IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 418 OF 2021

BETWEEN

SETH MBENA ..... APPLICANT

VERSUS

INTERTEK TESTING SERVICES
(EAST AFRICA) (PTY) LTD ..... RESPONDENT

RULING

S. M. MAGHIMBI, J.

This ruling is in respect of the preliminary objection raised by the respondent's Counsel against an application for revision of the decision of the Commission for Mediation and Arbitration ('CMA') filed herein. The relevant objection is to the effect that: -

i. That, the application is incompetent for failure to file a mandatory notice of intention to seek revision contrary to Regulation 34(1) of the Employment and Labour Relations (General) Regulations, GN 47 of 2017 ('Regulations').

The preliminary objection was argued by way of written submissions. Before this court the applicant was represented by Mr. Mwambene Adam, Learned Counsel whereas Mr. Lwijiso Ndelwa and Mr. Francisco Kaijage Bantu, Learned Counsels appeared for the respondent.

I appreciate the comprehensive submissions of both Counsels which shall be taken on board in due course of constructing this ruling.

Arguing in support of the preliminary objection the respondents' counsels submitted that the application is incompetent for failure to file CMA F.10 which is a notice of intention to seek revision pursuant to Regulation 34(1) of the Regulations. They stated that filing of the said notice is mandatory and important for commencement of any revision before the labour court thus, failure to file the same renders the application incompetent. They further submitted that the word shall is used in the relevant provision is coached in mandatory terms in accordance with section 53 of the Interpretation of Laws Act, (Cap 1 RE 2019) ('ILA'). He cited numerous decisions including the case of **Unilever Tea Tanzania v. Paulo Basondole**, Labour Revision No. 10 of 2010 (unreported) and therefore urged the court to struck out the application.

Responding to the preliminary objection Mr. Mwambene submitted that failure to file notice of intention to seek revision is procedural irregularity which does not go to the root of the revision. He argued that it is a settled law that in every procedural irregularity the crucial question is whether it has occasioned mis courage of justice as it was

held in the case of **Flano Alphonce Masalu @ Singu vs Republic (Criminal Appeal 366 of 2018) [2020] TZCA 197 (30 April 2020). He** stated that in his submissions the respondent's counsels did not state how the respondent was prejudiced by failure to file the said notice. He therefore urged the court to overrule the objection in question.

The contravened provision, Regulation 34(1) of the Regulations provides as follows:-

"Regulation 34(1) The forms set in the Third Schedule to these Regulations shall be used in all matters to which they refer."

It is undisputed fact that in the present application the notice of intention to file revision was not filed. Therefore, Regulation 34(1) of the Regulations quoted above was not complied with. The question to be addressed is what is the effect of failure to file the relevant notice. I find the question to be determined by this court, is whether the Revision at hand was initiated by CMA Form No. 10 which is required under Section 34(1) of the Regulations. Since it has not been established that the said form was or was not filed at the CMA, the presumption is that it was not filed and the follow up issue is whether the omission to do so is fatally defective to make the application incompetent. There is no need of

evidence to be adduced since if the form was filed, we would not have had these lengthy arguments.

Having said that, I will now move to determine the objection. The Regulations that is a subject of the objection is made under Section 98(1) of the ELRA. The Section provides:

98.-(1) The Minister may, in consultation with the Council, make regulations and prescribe forms for the purpose of carrying out or giving effect to the principles and provisions of this Act.

The Regulations in question have their basis under the cited provision of the ELRA. Turning to the specific provision in dispute, the Regulation 34(1) provides:

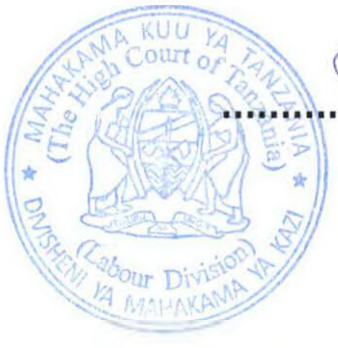
"The forms set out in the Third Schedule to these Regulations ***shall be used in all matters*** *to which they refer."*

In simple interpretation, the Regulation requires that in order to make or initiate any application under the Regulations or any other law in relation in matters where there are special forms provided for, those forms shall be used in the matters they refer to. For instance, a dispute is referred to the CMA by the CMA Form No. 1 made under Regulation 34(1) of the Regulations; it makes it mandatory such that in any case that the Form No. 1 is missing in the records, the Court of Appeal struck

out the appeal. (see the holding in the case of **CM-CGM Tanzania Ltd vs Justine Baruti (Civil Appeal 23 of 2020) [2021] TZCA 256 (15 June 2021**)

As far as the records are and taking from the submissions of the applicant, it has not been disputed that the said Form No. CMA F.10 was not lodged at the CMA prior to the filing of this revision application. Since the word "shall" has been used in the Regulation that created the Forms, the omission to do so is a fatal defect that cannot be cured by a simple argument/amendments. Owing to that I find the application before me to be fatally defective for failing to comply with the mandatory provisions of the Regulation 34(1) of the Regulation and consequently, the application is hereby struck out. However, in the interest of expeditious disposal of labor matters, I suo moto proceed to grant the applicant leave to refile the application for revision within twenty one (21) days from the date of this order after filing before the CMA the missing CMA Form No. 10.

Dated at Dar-es-salaam this 23rd day of May, 2022



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S.M. MAGHIMBI
JUDGE