IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 371 OF 2022

(Arising from an Award issued on 20/5/2021 by Hon. Mbena M.S, Arbitrator in Labour dispute No. CMA/DSM/KIN/200/21/71/21 at Kinondoni)

NDOVU RESOURCES LIMITED ..... APPLICANT

VERSUS

THIERRY MURCIA ..... RESPONDENT

JUDGMENT

Date of last Order: 01/12/2022
Date of Judgment:12/12/2022

B. E. K. Mganga, J.

Facts of this application briefly are that, in 2008, applicant employed the respondent as Country Manager. In April 2020, respondent and applicant agreed on salary reduction due to Covid 19 pandemic. It is said that they agreed further that the deducted salaries will be paid back in the form of fair and equity upon applicant receiving funds. It is said that there was no specific time within which applicant to repay the said deducted salaries. After entering into that agreement, the parties peacefully

continued to enjoy their employment relationship. It is undisputed fact that on 17th March 2021, respondent filed labour dispute No. CMA/DSM/KIN/200/21/71/21 before the Commission for Mediation and Arbitration henceforth CMA at Kinondoni claiming to be paid USD 64,423.84 on ground that he was underpaid by the applicant. Being late, together with the Referral Form (CMA F1), respondent filed the application for condonation(CMA F2) supported by an affidavit. It is further undisputed that the that the said application for condonation was granted on 6th April 2021 by Hon. Lemwely, D, Mediator. Having granted the application for condonation, and after failure of mediation, the dispute was arbitrated by Hon. Mbena M.S, Arbitrator, who, on 20th May 2021, having heard evidence of the parties issued an award in favour of the respondent by awarding him to be paid USD 67,160.54 within 14 days.

Applicant was aggrieved by the said award, as a result, she filed this application for revision. In the affidavit of Peter Balangwesa in support of the Notice of Application, applicant raised four grounds namely:-

1. *That the Honourable arbitrator erred in law and fact by considering other irrelevant factors in interpreting a viable legal contract of salary reduction.*

2. *That the Honourable arbitrator erred in law and fact by not considering the fact that the only funding that reached the applicant was set-off to repay the loan from the donor himself, thus there was no actual money that came into the applicant's hands that could be considered as income of any sort to reimburse the respondent, thus the arbitrator reaching an erroneous decision.*

3. *That the Honourable arbitrator erred in law and fact by not considering the fact that other employees' salaries were also reduced, some even more than that of the respondent, but none of them claimed any reimbursement because they knew of the circumstances.*

4. *That the decision reached by the Honourable Arbitrator is ambiguous and bad in law.*

In opposing the application, Anthony Mseke, advocate, filed both the Notice of Opposition and the Counter affidavit signed by himself, allegedly, that he was given power of Attorney by the respondent.

When the application was called on for hearing, Ms. Linda Mwambete, learned Advocate, appeared, and argued for and on behalf of the applicant, while Arbogast Anthony Mseke, learned Advocate, appeared for and on behalf of the respondent.

Ms. Mwambete, advocate for the applicant opted to argue the aforementioned grounds generally that, it was not proper for the arbitrator to award USD 64,423.84 to the respondent without considering that

respondent consented to the reduction of salary and working days as a relief for the reduction of salaries during Covid 19 pandemic. Counsel for the applicant referred to exhibit P2 that is the contract signed by the agreeing reduction of salary due to the effect of Covid 19 pandemic. Counsel for the applicant submitted that the arbitrator held that consent was up to 31st June 2020 failing to appreciate reasons behind the said contract namely, Covid 19 pandemic that affected the Company and the entire world because no one would have predicted when Covid 19 pandemic would have come to an end. She went on that, with that reality, which is why, parties stated in exhibit P2 that salary reduction will be operative at least until 30th June 2020. She submitted further that; the Arbitrator held that applicant received funding from other sources which could have been used to pay respondent but exhibit P4 shows that those funds were to offset the loan that was given to the applicant by other petroleum companies with a consideration that they will be given some parts of the project. She added that, respondent having consented to reduction of his salary, was estopped to deny that truth as it was held in the case of ***Trade Union of Tanzania (TUCTA) V. Engineering Systems Consultant Ltd*** [2020] TLR 647 CAT.

Before counsel for the applicant wound up her submissions, I asked her to address the court on three issues namely (i) whether there were grounds for condonation, (ii) whether condonation was properly granted and (iii) whether both CMA F1 and F2 were properly filled and filed.

Addressing the issues raised by the court, Ms. Mwambete, advocate for the applicant submitted that, the dispute was filed at CMA on 17th March 2021 and that according to CMA F1, the dispute arose in April 2020 but respondent did not fill the actual date on which the dispute arose. She added that, in CMA F2, respondent indicated that the dispute arose in April 2020 but did not also indicate a specific date as to when it arose. She submitted further that, failure to indicate the date on which the dispute arose, made it impossible for CMA to calculate the actual days of delay. Counsel for the applicant went on that, in CMA F2, respondent indicated that he was late for 10 months while he was late for 11 months. Counsel for the applicant went on that, respondent did not give reasons for the delay in his affidavit in support of the application but relied only on the certificate of urgency he filed. She submitted further that; condonation was improperly granted because there were no sufficient reasons advanced for the delay. She concluded that, since condonation was not properly granted,

then, the dispute was improperly heard by the arbitrator and prayed CMA proceedings be nullified.

Resisting the application, Mr. Mseke, learned counsel for the respondent, submitted that exhibit P2 was an agreement between applicant and respondent on reduction of salary and that, reasons for salary reduction were Covid 19 pandemic. He submitted further that; the agreement was only operative until 30th June 2020. He went on that, in exhibit P3, the parties agreed that a situation will be reviewed monthly and that though the parties noted that the arrangement in exhibit P2 was ending in June 2020, applicant prayed salary sacrifice to continue. He added that respondent did not dispute for salary sacrifice to continue. Counsel for the respondent went on that, there were conditions in exhibit P2 that the deducted salaries will be paid back in the form of fair and equity upon applicant receiving funds. During his submissions, counsel for the respondent conceded that, though reductions were supposed to be repaid, there was no specific time within which to repay. He further submitted that, exhibit P3 should be read together with exhibit P2 and hold that deduction continued until February 2021.

Responding to the issues raised by the court, Mr. Mseke, submitted that, respondent filed the dispute at CMA on 17th March 2021 indicating in CMA F1 that the dispute arose in April 2020. He conceded that, in CMA F1, respondent did not indicate a specific date of April 2020 as the date on which the dispute arose. He submitted further that, in CMA F2, respondent indicated that the dispute arose in April 2020 also without indicating the date on which it arose. He added that respondent merely indicated that he was late for ten (10) months. He submitted further that in CMA F2, respondent indicated that there were negotiations and promises from the applicant to pay the deducted salaries. Counsel submitted further that negotiations and promises are good grounds for extension of time. When probed by the court as to who granted the application and whether had powers, Mr. Mseke submitted that condonation was granted by Lemwely D. Mediator and conceded that mediators have no power to grant condonation. Despite that, Mr. Mseke maintained that the dispute was properly heard at CMA and prayed the application be dismissed.

In rejoinder, Ms. Mwambete, counsel for the applicant reiterated her submissions in chief.

I have considered submissions of the parties in favour and against this application and wish, for obvious reason, in disposing it, to start with the issues raised by the court.

It is undisputed that respondent did not file the dispute within 60 days provided for under Rule 10(2) of the Labour Institutions(Mediation and Arbitration) Rules, GN. No. 64 of 2007. It is also undisputed that on 17th March 2021 respondent filed CMA F1 indicating that the dispute arose in April 2020 without indicating a specific date it arose. It is further undisputed that on the same date, respondent filed an application for condonation (CMA F2) also indicating that the dispute arose in April 2020 without indicating a specific date it arose and further indicated that he was late for 10 months. It is my view that, the dispute was improperly filed without indicating a specific date on which it arose. More so, the application for condonation(CMA F2) was defective because it was not enough for the respondent to indicate that the dispute arose in April 2020 and that he was late for 10 months. I am of that view because, in terms of Rule 11(3) of GN. No. 64 of 2007(supra), in an application for condonation, applicant is required to give *inter-alia,* reasons for the delay and degree of

lateness. In my view, degree of lateness cannot be said was properly stated while respondent failed to state the date on which the dispute arose. In short, the said Rule requires the persons seeking condonation to account for the delay and in the application at hand, that was not done. In terms of Rule 11(4) read together with Rule 29(4)(d) both of GN. No. 64 of 2007(supra), the person seeking condonation must file an affidavit in support of the application for condonation stating grounds thereof. I have read the affidavit of Thiery Murcia, the respondent sworn on 16th March 2021 before Johnson Kaijage, Commissioner for Oaths, and find that the only reason that was advanced by the respondent was that respondent orally engaged the applicant and that the latter promised to settle the matter. In the said affidavit, respondent did not give the date he engaged the applicant nor accounted for the delay. It is my view therefore, that, condonation was improperly granted because there were no grounds. Even if we take that there was promise from the applicant, that promise cannot be a ground for extension of time or condonation. See the case of case of ***M/s. P & O International Ltd v. the Trustees of Tanzania National Parks (TANAPA),*** civil Application No. 265 of 2020, CAT (unreported)wherein the Court of Appeal held *inter-alia* that: -

"It is trite that pre-court action negotiations have never been a ground for stopping the running of time…the statute of limitation is not defeated or its operation retarded by negotiations for a settlement pending between the parties…negotiations or communications between the parties…did not impact on limitation of time. An intending litigant, however honest and genuine, who allows himself to be lured into futile negotiations by a shrewd wrong doer, plunging him beyond the period provided by the law within which to mount an action for the actionable wrong, does so at his own risk and cannot front the situation as defence when it comes to limitation of time."

It was conceded by counsel for the respondent that condonation was granted by the mediator and that the mediator have no powers to grant the application for condonation. I agree with him because that is the correct position of the law as it stands as it was held by the Court of Appeal in the case of Barclays Bank T. Limited vs AYYAM Matessa, Civil Appeal No. 481 of 2020 [2022] TZCA 189 wherein it was held that:-

"…Truly, under the ELRA the jurisdiction of a mediator as the title dictates, is to mediate, the process which does not include to dismiss and to decide a complaint. That would no doubt be a general rule. Under exceptional circumstances as it is in the provision under discussion, the mediator is empowered to dismiss the complaint if the referring party fails to appear and decide the same if the party against whom the referral is made fails to appear."

Since Mediator had no jurisdiction to grant condonation, submissions by counsel for the respondent that condonation was properly granted

cannot be valid. Since condonation was granted by the Mediator who have no powers, I hereby nullify CMA proceedings, quash, and set aside the award arising therefrom.

Dated in Dar es Salaam on this 12th December 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 12th December2022 in chambers in the presence of Linda Mwambete and Neema Richard, Advocates for the Applicant and Elipidius Philemon, Advocate for the Respondent.

B. E. K. Mganga
JUDGE