THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

REVISION NO. 44 OF 2017

(Originating from a Ruling in Complaint Ref. CMA/MBY/207/2016 in the Commission for Mediation and Arbitration for Mbeya at Mbeya)

TANROADS (MBEYA).....APPLICANT

VERSUS

FELIX MASATU.....RESPONDENT

JUDGEMENT

Date of Last Order: 29/04/2020
Date of Judgment: 23/07/2020

MONGELLA, J.

The respondent herein filed a complaint in the Commission tor Mediation and Arbitration (CMA) following termination of his employment by the applicant. The applicant raised a preliminary objection to the effect that the CMA had no jurisdiction to entertain the matter as the complainant (the respondent herein) was a public servant thus under the domain and power of the Public Service Commission and governed under the Public Service Act, No. 8 of 2002. The Hon. Arbitrator dismissed the preliminary objection ruling that the CMA had jurisdiction over the matter as the respondent was not a public servant. Disgruntled by this decision, the

applicant has preferred this revision in this Court. In this application he prays for this Court to call for the records and examine the proceedings and the ruling rendered so as to satisfy itself as to its propriety, legality, rationality, logic and correctness. The application is premised on the following grounds:

1. *Whether the Arbitrator was right in holding as she did, in the 3rd paragraph of page 5 of her ruling that the respondent is not a public servant.*

2. *Whether it is correct as implied by the Arbitrator's reasoning that the respondent being employed by the Applicant on a contract basis lacks the qualification of being a public servant despite the fact that he was holding office in public institution.*

3. *Whether it is correct as implied by the Arbitrator's reasoning that the respondent by not having a cheque number lacks the qualification of being a public servant despite the fact that he was holding office in public institution.*

4. *Whether the Arbitrator was correct in holding that the dispute between the applicant and the respondent can be resolved through the use of Employment and Labour Relations Act in forgetfulness of the compulsory requirement of the Public Service Act, 2002, which ousts the jurisdiction of the Commission (CMA) when dealing with public servants.*

Both parties were represented whereas the applicant was represented by Mr. Usaje Mwambene and the respondent was represented by Ms. Irene Mwakyusa, both learned advocates. The application was argued by written submissions.

Mr. Mwambene argued collectively on the 1st, 2nd and 3rd grounds. He contended that the Hon. Arbitrator grossly erred in law and fact by failure to appreciate the relationship between the applicant and the respondent leading her into concluding that the respondent was not a public servant. He went further to define the term "public servant" by citing the provisions of section 3 of the Public Service Act, No. 8 of 2002 which states:

> *"... a person holding or acting in a public service office, and whereas the "public service office" for the purpose of this Act means a paid public office in the United Republic charged with the formulation of Government policy and delivery of public services."*

Basing on the above cited definition, Mr. Mwambene argued that working on a public office for gain and delivering public service is a key element to be considered when defining a public servant. He further cited section 4 of the Interpretation of Laws Act, Cap 1 R.E. 2002 which interprets a public servant by stating that:

> *"Public Officer" or "public department" extends to and includes every officer or department invested with or performing duties of a public nature, whether under the immediate control of the President or not, and includes an*

officer or department under the control of a local authority, the community, or a public corporation"

He argued that the respondent was employed as a Weighbridge Shift In-charge by the applicant who is a Government Agency named TANROADS. He said that TANROADS is an executive agency of the Government, working under the Ministry of Works, Transport & Communication, and is established under section 3 (1) and (2) of the Executive Agency Act, Cap 245 R.E. 2002 together with the Executive Agencies (The Tanzania National Roads Agency (Establishment) Order, GN No. 293 of 2000. He contended that, being a Government executive agency, TANROADS' employees and their affairs are regulated by the Executive Agencies Act of 2002 together with the Public Service Act and their respective regulations. He added that the respondent was working with TANROADS Regional Office in Mbeya, whereby he was employed to serve the general public at Nkangamo Weighbridge Station as the Shift in-charge of the said weighbridge station. He was or the view that this is a Government office because the weighbridge is operated by the Roads Maintenance Department of TANROADS to serve the general public.

Mr. Mwambene further argued that the respondent was employed by the applicant on contractual basis. He said that TANROADS has two types of employees being permanent and pensionable and those on contracts. Those employees from both categories are TANROADS employees thus Government employees as they meet the criteria of public servants as defined above. He was of the view that the Hon. Arbitrator misdirected herself for ruling that the respondent was not a public servant without

considering the fact that he was employed in a government office and delivering public service, thus governed under the Public Service Act.

On the fourth ground, Mr. Mwambene argued that the CMA has no jurisdiction to entertain an employment dispute involving a public servant. He argued that there are conflicting provisions between the Employment and Labour Relations Act (ELRA) and the Public Service Act, which must have made the Hon. Arbitrator to assume that the CMA has jurisdiction to entertain the matter. He contended that the confusion is brought by section 2 (1) of the ELRA which provides that "***the Act shall apply to all employees including those in the public service of the Government of Tanzania***." He said that on the same line the Labour Institutions Act, No. 7 of 2004 (LIA) establishes the CMA to deal with employment and labour relations under the ELRA. However, he argued that these provisions of the ELRA and the LIA are in conflict with section 30 (1) and (2) of the Public Service Act as amended by section 12 (a) and (b) of the Public Service (Amendment) Act No. 18 of 2007 read together with Regulation 2 (f) of the Public Service Regulations, GN. No. 68 of 2003 which provides:

> *"30 (1) Servants in the Executive Agencies and Government Institutions shall be governed by the provisions of the laws establishing the respective executive agencies and institutions."*

> *"30 (2) Without prejudice to sub section (1), public servant referred to under this section shall also be governed by the provisions of this Act."*

"Reg. 2 These Regulations shall apply to all Public servants in the following services.

(f) The Executive Agencies service and the Public Institutions Service"

From the above cited provisions, Mr. Mwambene contended that public servants are governed by the Public Service Act together with the laws establishing their respective Government agencies and institutions. He further referred to section 9 (1) of the Public Service Act, 2002 saying that the provision establishes the Public Service Commission of which under section 9 (3) (vi) and 10 (1) (e) is entrusted to cater for executive agencies and public institutions, including receiving and acting on appeals from the decisions of other delegates and disciplinary authorities. Mr. Mwambene further referred to the Written Laws (Miscellaneous Amendments) (No. 3) Act of 2016 which amended the Public Service Act by adding a new provision, being section 32A. He said that this new provision has brought a new shift on the conflict of law between the ELRA and the Public Service Act. He submitted that the said provision states:

"A Public servant shall, prior to seeking remedies provided for in the Labour Laws, exhaust all remedies as provided for under this Act."

From the above provision he argued that as of now, a public servant has no other option than to fully utilize all the remedies available under the Public Service Act, before exploring other avenues in dispute settlement, which is to appeal to the Public Service Commission if aggrieved by the decision of his disciplinary authority. He cited a decision of this Court whereby a similar issue was underscored. That is the case of ***Benezer***

David Mwang'ombe v. The Board of Trustees of Marine Parks and Reserves Unit, Miscellaneous Application No. 380 of 2018 (unreported) in which it was held:

> *"...the law is very clear that courts have no jurisdiction to entertain disputes of public servants which are vested at the Public Service Commission."*

He argued that the Public Service Commission as an appellate disciplinary authority of public servants is also recognised under section 9 (5) of the Executive Agencies Act, Cap 245 R.E. 2002 as amended by the Executive Agencies (Amendment) Act No. 13 of 2009 read together with Regulation 55 (1) of the Executive Agencies (Personnel Management) Regulations, 1999, GN No. 75 of 1999 as amended by the Executive Agencies (Human Resources) Regulations, GN No. 195 of 2012.

Reverting to the point he earlier advanced regarding the conflict between the ELRA and the Public Service Act, Mr. Mwambene argued that the ELRA is a general law enacted to govern the relationship between the employer and the employee. He said that, on the other hand, the Public Service Act is a special law enacted to specifically govern the employment relationship of Public servants. He argued that it is an established general rule of statutory interpretation that where there is a conflict between a special and general Act, the provisions of the special Act prevail. To Bolster his argument he persuaded this Court with a Indian decision in ***Ejaj Ahmad v. The State of Jharkhand and Binay Kumar***, High Court of Jharkhand at Ranch C.M.P. No. 911 of 2007 in which it was held:

> *"A special law is applicable to a particular and specified subject...special law is a provision of law which is applicable to a particular or specified subject or class of subject...it will apply on special class of case and have no application in general cases."*

He further cited a case from the Court of Appeal of this Land in ***James Sendama v. Republic***, Criminal Appeal No. 279 "B" of 2013 (CAT at Tabora) whereby the Court expounded on whether a statute of general application can override a specific statute. The Court held:

> *"It is true that the provisions of the Public Prosecutions Service Act empower the DPP to delegate any of his functions, but we do not agree that it has the effect of overriding GN 191 of 1984. This is so because, first, the National Prosecutions Service Act is a statute of general application. Normally, such a statute would not apply where there is specific legislation in existence on a specific subject unless the wording of the particular provision suggests otherwise."*

He referred again to the case of ***Benezer David Mwang'ombe*** (supra) in which it was held:

> *"...despite the fact that Labour Laws cater for disputes between employers and employees relations as a general rule, where there is specific or special law governing a certain category of employer-employee relationship like the Government and Public Servants as it is, in this case, the specific law should prevail."*

In conclusion Mr. Mwambembe reiterated his argument that the respondent falls under public servants thus the CMA has no jurisdiction to entertain the dispute between him and the applicant. Citing the case of

The Registered Trustees of National Social Security Fund v. Kassim Juma Kimilila, Misc. Labour Application No. 61 of 2015 (unreported), he said that a court of law must ensure and satisfy itself that it has jurisdiction to entertain a matter tabled before it. He cited another decision on ***Fanuel Mantiri Ng'unda v. Herman M. Ng'unda & Others***, Civil Appeal No. 8 of 1995 (CAT, unreported) in which the Court stated the following regarding jurisdiction:

> *"The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature...The question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdiction position at the commencement of the trial...it is risky and unsafe for the court to proceed on the assumption that the court has jurisdiction to adjudicate upon the case."*

With the submission he made above he prayed for the CMA ruling to be quashed.

Ms. Mwakyusa made a general reply to Mr. Mwambene's submission. She supported the decision of the Hon. Arbitrator to the effect that the respondent does not fall into public service as he was not employed on permanent and pensionable basis, but on contractual basis and had no check number. She explained the procedure of employment in the Government to the effect that after the employee has signed the contract, whether for permanent or specific period, then his appointment letter and other personal particulars are entered into the Human Capital Management Information System (HCMIS) to facilitate payment of the employees first salary, create new employee records and generate a

check number. She distinguished the case of ***Benezer David Mwang'ombe*** (supra) cited by Mr. Mwamnbene stating that the learned counsel did not state what the status of the employee was in the said case to enable this Court to see if the circumstances are the same. Regarding the procedure of employment in the Government sector she elucidated above, she argued that the respondent did not go through the said procedure and thus does not qualify as public servant.

I first wish to commend the learned counsels, particularly, the applicant's counsel for the industrious research exerted in his eloquent submission. However, after considering the arguments of both counsels and the record placed before this Court, I find it is clear that this revision emanates from the decision of the CMA in preliminary objection. It is clear from the record that the matter was interlocutory and the resulting impugned ruling did not finalise the matter between the parties. Section 50 of the Labour Court Rules GN No. 106 of 2007 categorically prohibits appeals, review or revision from interlocutory decisions which do not finalise the dispute between the parties. It provides:

> "***No appeal, review or revision shall lie in interlocutory or incidental decisions or Orders unless such decision has the effect of finally determining the dispute.***" *[Emphasise is mine]*

The ruling of the CMA had no effect of finalizing the matter. In my settled view therefore, if the applicant was still convinced that the CMA had no jurisdiction, he should have patiently waited for the matter to be finalized, and then file revision in this Court including the issue among the grounds for revision. This position was also settled by my learned brother, Ndunguru,

J. in the case of ***TANROADS (MBEYA) v. Webster Lomba***, Labour Revision No. 43 of 2017 (HC at Mbeya, unreported). Convinced by another decision of this Court in ***Tanzania Fertilizers Company Ltd. v. Ayoub Omari***, Labour Revision No. 349 of 2015, (HC Lab. Div. at DSM, unreported) the learned ruled:

> *"At the outset I wish to point that, the ruling of the CMA which gave rise to this application did not finalize the matter rather the application had to proceed with the hearing; hence the present application is on an interlocutory one, hence this application contravenes Rule 50 of the Labour Court Rules GN No. 106 of 2007... The applicant ought to have made the present application as ground for revision (on jurisdiction issue) after the CMA had delivered the award on merit..."*

I am in line with the reasoning of my brother, Ndunguru, J. on this issue considering the express prohibition under section 50 of the Labour Court Rules against filing appeal, review, or revision on interlocutory decisions that do not finalize the dispute.

Having observed as above, I consequently dismiss the applicant's application and order the Labour Dispute in Complaint Ref. CMA/MBY/207/2016 at the CMA in Mbeya to proceed from the stage it reached. Being a labour matter I make no orders as to costs.

Order accordingly.

Dated at Mbeya on this 23rd day of July 2020.

L. M. MONGELLA

JUDGE

Court: Judgment delivered in Mbeya through virtual court on this 23rd day of July 2020 in the presence of Mr. Usaje Mwambene, learned advocate for the applicant.

L. M. MONGELLA

JUDGE