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**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA LABOUR DIVISION**

IN THE LABOUR COURT ZONE CENTRE

AT TABORA

REVISION NO. 10 OF 2014

RELI ASSETS HOLDING CO. LTD. APPLICANT

VERSUS

JAPHET CASMIL & 1500 OTHERS RESPONDENT

RULING

16/03/2015 & 20/03/2015.

MIPAWA, J.

This revision Application filed by the Applicant namely Reli Assets Holding Company Ltd against the Respondents Japhet Casmil and 1,500 others in which the Applicant is challenging the CMA¹ award met with a fierce Preliminary Objection on the point of law from the Respondent before the hearing was had. The

¹ CMA, refers to the Commission for Mediation and Arbitration established under section 12 of the Labour Institutions Act no. 7 of 2004 Cap. 300 R.E. 2009

applicant also later on **en suite** (immediately) followed suit by filing a Preliminary objection as against the Respondent.

At the hearing of the Preliminary objection(s) the Applicant Reli Estate was represented by the Learned Senior Counsel Mr. Mtaki while the Respondents enjoyed service of Mr. Sebukoto Learned Advocate, assisted by Advocate Iddi.

The first to file the Preliminary objection was Mr. Sebukoto Learned Counsel for the Respondent who submitted **Viva Voce**, (by live voice) that the affidavit of the Applicant is defective and attached with a document which is new to the Court. He submitted that the Labour Court Rules direct that under Rule 24(3) matter(s) which should be in the affidavit are spelt under sub-rule(3) of Rule 24 of GN 106 of 2007, the Rules. According to Mr. Sebukoto the Affidavit of the Applicant does not contain what is stated under Rule 24(3) (c) and (d)².

The Respondent's Counsel dropped the second limb of Preliminary objection that the format of the jurat of attestation in the affidavit is not in accordance to the law. Pushing his last limb

² Rule 24(3) (c) and (d); reads that; the application shall be supported by an affidavit which shall clearly and consicely set out (a)...(b)...(c) a statement of Legal issues that arise from the material facts in (d) and the relief sought. See the Labour Court Rules GN 106 of 2007.

of Preliminary objection, Counsel for Respondent submitted that the affidavit of the Applicant has been attached with what he termed unknown document by Law. The said document is headed "statement of legal issues" which when looked by ordinary eyes (it) appears to be an independent document.³

Mr. Sebukoto further submitted in conclusion that if you clearly look (I think *in ex-abandunt cautela* – with eyes of extreme caution) one will probably find that the Applicant had wanted to comply with Rule 24(3), (***by the Applicant filing a separate document styled statement of Legal issues***). However the law clearly stipulates that the contents in the separate document ought to have been part and parcel of the affidavit and since they are not put the affidavit is defective as well as the said document. He referred to this court the case of **Ramadhani Pazi and Wambura Malima V. Tanzania Civil aviation**.⁴ The case emanating from this court.

In Response to the Respondent's submission, Mr. Mtaki Counsel for the Applicant submitted that, they object to the Preliminary objection because, though Rule 24(3) of the Labour

³ Statement of Legal issues made under Rule 24(3) of the Labour Court Rules and attached to the Applicant's Affidavit

⁴ Labour Revision No. 325 of 2013 HCLD unreported per Mipawa, J.

Court Rules GN No. 106 of 2007 directs the way to follow in filing affidavits, it is his view that the Rule contradicts what he called "Sheria Kuu" (Principal Legislation) on affidavits which is the Civil Procedure Code,⁵ Order 19 Rule 3(1) of the Said Code, through sub rule (2). Thence it was his submission that the main Legislation cannot be overriden or contradicted by Rules. He referred the case of ***Uganda V. Commissioner of Prison ex-Parte matovu***⁶ and concluded that their affidavit is correct and complies with the CPC⁷.

Pegging on Affidavit, Mr. Mtaki refered also to this court the Court of Appeal Case in **Samwel Kimaro V. Hidaya Didas**,⁸ CAT at Mwanza and added that

*... even if the court will agree with the Counsel for Respondent the same will not render the case incompetent (application) because at page 17 of the **Hidaya Case** it is not always where affidavit which are defective the court must strike out the case, there is a room to amend as the defect does not go to the roots of the matter...*⁹

The Respondent Counsel on strengthening his point as depicted from the excerpt above that the court may order

⁵ The Civil Procedure Code Cap. 33 R.E. 2002

⁶ (1966) E.A. at page 520

⁷ *op.cit.* note 5

⁸ Civil application No. 20 of 2012 CAT at Mwanza PP. 15-18

⁹ Respondent's submission Viva Voce

amendment, he referred to the case of **NHC V. Ettienne Hotel**¹⁰, CAT at Dar es Salaam (unreported) *in which an order* of Amendment of the affidavit was ordered.

He concluded that the skipping of sub paragraphs (c) (d) of Rule 24(3) is not fatal as the contents have been placed in the document.

In rejoinder submission the Respondent Counsel Mr. Sebukoto insisted that, Rules have been given powers by the law and provide ways of dealing with Labour matters in accordance with the Labour (court) laws and Rules. A person in the Labour Court may go to the Civil Procedure Code only if there is a ***lacuna*** in Labour Court Rules. In the circumstance of what has been filed by the Applicant's Counsel there was nothing to depart from the Labour Court Rule 24(3) which was put to 'escape' the filing of many documents. He concluded that there is no cure of a defective affidavit rather than the court to strike it out.

On the Preliminary objection raised by the Applicant's Counsel Mr. Mtaki as against the Respondents, he briefly submitted in support of the Preliminary objection that the Counter

¹⁰ Civil application No. 10 of 2005 CAT at Dar es salaam pp 4-6

affidavit of the Respondent as per page three (3) appears that the document was filed and received by a clerk of the Commission for Mediation and Arbitration, that is who signed, hence abusing Rule 24 (3) (4) of the Labour Court Rules. The application before the court is not in the Commission but in the High Court Labour Division, the Counter affidavit therefore should be expunged.

In reply Mr. Sebukoto Advocate for the Respondent admitted to what the Counsel for Applicant Vested. However he told this court that the same was a clerical error for the words "... clerk of the Commission ..." to appear in their Counter affidavit, that the Counter affidavit has been filed in the High Court Labour Division as evidenced in the court stamp and the signature of the court Registry officer, therefore it is their view that the document was filed in the High Court Labour Division Tabora Registry and it is an error which does not go to the roots of the affidavit, it can be corrected.

I have duly considered the Valuable submission of both Learned Counsel for the Respondent and the Applicant in ***ex-abandunt cautela*** (with extreme caution) I will consolidate the two Preliminary objections which were argued separately but

in-tandem (together). The nagging questions to be determined first in the Preliminary objection raised by the Respondent may be couched thus:

1. *Whether or not the affidavit of the applicant is defective for not complying with the provisions of Rule 24(3) of the Labour Court Rules*¹¹
2. *Whether the document styled "statement of Legal issues" filed by the Applicant forms part of the affidavit as per Rule 24(3) of the Rules*¹²

Now as correctly pointed out by the Respondent's Counsel and conceded by the Applicant's Advocate that Rule 24(3) of the Labour Court Rules Government Notice No. 106 of 2007 directs the way to follow in filing of affidavits in the Labour Court for Labour and Employment matters, for easy of reference I will reproduce the relevant Rule ***in extenso*** (at length).

*24(3) the application shall be supported by **an affidavit** which **shall** clearly and concisely set out*

- (a) The names and description and address of the parties*
- (b) A statement of the material facts in a chronological order on which the application is based*
- (c) **A statement of legal issues that arise from the material facts; and***
- (d) **The relief sought** (emphasis mine).*

¹¹ Labour Court Rules Government Notice No. 106 of 2007

¹² *ibid*

The spirit of the Respondent Preliminary objection on its first limb is that the affidavit of the Applicant has not complied with the requirements of Rule 24(3) (c) (d) (specifically). The applicant had skipped Paragraph (c) and (d) of Rule 24(3) of the Rules GN 106 of 2007 which requires the applicant or deponent to state in the affidavit "a statement of legal issues that arise from the material facts and state the relief sought therein.

Although Mr. Mtaki has conceded to the fact that he skipped paragraph (c) and (d) (above stated) in the affidavit he was of the view that, though Rule 24 (3) of the Labour Court Rules directs the way of filing affidavits, it is his opinion that the Rule contradicts "Sheria Kuu"(Main Legislation or Act) which is the Civil Procedure Code¹³, *note bien* order 19 Rule 3(1) through sub-rule(2). He referred the case of **Uganda V. Commissioner of Prison ex-parte Matovu**,¹⁴ and concluded that the Applicants affidavit is correct and complies with the Civil Procedure Code.¹⁵

I will come later on the defensive argument of the learned Counsel for skipping the requirements of Rule 24(3) (c) and (d) of the Labour Court Rules under the camouflage of *the Civil*

¹³ Cap. 33 R.E. 2002 commonly known in its economy as CPC

¹⁴ *op.cit.* note 6

¹⁵ *op.cit.* note 5

Procedure Code. Suffice it *in limine* (at the out set) to put a simple but an apparently pertinent queez what is an affidavit? Confronted with that question the Court of Appeal in **Director of Public Prosecutions V. Dodoli Kapufi and Patson Tusalile**¹⁶ quoted with approval the definition of a affidavit in Tamann's LAW DICTIONARY by D.P. MITTAI, AND IN BLACK'S LAW DICTIONARY.¹⁷ That Affidavit is;

...A voluntary declaration of facts written down and sworn by the declarant before an officer authorized to administer Oath's ... it is a statement in the name of a person called a deponent, by whom it is Voluntarily signed or sworn to or affirmed. It must be confined to such statements as the deponent is able of his own knowledge to prove, but in certain cases may contain statement of information and belief with grounds thereon ...

The above excerpt represents the definition of the affidavit which are about six of them as spelt out at page two of the Ruling of the court in **Dodoli Kapufi Case**¹⁸ which are

- (i) *The statement or declaration of facts etc by the deponent*
- (ii) *A verification clause*
- (iii) *A Jurat and*
- (iv) *The signatures of the deponent and the person who in law is authorized either to*

¹⁶ Criminal Application No. 11 of 2008 CAT (Othman, L.J Rutakangwa, J.A and Mbarouk, JA) per Rutakangwa J.A

¹⁷ MITTAL, D.P. Law Dictionary at P. 138 and BLACK'S LAW DICTIONARY 7TH Ed at page 58

¹⁸ *op.cit.* note 16

administer the Oath or to accept the affirmation.

The requirements of the affidavit must be put by the deponent in order for the affidavit to be an affidavit ***par-excellence*** and legally ***in Premio Legis*** (from the bosom of the law) a skip of the requirement needed to be in the affidavit or not following the rules governing affidavit renders the affidavit defective. The above position was emphasized by the Court of Appeal of Tanzania in the case of **D.B. Shapriya and Co. Ltd V. Bish International BV.**¹⁹ In which the Court of Appeal stated ***in totidem*** verbs (in many words) that;

*...Affidavit has been defined as a written document containing material and relevant facts or statement relating to the matters in question or issue and sworn by the deponent before a person or officer duly authorized to administer any oath or affirmation or take any affidavit. It follows from this definition that **an affidavit is governed by certain rules and requirements that have to be followed (emphasis mine)**...*

Now borrowing the words of the learned Justice of Appeal that "an affidavit is governed by certain rules and requirements

¹⁹ Civil Application No. 53 of 2002 CAT A single Justice of Appeal in the Court of Appeal was defining the term affidavit

that have to be followed” it is my considered opinion that, guided by the Labour Laws and Rules that an affidavit in Labour and Employment matters is governed by and large by rules and requirements as spelt out in Rule 24(3) (a) (b) (c) and (d) of the Labour Court Rules GN No. 106 of 2007. Therefore a deponent must follow the same. Since the applicant did not follow the rules and requirements guiding the affidavit in the Labour Court by skipping certain rules and requirements, the affidavit falls in the quagmire of being called a defective affidavit **par se**. I entirely and respectfully agree with the Learned Counsel for the Respondent that the rules and requirements put by the applicant in the document styled “statement of legal issues” ought to have been put and included in the affidavit so as to form part and parcel of the Applicant’s affidavit that was sworn attested by the Commissioner for Oaths and verified by the deponent to give it a Legal **Dunamis** (GK –Power).

The document purportedly to be attached does not form any legal essence **ab-initio** derived from Rule 24 (3) (c) or (d) it may be just like a “crying evil” in the eyes of the Law, Rules and Requirements governing Affidavit in the Labour and Employment matters filed in the Labour Court. Hence defective.

Mr. Mtaki Senior Counsel for the Applicant apart from conceding that he skipped the requirements of an affidavit in Rule 24(3) (c) and (d) of the Labour Court Rules, he maintains still that the Applicant's affidavit is correct hence not defective as it has complied with the Requirement of the Civil Procedure Code Cap. 33 R.E. 2002 a Principal Legislation and that Rule 24(3) of the Labour Court Rules contradicts the Civil Procedure Code, he referred also the Case of ***Uganda V. Commissioner of Prison ex-parte Matovu*** as an authority governing affidavit. I have carefully considered the arguments of the learned Counsel on this aspect and I have had a cursory glance on the mentioned case. With great respect I don't share his views and I have the ***raison d 'etre.***

The Labour Court as a specialized court and Division of the High Court has its Labour Laws and Rules enacted and passed by the legislature with the aim of guiding the Labour Court to achieve its ends, purpose and specific objectives which is social justice, hence the Labour Legislation are enacted to achieve that goal of ***Social Justice*** which is intended to achieve ***Industrial Harmony***. It is different from Legal justice which Mr. Mtaki holds its Placard firmly in this court. Professor Surya Narayan Misra

Pointed out this difference between social Justice and Legal Justice in his Master Piece Book titled; Introduction to Labour and Industrial Laws²⁰ That:-

... Social Justice is different from Legal Justice. The different is not of objective but aim at dispensing justice. The different is due two reasons;

- (i) Social justice aims at doing justice between classes of Society, and not between individual.*
- (ii) The method which it adopts is not unorthodox compared to the method of Municipal Law. Justice dispensed according to the law of master and servant based upon the principle of absolute freedom of contract and doctrine of **Laissez faire**, is legal justice. Social justice is something more than mere justice, it is a philosophy superimposed upon the legal system.*

It is therefore clear that the enactment of Labour legislation do not contradict other legislation like the Civil Procedure Code, because Labour Court Rules are also made under Section 55(1) of the Labour Institutions Act No. 7 of 2004, A Principal Legislation enacted by the Parliament. In practice the Civil Procedure Code is not applicable in the Labour Court. The Civil Procedure is applicable in the Labour Court when there is **a lacuna** in its Labour Court Rules, but where there is a specific rule or law providing for a certain aspect then the Civil Procedure or any law

²⁰ 14th Edition central law Publication Darbhanga colony (1994) Alahabad

thereof cannot apply. The Labour Court Rules provide for what rules and requirements an affidavit must contain, this is not a contradiction in my view with the Civil Procedure Code or any other law, or legislation.

Labour Legislation do not contradict other legislation, but rather they simplify and streamline procedures hence overshadows other legislation. Perhaps for the purpose of strengthening this point I am obliged to quote the Learned Authors of Labour Laws from Republic of South Africa, where our Labour laws are in Parimateria and heavily borrowed from, in their masterpiece work detailed in their book titled Essential Labour Laws: Collective Labour Law Volume 2 third Edition 2002: The most Learned Authors; Proffessor Annal Basson, Marylyn Christianson, Christoph Garbers, Proffessor PAK Le Roux, Dr. Carl Mische, and Dr. Emil Strydom. The most Learned Authors in Labour Law Writing on the purpose and objectives of the Labour Relation Act 1995 (South Africa) which is in Parimateria with The Employment and Labour Relations Act, 2004 (Tanzania) in most aspects state that;

...The Labour Relations Act 1995 also simplifies and streamlines procedures... as far as dispute resolution procedures are concerned where there is always the possibility that aspects of procedure (the procedure

a party must follow to have a dispute resolved) overshadows substance... the Act ... has been drafted in a revolutionary style and language that is simple and free of technicality easy to understand. This should not misled us into this thinking that everything is straight forward – many of the provisions of the Act still require careful interpretation...

I entirely and respectfully subscribe to the above position which applies also to our Labour laws legislations in so as far they are in Parimateria with the South Africa Labour Laws. We have efficient and effective dispute resolution mechanism and Procedures, simplified ***par-excellence*** which if are not read ***in ex-abandunt cautela*** (with the eyes of caution or extreme caution) may build a negative understanding that they contradict other legislation. ***Par exempli*** (for example) Section 57 of the Labour Institutions Act No. 7 of 2004 gives an automatic right for a party to appeal to the Highest Court of the Land (the Court of Appeal of Tanzania) when is aggrieved with the decision of the Labour Court Division of the High Court. The Court of Appeal has interpreted that Section wisely revolutionary and in regard to the objectives of the Labour Legislations of our country. See the Court of Appeal decision in the case of **Bulyanhulu Gold Mine (T) Ltd. Vs Nicodemus Kajungu & 1511 others**, Civil Appl. No. 37 of 2013, per Mmilla, JA. See also the Principal objectives

of the Employment and Labour Relations Act No. 6 of 2004 (Tanzania) in this Ruling ***in tandem*** (together) with Section 3 of the Act where the objectives are nomenclatured.

It cannot be said therefore that Section 57 of the Labour Institution Act ***Contradicts*** other laws which require the party aggrieved to have first apply before the High Court for leave to appeal to the Court of Appeal of Tanzania. But rather, in Labour and Employment matters regard must be had to the objectives of the Labour Laws Legislation in the country and the purpose thereof. The ***objectives*** and ***purpose*** of the Labour laws legislation is therefore not to contradict other piece of legislation; but;

*...to advance economic development, Social Justice
Labour peace industrial harmony and the
democratization of the work place by fulfilling the
primary objectives of Labour Laws legislations...*

The legislature intention to enact Labour Legislation was to achieve the Social Justice and hence Industrial harmony and Labour Peace. The words of the Supreme Pontiff, His Holiness Pope Pius XI, strengthened and cemented this point of achieving Social Justice, quoted from paragraph 51-52 of the Encyclical

Divini Redemptoris (of divine Redeemer) as quoted from the book *Introduction to Social Justice*,²¹ at page 35, that:

*...If Social Justice is satisfied the result will be an intense activity in economic life as a whole, pursued in tranquility and order ... But Social Justice cannot be said to have been satisfied as long as working men are denied a salary that will enable them to secure proper sustenance for themselves and for their family, as long as they are denied the opportunity of acquiring a modern fortune and forestalling the plague of universal pauperism as long as they cannot make suitable provisions through Public or private Insurance for old -age, for period of illness and for un-employment.....*²²

In order to achieve the specific goal of Social Justice as above explained Labour Legislation have been enacted for that great purpose and the Labour Courts have to deal with Labour and Employment matters on interpretation of Labour Legislation which are (as supra pointed out) enacted to achieve the specific objective which is Social Justice and Industrial harmony. To add more, Labour Legislations put ***in primo loco*** (in the first place) the first Law of Social Justice which is "...That the common good of all society be kept inviolate..."²³ Thus aiming at Social Justice Labour Legislation are simplified to achieve that purpose and as

²¹ Rev. William Ferres (Ph.D) *Introduction to Social Justice*, Published by Centre for Economic and Social Justice, Arlington 1997 Edition VA 22 of 2007.

²² *ibid*

²³ Rev. Williams op.cit note 21

rightly pointed by Elleen Baldry and Ruth maccaustand in their Paper titled "Social Justice in development"²⁴ when defining the term Social Justice that;

*...The words or at least concepts of Social Justice are used in context where people understand **Social Justice to be about fairness beyond Individual Justice.** (Emphasis mine)...*

The above excerpt about "Social Justice to be about fairness beyond individual justice is an important one. The Labour Court has been lenient to the parties in order to pull its objectives and purpose as a court of equity, to provide social justice and fairness to the extent that it has been the practice of the court to grant parties leave to re-file proper revision application after striking the incompetent application not properly cited with the enabling provision of the law and since the practice of the court is the law of the court (***cursus curiae est lex curiae***) the move cannot be taken (as) tantamount to contradicting other legislation which do not provide that "golden chance" to the parties regard being had ***in primo loco*** (in the first place) the objectives and purpose of Labour laws as it has been rightly pointed out ***supra*** that;

The purpose and objectives of the labour laws legislation is to advance economic development, Social Justice, Labour peace (Industrial harmony)

²⁴ Unpublished paper 2008, 7

and democratization of the work place by fulfilling the Primary Objectives of the act.... (and) one of the Primary Objective is to provide for more effective dispute resolution procedures and Mechanism for both dispute of right²⁵ and dispute of interest...²⁶ to keep the Procedures underlying labour litigation as simple as possible in order to speed up litigation ... namely delays...²⁷

One last example is that in Labour Laws the dispute about collective agreements is an important example of a simplified procedure to attain social justice, industry harmony or Labour peace, because disputes on collective agreements may have a significant adverse effect on the relationship between employers (or employers organization) and a Trade Union or Unions. Therefore every collective agreement (excluding closed shop,²⁸

²⁵ A dispute of right; is a dispute about the interpretation or application of already existing right. These rights may originate in the common law (such as the right that an employer has to give reasonable commands to an employee) in contract (such as the right to overtime pay contained in the existing contract of employment or in a collective agreement) or in Legislation (such as for example, the right not to be unfairly terminated.)

²⁶ A dispute of interest is a dispute about the creation of a new right (such as employees demanding that their employer must provide their children with after school care where this has never been done) or more commonly, about the variation of an existing right (for example, where employees demand an increase in wages)

²⁷ Proffessor Bassom et al Essential Labour law volume 2 collective labour law, Third Edition Labour law Publications, Houghton 2041 (South Africa) at page 21

²⁸ Closed shop agreement, is where a representative trade union and an employer or employers' organisation may conclude a collective agreement, to be known as a closed shop agreement, requiring all employees covered by the agreement to be members of the trade union.

and agency shop²⁹, agreements), must contain a Procedure which is simplified for the resolution of disputes about the interpretation of or the application of the collective agreement. ***The simplified procedure is not intended to contradict any other law or legislation, save to cater for the objectives and purpose of the Labour Laws per se.***

Nomenclature under Section 3 of Act No. 6 of 2004 as (a)(b)(c)(d)(e)(f) and (g) the Principal Objects of the Employment and Labour Relations Act No. 6 of 2004 for example, include ***inter alia.***

- (a) *To promote economic development through economic efficiency, productivity and social justice;*
- (b) *To provide the legal frame work for effective and fair employment relations...*
- (c) *...*
- (d) *To regulate the resort to Industrial action as a means to resolve disputes.*
- (e) *To promote a frame work for the resolution of dispute by mediation arbitration and adjudication*
- (f) *To give effect to the provisions of the Constitution of the United Republic of Tanzania of 1977, in so far as they apply to*

²⁹ Agency shop agreement, is where a representative trade union and an employer or employers' organisation may conclude a collective agreement, to be known as an agency shop agreement, requiring the employer to deduct an agreed agency fee from the wages of employee indentified in the agreement who are not members of the trade union but are eligible for membership thereof.

- Employment and Labour Relations and conditions of work, and*
(g) *Generally to give effect to the core convention of the International Labour Organisation as well as other ratified conventions.*

Now, despite the objectives of the Labour laws in our soil, the same should not be taken to despise the whole concept of legal writing and drafting and **surtout** (above all) the concept of legal justice at large, under any pretext of contradicting other laws and what- have- you, because social justice does not operate in isolation but **in tandem** (together) with legal justice. One distinguished Author rightly and currently pointed out in his book titled "Legal Philosophy; Jurisprudence"³⁰ that:

*...Social justice would not be possible in the absence of Legal justice and to a certain extent commutative justice. Legal justice, therefore, ensures that the relations of the individual to the community are well – regulated. In fact, it also imposes on the members of the society the duty to make a contribution to the realization of the common weal...*³¹

³⁰ Nyasani, J. Legal Philosophy; Jurisprudence. The Consolata Institute of Philosophy Press 3rd Edition 2010.

³¹ *ibid* at page 23

To conclude on the Preliminary objection raised by the Respondent which I entirely and respectfully agree, the Applicant was wrong for not complying with the simplified **rules** and **requirements** of an affidavit as spelt out under Rule 24 (3) (c) and (d) which are mandatory to be in the affidavit to form part thereof. The words "The Application **shall be supported by an affidavit, which shall clearly and concisely set out (a).... (b)(c)..... (d)** (emphasis is supplied) Pre-supposes the mandatory requirement in the circumstances. They do not contradict any other Law or Legislation, but regard being had first the objectives and purpose of the Labour Law Legislation. Short of that the affidavit become 'chilled' with incurable defects and hence it lacks the **ex-cathedra** (official authority) and **dunamis** (power) to support the application and as a result thereof the whole application becomes incompetent **in toto**.

Mr. Mtaki Senior Counsel for the Applicant has requested this court to order an amendment in case the court finds that the affidavit of the Applicant is defective. He relied on the case of **Samwel Kimaro V. Hidaya Didas**³² that it is not always where

³² Civil application No. 20 of 2012 CAT at Mwanza (unreported)

affidavit which are defective the court should always strike out the case, there is a room for amendment as the ***defect does not go*** to the roots of the matter.

With great respect to the Learned Senior Counsel, the omission of the Applicant to include Paragraph (c) and (d) of Rule 24 (3) of the Labour Court Rules so as to form part of the affidavit is an irregularity which goes to the root of the matter. The Applicant's duty to include paragraph (c) and (d) of Rule 24(3) was by and large ***Vinculum Juris*** (Bond of Legal necessity) and he (Applicant) cannot "escape" to be called ***De son tort de mesne*** (Author of his own wrong)

The present revision Application cannot be adjourned pending the amendment of the affidavit as prayed by the Learned Counsel for the Applicant because an incurably defective affidavit cannot be amended as the practice has hitherto been in this court and the highest court of the land ***id est*** the Court of Appeal of Tanzania and since ***cursus curiae est lex curiae***, that is; The practice of the court, is the law of the court, It follows therefore that in the light of the Court of Appeal holding in **Leon Silayo Ngalai V. Hon. Justine Salakana**³³ as quoted with approval by

³³ Civil appeal No. 38 of 1996 (unreported)

the Court of Appeal in **The Project Manager Es-ko. International. Kigoma V. Vicent J. Ndugumbi**³⁴ that the only remedy is to strike the application "Chilled" by a defective incurably affidavit as application is incompetent. The court ***in totidem verbis*** (in many words) stated in ***Ngalai V. Ngalai*** (case) Supra, that;

... the second aspect is whether this court may adjourn an appeal which is incompetent ... this court had said it before that an incompetent appeal amounts to no appeal. It follows therefore the court cannot adjourn what it does not have. Under such circumstances, what the court does is to strike out the purported appeal off the register....

Turning now to the Preliminary objection raised by the Learned Counsel for the Applicant the Counter Affidavit appears at page 3 that the document was filed and received by a clerk of the Commission for Mediation and Arbitration who signed the Counter affidavit must be expunged from the record because it seems that the document was not filed in the High Court Labour Division rather it was filed in the Commission.

With respect, this Preliminary objection should not take the precious time of the court because as currently pointed out by the Respondent Counsel the typing error committed does not go to

³⁴ Civil appeal No. 22 of 2009 CAT at Tabora Page 7 (unreported)

the root of the matter and it cannot cause the Counter Affidavit to be expunged from the case file and I think to my mind that typing errors do occur in the course of the process and I order the same to be rectified so as to read in the High Court of Tanzania Labour Division in lieu of in the Commission for Mediation and Arbitration.

In the event and on the foregone I strike out off the Register this revision application for being incompetent before the court. Application for revision is strike out, with leave of twenty eight (28) days for the Applicant to re-file a competent application and days commence to run from today the 20th day of March 2015.

I.S. Mipawa
JUDGE
20/03/2015

Appearance:

1. Applicant: Mr. Mtaki Advocate for Applicant - Present
2. Respondent: Present

COURT: Ruling has been read over and explained to the parties present as shown in the appearance above.

I.S. Mipawa

JUDGE

20/03/2015