IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KITUSI, J.A., And RUMANYIKA, J.A.)

CIVIL APPLICATION NO. 342/18 OF 2019

PATRICK MAGOLOGOZI MONGELLA ..... APPELLANT

VERSUS

THE BOARD OF TRUSTEES OF THE PUBLIC SERVICE SOCIAL SECURITY FUND ..... RESPONDENT

(Application from the Judgment and Decree of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Mipawa, J.)

dated the 4th day of August, 2016
in
Revision No. 90 of 2016

.....

RULING OF THE COURT

21st February & 22nd April, 2022

NDIKA, J.A.:

The applicant, Patrick Magologozi Mongella, was employed on 19th November, 2003 as the Director of Operations of the defunct Board of Trustees of the Public Sector Pension Fund (the "PSPF") whose successor by the operation of law with effect from 1st August, 2018 is the respondent, the Board of Trustees of the Public Service Social Security Fund. On 9th March, 2013, the respondent terminated the applicant's services upon convicting him of acts of insubordination against the then Acting Director

General of the PSPF. The applicant vainly challenged the termination in the Commission for Mediation and Arbitration ("the CMA"), which, by its award dated 31st March, 2015, ruled that the termination was fair, substantively and procedurally. Resenting that outcome, the applicant applied to the High Court, Labour Division ("the Labour Court") for revision of the CMA's award but once again the effort went unrewarded. He now moves this Court for revision of the High Court's decision, which was handed down on 4th August, 2017.

The application before us is by notice of motion predicated upon, among others, section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 ("the AJA") and rule 65 of the Tanzania Court of Appeal Rules, 2009, seeking the following orders:

a) An order setting aside the High Court's decision dismissing the applicant's application for revision;
b) A declaration that the termination of employment of the applicant by the respondent was not fair;
c) An order replacing the High Court's order of dismissal of the revision application with an order granting the same and consequently setting aside the CMA's decision.

d) An order to reinstate the applicant without loss of remuneration from the date of unfair termination to the date of reinstatement.

The applicant swore an affidavit in support of the application. The respondent opposes the application and had its Director of Human Resources and Administration, Mr. Paul Chakale Kijazi, depose an affidavit in reply.

By way of background to the matter, the applicant avers in the supporting affidavit that, being aggrieved by the High Court's decision, he initially lodged a notice of appeal on 11th August, 2017 and a letter requesting for copies of proceedings, judgment and decree. The said notice and letter were duly served on the respondent. Subsequently, upon receiving and reading the copies of the impugned judgment and decree of the High Court, he realized that there were "several matters of fact which were wrongly decided" and therefore it dawned on him that his grievances concerned matters of fact or mixed law and fact as opposed to pure matters of law. Since in terms of section 57 of the Labour Institutions Act, Cap. 300 R.E. 2019 ("the Act"), an appeal to this Court from any decision of the Labour Court lies on a point of law only, he terminated the appeal process he had initiated by having his notice of appeal marked withdrawn

on 24th April, 2018 by the order of Juma, C.J. Desirous of pursuing the matter by way of revision as the only feasible option, he sought and obtained an order of extension of time dated 18th June, 2019 upon which he lodged this matter on 14th August, 2019.

The application is predicated on ten grounds, which, according to the applicant, raise questions of fact but not pure points of law. We take the liberty to reproduce them in full as hereunder:

(i) That the Honourable High Court erred in fact in holding that the two charges of insubordination and use of rude language were proved against the applicant while there is nothing on record to constitute proof of the same.

(ii) The documentary evidence used by the arbitrator and affirmed by the Hon. Judge were neither tendered nor admitted during trial at the Commission for Mediation and Arbitration.

(iii) That the minutes of the Management Meeting that sat on 26th July, 2012 which were the basis of the disciplinary charges were confirmed on 23rd August, 2012 with the changes and the effect of changes meant that the decisions and instructions made and recorded in the minutes of 26th July, 2012 were vague.

(iv) That Mr. Adam Mayingu, the respondent's Director General, who was the complainant against the applicant, participated in the meetings of the PSPF Board Committee for Staff Welfare, Appointments and Disciplinary Matters; also, in the Board

Meetings of the respondent to deliberate the charges against the applicant and making the decision to terminate the employment of the applicant in the absence of the applicant, making the whole disciplinary process biased.

(v) The Honourable Judged erred in fact in holding that the applicant did not challenge the substantive fairness of his termination of employment while paragraph 25 of the affidavit in support of the revision pleaded that the award was founded on evidence that was not tendered and admitted and ground ten of the submission for revision was based on substantive fairness.

(vi)That the Honourable Judge erred in fact in not deciding the issue of composition of the inquiry committee in the light of the evidence on record by PW1 and PW3.

(vii) That the Committee of the Board and the Board of Trustees were improperly constituted at the time they deliberated on this matter as per the Social Security Laws (Amendments) Act, 2012.

(viii) That the Honourable Judge erred in fact in holding that there is enough evidence as per the Commission for Mediation and Arbitration's records that the applicant was given time to mitigate his case as per the disciplinary proceedings and disciplinary procedures of the respondent while there was none on record.

(ix) That the Honourable Judge erred in fact in not finding that the Chairman of the Board was actively involved in the disciplinary process by issuing the suspension letter, charge sheet, notice of hearing, participated in the deliberations of the decision and

issued the termination letter thus making the whole disciplinary process biased.

(x) That the Honourable Judge erred in fact in not finding that the applicant was not heard by the Board of Trustees prior to termination.

We heard the application on 21st February, 2022. Before us, Messrs. Makaki Masatu and Frank Mwalongo, learned advocates, stood for the applicant. On the adversary side, Mr. Elisa Abel Msuya and Ms. Regina Anthony Kiumba, learned counsel, appeared for the respondent.

Ahead of the hearing, we directed the learned counsel that, apart from submitting on the merits of the application, they should address us on its competence; whether the applicant has properly invoked the revisional jurisdiction of the Court to deal with supposedly matters of fact. In that vein, we particularly invited them to address us on, **one**, whether in a revision this Court has power to re-appreciate the evidence on record; and **two**, whether the ten grounds of revision upon which the application is based raise matters of fact or points of law.

At the outset, we acknowledge that section 57 of the Act provides that any appeal to this Court from a decision of the Labour Court lies on a point of law only. It stipulates as follows:

"Any party to the proceedings in the Labour Court may appeal against the decision of that court to the Court of Appeal of Tanzania on a point of law only."

In effect, the above provision bars appeals to this Court against any decision of the Labour Court on matters of fact.

Addressing us on the competence of the appeal, Mr. Mwalongo submitted that since section 57 of the Act bars appeals to this Court on matters of fact or mixed matters of fact and law, an aggrieved party seeking to challenge any decision of the Labour Court on such matters must resort to revision as held by the Court in **Muhimbili National Hospital v. Costantine Victor John**, Civil Application No. 44 of 2013 (unreported). He further contended that in exercise of its revisional powers, the Court can re-appreciate or re-assess the evidence so as to come up with its own findings of fact and conclusions. However, he did not cite any authority to back up his proposition.

Mr. Masatu weighed in on what is a point of law. Referring to **Hezron Nyachiya v. Tanzania Union of Industrial and Commercial Workers & Another**, Civil Appeal No. 79 of 2001 (unreported), he defined a pure point of law as one argued on the assumption that all the

facts pleaded by the other side are correct. It was his contention that the ten grounds of revision do not raise any points of law but matters of fact. He thus urged us to find that the instant application is maintainable.

Mr. Msuya, on his part, strongly disagreed with his learned friends. He submitted that the Court's revisional authority does not include any power to re-appraise or re-appreciate the evidence received by the CMA. We understood him to mean that the determination of the correctness, legality or propriety of any finding, order or any other decision made thereon and as well as the regularity of any proceedings of the Labour Court under section 4 (3) of the AJA would not entail a re-appreciation or re-appraisal of evidence so as to come up with its findings of fact. As regards the grounds of revision upon which the application is based, he stoutly argued that they all raise points of law, which ought to have been pursued in an appeal under section 57 of the Act. He thus urged us to find the application misconceived and proceed to strike it out.

In determining whether the Court's revisional jurisdiction has been properly invoked in this matter for the purpose of dealing with what have been dubbed as "matters of fact," we think that it is apt that we start off

by extracting the provisions of section 4 (3) of the AJA vesting the Court with the power of revision:

> *"(3) Without prejudice to subsection (2), the Court of Appeal shall have the power, authority and jurisdiction to call for and examine the record of any proceedings before the High Court for* ***the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings of the High Court.****"* [Emphasis added]

We have deliberately emboldened the text to the above provision to underline that the Court's revisional authority thereunder is for the purpose of satisfying itself as to the *"correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings of the High Court."* Before we discuss what this power entails, we would restate, so far as this matter is concerned, that it is settled jurisprudence that this authority may be invoked in matters which are not appealable to the Court with or without leave. Indeed, that was a part of the holding of the Court in **Halais Pro-Chemie v. Wella A.G.**

[1996] TLR 269 at page 272, which was based on its two earlier decisions: **Moses Mwakibete v. The Editor – Uhuru and Two Others** [1995] TLR 134 and **Transport Equipment Ltd v. D.P. Valambhia** [1995] TLR 161. For clarity, we extract the said holding as follows:

> *"We think that Mwakibete's case read together with the case of Transport Equipment Ltd are authority for the following legal propositions concerning the revisional jurisdiction of the Court under ss (3) of s 4 of the Appellate Jurisdiction Act, 1979:*
>
> *(i) The Court may, on its own motion and at any time, invoke its revisional jurisdiction in respect of proceedings in the High Court;*
>
> *(ii) Except under exceptional circumstances, a party to proceedings in the High Court cannot invoke the revisional jurisdiction of the Court as an alternative to the appellate jurisdiction of the Court;*
>
> *(iii)* ***A party to proceedings in the High Court may invoke the revisionai jurisdiction of the Court in matters which are not appeaiabie with or without leave;***

(iv) A party to proceedings in the High Court may invoke the revisionai jurisdiction of the Court where the appellate process has been blocked by judicial process." [Emphasis added]

Certainly, the instant application falls under item (iii) in the above holding; for, it is common ground that no appeal lies to the Court from a Labour Court's decision on matters of fact.

We wish to acknowledge that this application for revision is not novel. We encountered an analogous matter in **Muhimbili National Hospital** (*supra*) where we took the view that an applicant who could not appeal on a finding of the Labour Court on matters of fact could apply for revision of the decision. However, in that decision we did not specifically interrogate and determine whether it is within the ambit and parameters of the Court's revisionai jurisdiction to re-assess or re-appreciate the evidence on record so as to come up with its own findings.

We think that in the instant case, we are enjoined to determine the ambit and parameters of the Court's revisionai authority, which is expressly legislated for the purpose of the Court satisfying itself as to the "correctness, legality or propriety of any finding, order or any other

decision made thereon and as to the regularity of any proceedings of the High Court."

We scanned the decisions of the Court but we did not find one clearly delineating the parameters of the Court's revisional authority under section 4 (3) of the AJA so far as the question of re-appraisal of matters of fact is concerned. Of course, we noted, for example, that in **Olmeshuki Kisambu v. Christopher Nain'gola** [2002] TLR 280 at 283, the Court observed that the power of revision can:

> *"come into play where the record reveals incorrectness, illegality or impropriety in any finding, order or other decision of the High Court or irregularity in the proceedings of the court."*

In the same vein, the Court in **Halima Hassan Marealle v. Parastatal Sector Reform Commission & Another**, Civil Application No 84 of 1999 (unreported) stated that:

> *"It is apparent that the provision of this subsection seeks to ensure that this Court has powers to* ***rectify any errors, illegalities or impropriety in the decisions or proceedings of the High Court which come or are brought to its attention****. Thus, the Court may be moved in*

revision by a third party who, say, has an interest in the matter. Likewise, the Court, acting on its own information or on information received from anyone, may of its own motion initiate revision proceedings. It is necessary to reiterate, however, that the power of revision under sub-section (3) is exercisable sparingly and only in limited circumstances, such as, where no right of appeal lies to this Court, the reason being that the sub-section should not be regarded as proving an alternative to appeal process." [Emphasis added]

In **Hasmukh Bhangwanji Masrani v. Dodsal Hydrocarbons and Power (Tanzania) PVT Limited & Three Others**, Civil Application No. 100 of 2013 (unreported), the Court held that section 4 (3) of the AJA provides two distinct avenues for invoking its revisional jurisdiction:

"The first distinct scope and parameters are grounds which call upon this Court to satisfy itself on correctness, or legality or propriety of any finding, order or any other decision made by the High Court. The second distinct scope and parameters are grounds calling this Court to satisfy itself of the regularity of any proceedings of the High Court. Existence of these two distinct avenues for moving this Court on revision have been

tangentially confirmed in ***The Board of Trustees of the National Social Security Fund (NSSF) v. Leonard Mtepa,*** *Civil Application No. 140 of 2005 (unreported) where we suggested a difference between on one hand, revision for purposes of satisfying ourselves of regularity of the proceedings which were pending in the High Court; and on the other hand, revision for the purposes of considering the legality and correctness of orders of the High Court."*

Luckily, the question at hand has received judicial consideration in India on several occasions out of which we can borrow a leaf. The decision of the Supreme Court of India in **Hindustan Petroleum Corporation Ltd. v. Dilbahar Singh**, (2014) 9 SCC 78 appears to be of immense significance. In that case, the Supreme Court had to determine the ambit and scope of revisional jurisdiction of, inter alia, the High Court with particular reference to three Rent Control Statutes of the states of Delhi, Kerala and Tamil. The revisional jurisdiction provisions in the said statutes were in *pari materia*. For illustration, we extract section 20 of the Kerala Building (Lease and Rent Control) Act, 1965, stipulating as follows:

"20. Revision. – (1) In cases, where the appellate authority empowered under section 18 is a

Subordinate Judge, the District Court, and in other cases the High Court, may, at any time, on the application of any aggrieved party, call for and examine the records relating to any order passed or proceedings taken under this Act by such authority for ***the purpose of satisfying itself as to the legality, regularity or propriety of such order or proceedings, and may pass such order in reference thereto as it thinks fit.***" [Emphasis added]

Having examined in that case the extent, ambit and meaning of the terms "legality", "propriety", "correctness" and "regularity" used in the three Rent Control Acts, the Supreme Court observed in paragraphs 27 to 30 of its judgment as follows:

"27. The ordinary meaning of the word legality is lawfulness. It refers to strict adherence to law, prescription, or doctrine; the quality of being legal.

28. The term propriety means fitness; appropriateness, aptitude; suitability; appropriateness to the clrcumstances or condition conformity with requirement; rules or principle, rightness, correctness, justness, accuracy.

29. The terms correctness and propriety ordinarily convey the same meaning, that is, something which is legal and proper. In its ordinary meaning and substance, correctness is compounded of legality and propriety and that which is legal and proper is correct.

30. The expression regularity with reference to an order ordinarily relates to the procedure being followed in accord with the principles of natural justice and fair play."

Ultimately, the said Court concluded that the revisional jurisdiction of the High Court for the purpose of satisfying itself as to the correctness, legality, propriety or regularity of such order or proceedings does not involve the authority to re-appreciate the evidence on record. For clarity, we reproduce at length the said Court's conclusion as expressed in paragraph 45 of the judgment:

"45. We hold, as we must, that none of the above Rent Control Acts entitles the High Court to interfere with the findings of fact recorded by the First Appellate Court/First Appellate Authority because on ***re-appreciation of the evidence, its view is different from the Court/Authority below.*** *The consideration or*

examination of the evidence by the High Court in revisionai jurisdiction under these Acts is confined to find out that finding of facts recorded by the Court/Authority below is according to law and does not suffer from any error of law. ***A finding of fact recorded by Court/Authority beiow, if perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, is open to correction because it is not treated as a finding according to law.*** *In that event, the High Court in exercise of its revisionai jurisdiction under the above Rent Control Acts shall be entitled to set aside the impugned order as being not legal or proper. The High Court is entitled to satisfy itself [on] the correctness or legality or propriety of any decision or order impugned before it as indicated above.* ***However, to satisfy itself to the regularity, correctness, legality or propriety of the impugned decision or the order, the High Court shall not exercise its power as an appellate power to re-appreciate or re-assess the evidence for coming to a different***

> ***finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a court of first appeal.*** *Where the High Court is required to be satisfied that the decision is according to law, it may examine whether the order impugned before it suffers from procedural illegality or irregularity."*[Emphasis added]

The above decision was followed recently by the said Court in **Addissery Raghavan v. Cheruvalath Krishnadasan**, Civil Appeal No. 2528-29 of 2020. As we shall demonstrate below, we think the holding in **Hindustan Petroleum Corporation Ltd.** (*supra*) equally applies to the revisional authority of this Court under section 4 (3) of the AJA.

While we are cognizant that this Court's appellate jurisdiction as delineated by section 4 (2) of the AJA would involve a re-hearing on fact and law, subject to the limitation in some way by sections 5 and 6 of the AJA, the Court's revisional jurisdiction under section 4 (3) of the AJA does not necessarily involve any re-hearing. The jurisdiction "for calling for and examining the record of proceedings before the High Court" is analogous to a power of superintendence for the purpose of keeping the High Court within the bounds of its jurisdiction so as to ensure that it hears and

determines matters according to law, applicable procedure and defined principles of justice and fair play – see similar reasoning in **M/s. Sri Raja v. Lakshmi Dyeing Works and Others v. Rangaswamy Chettiar** [(1980) 4 SCC 246]. So, for instance, in determining the legality of a particular decision or order of the High Court, this Court will examine if that decision or order has the quality of being legal; that it has complied with the applicable law or doctrine. As for correctness and propriety of any impugned decision or order, it would involve the same endeavour to determine if it is legal and proper. The inquiry into the regularity of the impugned proceedings will not go beyond examining whether the proceedings followed the applicable procedure and accorded with the principles of natural justice and fair play. None of these endeavours will involve a re-appreciation or re-appraisal of the evidence on record, which, is what the Court does while exercising its appellate authority on a first appeal by re-hearing the case on fact and law and coming up with its own findings of fact. Any suggestion that the Court can re-hear and re-appreciate the evidence when exercising its revisional jurisdiction will obliterate the distinction between the Court's appellate authority and its

power of superintendence, respectively, under subsections (2) and (3) of section 4 of the AJA.

In view of the foregoing, we are decidedly of the opinion that the Court's revisional authority under section 4 (3) of the AJA cannot be invoked for the purpose of dealing with purely matters of fact, which were allegedly decided wrongly by the Labour Court. Revisional power is not for a fact-finding expedition leading to interference with the findings of fact recorded by the CMA or the Labour Court. That power is not and cannot be equated with the power of reconsideration of all questions of fact as a court of first appeal.

Following the principle in **Hindustan Petroleum Corporation Ltd.** (*supra*), we hold without any hesitation that the Court can only re-appreciate the evidence in the course of discharging its revisional jurisdiction in scenarios raising points of law including the following: **one**, determining whether a finding of fact recorded by High Court (or the Labour Court) is according to law and does not suffer from any error of law. **Two**, whether a finding of fact is perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous. We

would stress that at the core of these scenarios are points of law, not matters of fact.

Concluding on the first issue, we are satisfied that the Court has no authority under section 4 (3) of the AJA to consider and determine pure matters of fact which cannot be entertained in an appeal made under section 57 of the Act.

We need not travel a long distance on the second issue whether the ten grounds of revision upon which the application is based, raise matters of fact or points of law.

According to **Black's Law Dictionary**, 4th Edition, St. Paul, Minnesota, West Publishing Co., 1968, at page 1,130, the term "matter of fact" means that which is to be ascertained by the senses, or by the testimony of witnesses describing what they have perceived" while a matter of law is expressed as "whatever is to be ascertained or decided by the application of statutory rules or the principles and determinations of the law, as distinguished from the investigation of particular facts."

In the case of **CMA-CGM Tanzania Limited v. Justine Baruti**, Civil Appeal No. 23 of 2020 (unreported), the Court adopted in a labour

dispute the definition of a point of law in tax matters as expressed in the cases of **Atlas Copco Tanzania Limited v. Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 167 of 2019; and **Kilombero Sugar Company Limited v. Commissioner General (TRA)**, Civil Appeal No. 14 of 2007 (unreported) as follows:

> *"Thus, for the purpose of section 25 (2) of the TRAA, we think, a question of law means any of the following: **first**, an issue on the interpretation of a provision of the Constitution, a statute, subsidiary legislation or any legal doctrine on tax revenue administration. **Secondly**, a question on the application by the Tribunal of a provision of the Constitution, a statute, subsidiary legislation or any legal doctrine to the evidence on record. **Finally**, a question on a conclusion arrived at by the Tribunal where there is failure to evaluate the evidence or if there is no evidence to support it or that it is so perverse or so illegal that no reasonable tribunal would arrive at it."*

As we held in **CMA-CGM Tanzania Limited** (*supra*), the above definition would apply *mutatis mutandis* to labour appeals to the Court.

Guided by the above definition, we carefully examined the ten points cloaked as matters of fact in the notice of motion. Upon our careful and close reflection, none of them raises a pure matter of fact. To begin with, it is so evident that the first, second, third, fifth and eighth points challenge the findings of fact made by the Labour Court either on the ground that they were unsupported by the evidence on record or that they were based on extraneous matters or on a misapprehension of the evidence on record. These complaints clearly raise questions of law which ought to have been pursued in an appeal pursuant to section 57 of the Act. For, they essentially charge that the said impugned findings cannot be treated as findings made according to law. The same position holds true for the sixth and seventh grounds charging that the inquiry committee was improperly constituted contrary to the applicable law. The fourth, ninth and tenth grounds, contending that the disciplinary hearing process that the applicant went through was a flawed process on the ground that it was epitomised by bias and abrogation of his right of hearing, equally raise matters of law, not bare factual contentions.

In the premises, we hold that even if it were assumed that this Court's revisional jurisdiction could be invoked for the purpose of fact-

finding, the alleged "matters of fact" in the notice of motion raise points of law, which should have been pursued in an appeal.

All said, we are satisfied that this application is completely misconceived. Accordingly, we strike it out. We make no order as to costs bearing in mind that this matter is a labour dispute normally not amenable to any award of costs.

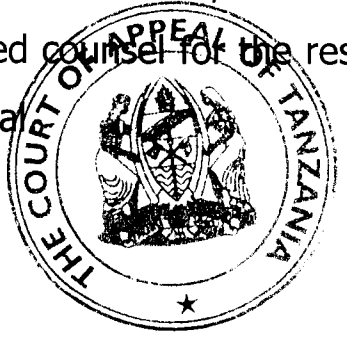
DATED at **DAR ES SALAAM** this 20th day of April, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 22nd day of April, 2022 in the presence of Ms. Mariam Masandika, learned counsel for the applicant and Ms. Regina Kiumba, learned counsel for the respondent, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL