IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 584 OF 2018

DAR ES SALAAM CITY COUNCIL.....APPLICANT

VERSUS

GENEROSE GASPAR CHAMBI .....RESPONDENT

JUDGMENT

Date of last Order: 6/03 /2020
Date of Judgment: 16/04/2020
Z. G. Muruke, J

The applicant **DAR ES SALAAM CITY COUNCIL**, being aggrieved with the award of Commission for Mediation and Arbitration [herein after to be referred to as CMA], on labour dispute No.CMA78/DSM/ ILA/R.268/16/718 delivered on 7th May,2017 by Matalis,R, Arbitrator, filed present application seeking revision of the award.

Application is supported by affidavit of the applicant's Principal Office Chivawe Mberesero. In opposition, respondent filed counter affidavit sworn by the respondent Jenerose Gaspar Chambi. The case was disposed by way of written submission, I thank both parties for adhering to the schedule hence this judgment. The applicant was represented by Chevawe Mberesero one of the applicant solicitors, while the respondent was represented by Gauden Mrugaruga –Personal Representative of her own choice.

The respondent was employed by the applicant as a Personal secretary on 1st September,2003. She worked with the applicant until 20th July, 2011, where she was terminated on absenteeism. Aggrieved with termination, the respondent filed a dispute before CMA claiming to have been unfairly terminated. CMA found that she was unfairly terminated. Same dissatisfied the applicant, hence present revision.

Submitting on the grounds for revision, the applicant counsel stated with ground three, that, CMA had no jurisdiction to entertain the dispute on the reason that , the respondent had to appeal to the Commission of Public Servant instead of CMA, referring **Section 25(1), (b) of the Public Service Act No. 8 of 2002 reading together with Rule 61(1) of the Public Service Regulations of 2003 and Section 32A of the Public Service Act No. 8 of 2002 as amended by Written laws Miscellaneous Amendment Act No.3 of 2016** which provided for exhaustion of the remedies provided under the Public Service Act prior seeking available remedies under the labour laws.

The Applicant counsel added that, even if the respondent could have said that the amendment came after she had instituted her case, the position of the law is clear that, when a new enactment deals with rights, procedures such enactment applies to all actions before or after passing the bill. He cited the cases of **Benbros Motors Tanganyika Ltd vs. Ramanlal Haribhai Patel** [1967] HCD no.435 **and Makongoro vs Consiglio** [2005] EA 247 as referred in the Court of Appeal case of

Rebeca Wegesa Isack vs. Tabu Msaigana and Peter Ngekela Civil Application number 444/08 of 2017 that the law operates retrospectively on matters affecting procedure only.

In reply to the applicant's submissions, Mr. Gauden Murugaruga argued that, the respondent was employed in a public service on Operational services which is considered to be permanent term as the agreement is without reference to time or task. According to regulation 59 of the Public service Regulations, 2003, her disciplinary proceedings are provided under Security of employment Act which was repealed and replaced by the Employment and Labour Relations Act (ELRA). Therefore CMA has jurisdiction to entertain the respondent's complaint against the applicant. Respondent representative referred the cases of **James Leonidas Ngonge Vs Dawasco,** Labour Revision No.382 of 2013 and consolidated Labour revisions of **Attorney General vs. Maria Mselemu** L.revision No.270/2008 and **Attorney General vs. Allan Mulla** where it was held that " The CMA has jurisdiction in all labour disputes irrespective of whether the government is a party". Mr. Mrugaruga also cited the case of **Mahona Vs University of Dar es salaam** (1981) TLR 5.

It is worth noting that Jenerose Gasper Chambi, (respondent) first filed complaint No. CMA/DSM/ILA/28/11/148 at the Commission for Mediation and Arbitration 2011. Same was marked withdrawn upon request by same respondent representative Mr. Gauden Mrugaruga of LABMAN CONSULT LTD, on 10/03/2016. For clarity same is hereby reproduced.

AMRI:

Ruhusa ya mgogoro kuondolewa imetolewa, mgogoro unaweza kufunguliwa ndani ya siku 30 tangu 10/03/2016.

Sgd:
Mwidunda
MUAMUZI
10/03/2016

From the records respondent was granted thirty days leave to file complaint if she still wishes. Second complainant of which award is subject of this revision was filed on 06th April, 2016.

Having gone through the rival submissions and records, this court is called upon to determine the following issues:

i. Which type of contract did the parties engaged to?
ii. Whether the employer had valid reason to terminate the applicant.
iii. Whether the procedure for determination were adhered.
iv. What are the reliefs to the parties?

Before addressing the raised issues, I find it worth to decide on the issue of jurisdiction on this matter as raised on ground three of revision, the applicant claimed that CMA had no jurisdiction when determine the matter at hand. From records, it is clearly shown that the cause of action arose in 2011, though the respondent delayed to pursue the same at the time when the cause of action arose, but it was with leave of the court, as shown above.

In 2004 the Employment and Labour Relations Act (ELRA) was enacted and its application covered the employees in Public Service employees serve for exclusion as per Section 2 of the ELRA. However, in 2016 with Miscellaneous Amendment Act no.3/2016, the parliament amended the Public Service Act, by adding section 32A which required all employees on Public Service in labour dispute, to exhaust internal remedies provided in the Act before engaging on other labour laws.

This court having heard both parties, there is no dispute that amendments of Public Service Act provide that public servant must exhaust all local remedies provided under the Public Service Act Cap 298. This mandatory requirement is captured under section 26 of the written laws (Miscellaneous Amendments) No. 3 of 2016. Thus, prior to seeking remedy from other established bodies, a Public servant must comply with the directives provided in the public service Act.

Act no. 18 of 2007 introduced subsection 2 of section 30 of the Act to include servant working in all government institutions to be governed by the Public Service Act. For clarity Section 30 now read as.

> *(1) Servants in the Executive Agencies and Government Institutions shall be governed by provisions of the laws establishing the respective executive agency or institutions.*
>
> *(2) Without prejudice to subsection (1) Public Servants referred under this section shall also be governed by provisions of this Act.*

The above cited provision provided for applicability of the Public Services Act to employees of all public institutions, including the respondent. Therefore employees under Public Institutions are governed by the Laws establishing those agencies and the public services Act. Moreover, Section 22 of the Employment and Labour Laws (Miscellaneous Amendments Act) 2015 provides that where there is inconsistency between Labour laws and Public Services Act, the Public Services Act shall prevail. It is therefore settled that servants in the executive agencies and government institutions shall be governed by provisions of the Laws establishing the respective executive agency or institutions and where there is inconsistency between the two the Public Services Act shall prevail. There is no dispute that amendments of Public Service Act provide that public servant must exhaust all local remedies provided under the Public Service Act Cap 298. This mandatory requirement is captured under section 26 of the written laws (Miscellaneous Amendments) No. 3 of 2016. Thus, prior to seeking a remedy from other established bodies, a Public servant must comply with the directives provided in the public service Act.

From the records the respondent employment contract under Section 6 states that ***"Your appointment is subject to the relevant provision of the Local Government Staff Regulations, 1983 as supplemented by circular instructions and as amended from time to time."***

As correctly submitted by Chavawe Mberesero counsel for the applicant that the above procedure was given to the respondent even before the establishment of section 32A above, in which respondent was

directed in her termination letter to appeal pursuant to Section 25(1)(b) of the Public Service Act No. 8 of 2002 reading together with rule 61(1) of the Public Service Regulations of 2003.

The position of the law is clear that when a new enactment deals with rights procedures such enactment applies to all actions before or after passing the bill. This position was stated in the **Benbros Motors Tanganyika Ltd Vs. Ramanlal Haribhai Patel** [1967] HCD No. 435 that.

> *"When a new enactment deals with rights of action unless it is so expressed in the Act and existing right of action is not taken away, but when it deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act."*

The position was also cemented in the case of Makorongo Vs. Consiglio [2005] EA 247 where it was held that:-

> *"One of the rules of construction that a court uses to ascertain the intention behind the legislation is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary."*

All the above precedent were considered in a recent court of Appeal decision in Civil Application No. 444/08 of 2017, **Rebecca Wegesa Isaack Vs. Tabu Msaigana, Peter Ngekela, Mwambegela, J.A**, held

at page 3 that, indeed, as correctly stated by Mr. Mushobozi, given the amendment, this application has been overtaken by events. And in situations like the present, as rightly argued by Mr. Magongo, the procedural amendment will operate retrospectively, as the law requires;

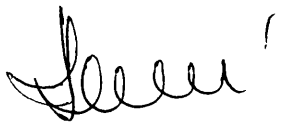
In the case at hand it is a matter of procedure. The amendment created by written laws (Miscellaneous Amendments) No. 3 of 2016, ought to act retrospective. Respondent did not take step to the public service commission. Instead went straight to CMA, that adjudicated the dispute without jurisdiction. Jurisdiction to hear the dispute before any court, tribunal or any other authority is fundamental. To the best of my understanding, any dispute conducted without jurisdiction, proceedings, subsequent orders, rulings and or Judgment are rendered nullity, and ought to be quashed on appeal or revision. It is obvious that, respondent out to have appealed to Public Service Commission. Instead, she referred the matter to CMA, which lacked jurisdiction to entertain the same. Thus, proceedings, in labour dispute No. CMA/DSM/ILA/R. 268/16/718 are quashed and award is set aside. Ordered accordingly.

Z. G. Muruke

JUDGE

16/04/2020

Judgment delivered in the presence of Chevawe Mberesero, Learned Counsel for the applicant also holding brief of Gaudine Mrugaruga, for the respondent.



Z. G. Muruke

JUDGE

16/04/2020