from section 94(1) (f) (ii) as we shall presently demonstrate, by citing a few examples.

It cannot be seriously contended that any person feeling aggrieved by a decision of the Registrar under Part IV can appeal to the Labour Court on the basis of S. 94(1) (a). The right of appeal is created or granted by section 57. This section reads as follows:-

> *"Every person aggrieved by a decision of the Registrar made under this Part may appeal to the Labour Court against that decision."*

Similarly, a person wishing the Labour Court to review or revise an arbitrator's award made under Part VIII, cannot move that court under s. 94(1) (b)(i). He or she has to proceed under s. 91(1). Also the right to refer a complaint to the Labour Court is granted by s. 86(7) (b) and not s. 94(1) (d). Again applications for declaratory orders are covered by s. 85(4) and (5), among others, and not s. 94(1) (f) (i), e.t.c.

On the issue of injunctions generally, we find that indeed the Labour Court has jurisdiction to grant them. Regarding injunctions to restrain a strike, it is also our finding that the said court has been given such jurisdiction under the Employment Act only. All the same, such jurisdiction is subject to two conditions precedent. These are that the strike must be illegal and it [Court] must be properly moved under the relevant enabling provisions of the said Act. From our objective reading of this Act, we are of the settled mind that the only relevant provision is section 84(1)(a). This provision reads as follows:-

> *"Where a strike or lock out is not in compliance with this Act, or a trade union or employer or employers' association engages in prohibited conduct, the Labour Court shall have exclusive jurisdiction –*
> *(a) to issue an injunction to restrain any person from -*
> *(i) participating in an unlawful strike or lock out;*
> *(ii) engaging in any prohibited conduct;....."*

So assuming, without deciding here, that the provisions of the Employment Act cover strikes declared under s. 26(2) of the Act No. 19 of 2003, then one seeking an injunction to restrain such a strike ought to proceed under s. 84(1)(a). It goes without saying, therefore, that the learned trial judge had been wrongly moved and erred in law in entertaining and determining Application No. 19 of 2008 which was not competently before him. It will then be accepted without further elaboration that the proceedings before Mandia J. were a nullity. Since the proceedings were a nullity even the order made therein including the court's ruling and final order were a nullity. Fortunately, counsel for both parties in these proceedings are of the same firm view.

Because the proceedings before the Labour Court were a nullity, that's why we felt constrained not to strike out this application. We did so in order to remain seized with the Labour Court's record and so be enabled to intervene ***suo motu*** to remedy the situation. This Court recently thus acted, in almost similar circumstances, in the case of ***TANZANIA HEART INSTITUTE V.***

As the learned trial judge was enjoined by law to strike out the respondent's incompetent application and did not do so, it now falls within our jurisdiction to do what he failed to do. This will not be the first time the Court is doing so. It has thus intervened in the past.

It accordingly invoked its revisional powers under section 4(2) of the Act, to quash the proceedings in the High Court and set aside all the orders made therein.

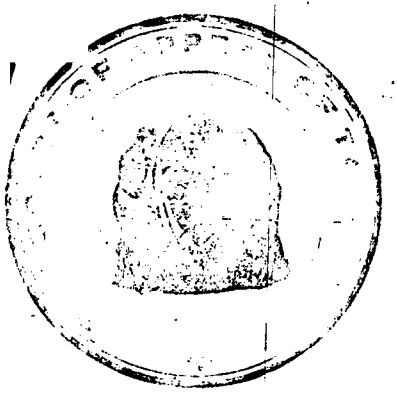
In the case of ***ANTONY J. TESHA V. ANITA TESHA,*** Civil Appeal No. 10 of 2003 (unreported), during the hearing of the appeal it was discovered that the High Court had issued leave to appeal when it had been wrongly moved. The Court held that the High Court had erred in not striking out the application. It accordingly struck out the application as well as the notice of appeal. The Court did the same in identical circumstances of wrong citation in the case of ***ALOYCE MSELE V. THE CONSOLIDATED HOLDING CORPORATION,*** Civil Appeal NO. 11 OF 2002 (unreported).

In this particular case we are strictly enjoined by law to do what the learned trial judge in the Labour Court failed to do. Failure to do so would be tantamount to perpetuating illegalities, and in particular the injunction order which is admittedly a nullity. Acting under s. 4(3) of the Act we hereby revise the incompetent proceedings in the Labour Court. The same as well as all the orders

including the impugned injunction granted therein, are hereby quashed and accordingly set aside. We make no order for costs.

DATED at DAR ES SALAAM this 11th day of November,2008.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL



N.P. KIMARO
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

P.B. KHADAY
DEPUTY REGISTAR