

THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

LABOUR REVISION NO.81 OF 2019

(Originating from Labour Dispute No. RF CMA/GTA/90/2017)

GEITA GOLD MINING LIMITED APPLICANT

VERSUS

SAMWEL JAPHAT RESPONDENT

RULING

Last order: 12.06.2020

Ruling date 18.06.2020

A.Z.MGEYEKWA, J

This an application for revision whereas, the applicant prays for this court to call and revise the proceedings of the Commission for Mediation and Arbitration of Geita in Dispute No. CMA/GTA/90/2019. The application was opposed by the respondent who filed a Counter Affidavit and raised a preliminary objection on three grounds that:-

1. *That the Notice of application is defective by not containing the address and description of the parties contrary to Rule 24 (3) (a) of GN. No. 106 of 2007.*
2. *That, the affidavit is incurably defective by not containing the name of the Commissioner in jurist contrary to section 8 of the Notaries Public and Commissioners for Oaths Act as amended from time to time.*
3. *That, the application is defective by not containing an index to the pagination as per Rule 46 (1), (2) and (3) of GN. No. 106 of 2007.*

Submitting for the first point of objection, Mr. Lutehanga submitted that in any application on labour cases the Labour Court Rules, 2007 GN. No. 106 of 2007 must be observed. He went on to argue that Rule 24 (3) (a) of the Labour Court Rules, 2007 GN. No.106 of 2007 provides that:-

"The application shall be supported by an affidavit which shall clearly and concisely set out the names, description, and address of the parties."

Mr. Lutehanga argued that the affidavit supporting the application is defective since it does not contain the addresses of the parties as required by the Labour Court Rules. He went on to submit that the affidavit is also defective for failure to contain an index to the pagination as required by

Rule 46 (1) (2) and (3) of the Labour Court Rules, 2007 GN. No. 106 of 2007.

It was the learned counsel for the respondent further submission that the application before this court is incurably defective since its jurat of attestation does not contain the name of the Commissioner for Oaths contrary to section 8 of the Notaries Public and Commissioner for Oaths Act as amended by the Written Laws (Miscellaneous Amendments) Act No.2 of 2016. To fortify his argumentation he cited the case of **Darusi Gidabosi v Republic** Court of Appeal of Tanzania, Arusha (unreported).

The Court of Appeal held that:-

"In the instant application the Commissioner for Oath has failed to insert his name in the jurat which is contrary to section 8 of the Notaries Public and Commissioner for Oaths, Act, Cap.12 [R.E 2002] as amended by section 47 of the Written Laws (Miscellaneous Amendments) No.02 Act, 2016, such defect renders the affidavit in support of the Notice of Motion incurably defective."

In conclusion, Mr. Lutehanga argued that with the cited authorities he prays this court to dismiss this application for being defective.

In his brief reply, in relation to the first objection, Ms. Stella Manongi submitted that affidavit in support of the Notice of Application clearly

provided descriptions and addresses of the parties. She went on to argue that the applicant's affidavit is sworn by the Principal Officer of the applicant, one David Nzaligo who stated his descriptions and address on behalf of the applicant. He referred this court to the applicant's affidavit before the first the beginning of the first paragraph and went on to argue that the descriptions of the respondents are stated in the second paragraph. She continued to argue that the affidavit is not a prescribed form and the cited law did not provide specifically where in the affidavit the descriptions should be located. Ms. Stella Manongi added that the descriptions can be placed in the first, middle, or last paragraphs. She urged this court to find that the applicant stated clearly the names, description, and addresses of the parties as required by the law.

Submitting for the second objection, the learned counsel for the applicant argued that the applicant's affidavit was properly attested and filed in accordance with the law. He urged this court to dismiss the second objection.

With respect to the third objection, Ms. Stella Manongi argued that the applicant has complied with the provisions of the law in filing his affidavit. She forcefully submitted that the affidavit cannot be defective

for not containing an index to pagination since the same does not render the whole application defective. She urged this court to disregard the third objection because it does not affect the root of the subject matter and does not render injustice to the other party. To buttress her position she cited the case of **James Funke Gwagilo v Attorney General** [2004] TLR 161.

The learned counsel for the applicant invited this court to consider the overriding principles in determining the matter this court to consider just and timely disposal of the proceedings. He referred this court to the case of **NBC LTD v Ahmad Mkwepu** Misc. Labour Application No. 195 of 2013 High Court of Tanzania (Labour Division) Dar Es Salaam (unreported) which held that:-

"The spirit of the Labour Court has always been to expedite the matter before it without too much lingering on technicalities, regard being also the Labour Court is the Court of law and equity."

She went on to argue that the strength of the above authority is that procedural technicalities should not be given much weight especially on the defects which are not incurably defective to avoid the unnecessary delay on the disposal of the dispute.

In conclusion, the learned counsel for the applicant prays this court to consider the cited supporting authorities and find that the purported points of objections are not maintainable in law thus the same deserves to be dismissed.

After a thorough perusal of the point of preliminary objection along with the submissions of both parties, the issue for determination is *whether the preliminary objection is meritorious.*

Starting with the third point of objection, that the application is defective by not containing an index to the pagination as per Rule 46 (1) (2) of the GN. No. 106 of 2007. Turning to the Notice of Application in question, I have noted that the particulars of parties and the index to the pagination are missing. Does the same justify striking out of the application? I ask myself? I think it does not. It is true that the applicant has not included an index to the pagination but also I understand that rules of procedure should be adhered to but not without some sense of reasoning. Accordingly, for this reason, I find the omission does not go to the root of the application. Thus, this objection is demerit.

Addressing the second point of objection that the affidavit is incurably defective by not containing the name of Commissioner in jurat. A perusal of the Applicant's affidavit, which was taken on 9th September, 2019, the

court records shows that the jurat of attestation includes the name of the Commissioner for Oaths as stated under section 8 of the Notaries Public and Commissioners for Oaths Act, Cap.12 [R.E 2002] as amended by the Written Laws (Miscellaneous Amendments) Act No.2 of 2016 which read:

" Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act **shall insert his name** and state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made." *(Emphasis added)*.

Therefore the requirement under section 8 of the Act was followed. Therefore, the affidavit is proper contrary to the objection raised by the learned counsel for the respondent.

With regard to the first point of preliminary objection that the notice of application is defective by not containing the address and description of the parties contrary to Rule 24 (3) (a) of GN. No. 106 of 2007. Reading Rule 24 (3) (a) of the Labour Court Rules 2007, GN.106 of 2007 provides that:-

" (3) *The application shall be supported by an affidavit, which **shall clearly and concisely set out –***
(a) the names, descriptions, and addresses of the parties.
[Emphasis added].

The words in the above Rule is couched in a mandatory term by the use of the word shall means that the procedure set by the law has to be

followed not the practice. Following the mandatory requirement under the above mentioned Rule it is my view that the said particulars are supposed to be stated at the beginning of the applicant's affidavit after the name of the person who takes an oath then the names, description, and addresses of the parties follows. But the affidavit at hand lacks the names, description, and address of the parties. Therefore, this point is sustained.

The applicant has raised the overriding objective, urging that this court to focus on the substantive justice rather than technicalities, I am of the considered opinion that the overriding objective is not applicable in any preliminary objection which is raised following the mandatory requirement, in the above Rule the applicant was legally bound to follow the said procedure.

Given the above analysis and the position of the law, I sustain the preliminary objection and proceed to strike out the application without costs.

Order accordingly.

DATED at Mwanza this 18th June, 2020.


A.Z.MGEYEKWA

JUDGE

18.06.2020

Ruling delivered on 18th day of June, 2020, Ms. Grace Majwala, learned counsel for the respondent also holding brief for Mr. Lutehanga, learned counsel for the applicant was remotely present.


A.Z.MGEYEKWA

JUDGE

18.06.2020