

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISION No. 54 OF 2019

(Originating from Labour Dispute CMA/GTA/28/2019 for Geita)

HAMZA OMARY ABEID.....APPLICANT

VERSUS

PRO MINING SERVICES.....RESPONDENT

RULING

12th April, & 5th May, 2020.

TIGANGA, J.

This ruling is in respect of the preliminary objection raised by the respondent against this application for revision filed by the applicant. The gist of the said objection is to the effect that;

- i) The Labour Revision is incurably defective for lack of a notice of representation contrary to rule 43(1) (a) (b) of the Labour Court Rules, GN No. 106 of 2007.
- ii) That the application for revision is incurably defective for contravening the provisions of rule 24(3) (d) of the Labour Court Rules (supra).

When this matter was placed before me for hearing of the preliminary objection, the learned counsel, Mr. Ndanga appeared for the

applicant whereas the respondent enjoyed the services of Mr. Bugoti, learned counsel.

Arguing in support of the first ground of preliminary objection, Mr. Bugoti claimed that the application is defective for lack of notice of representation. It was his contention that, the applicant was supposed to file the said notice together with the application, but did not. He went further claiming that the notice of representation, according to rule 43(1) (a) (b) (supra) is mandatory with the aim of advising the Registrar on the names of the representing officer, the place where he is working and his postal address.

The counsel stated that, as the said rule contains the word "shall" which means "mandatory", for that reason, the applicant was supposed to file the said notice together with the application, failure of which renders this application incompetent.

On the second ground of objection, he claimed that the application is incompetent for being supported by an affidavit which is defective for contravening rule 24(3)(d) of the Labour Court Rules (supra), which requires an affidavit to contain reliefs sought by the applicant. He submitted further that, the said rule is also couched in mandatory terms, therefore the applicant had to include the reliefs sought in the affidavit. He cited the case of **Modesta P. Shija versus Fonties Safaris Operators** as it appears in the Labour Court Digest (1013) in which it was held that, the affidavit should reflect the reliefs sought and it must comply fully with the requirements of the rules. He concluded by praying that this application be struck out and an order for costs be made.

Replying to the submission by counsel for the respondent, Mr. Ndanga, submitted that the application is built by the notice of application, chamber summons and an affidavit. He stated that, the notice of application will cure the absence of the notice of representation because it contains address of the advocate. He also invited this court to apply the principle of overriding objective which requires the courts to be guided by substantive justice rather than technicalities.

Arguing in response to the second ground of objection, Mr. Ndanga stated that the reliefs sought have been indicated in the notice of application and the chamber summons. He claimed that, the affidavit filed in support of the application is competent as it narrates the facts which lead to the application at hand. That said, he prayed for the objection to be rejected.

In his rejoinder, Mr. Bugoti reiterated his earlier submission, that the raised preliminary objection is on pure point of law and does not need evidence. The affidavit was supposed to comply with the mandatory rule stated above which sets out the criteria. He further claimed that he agrees with fellow counsel that, the general principle is that, affidavits should not contain reliefs sought, however in labour matters, that is not the case, to the contrary, the law has categorically directed that, the affidavit has to contain reliefs and prayers. He was of the firm view that overriding objectives cannot override the mandatory procedural laws or else there would not have been requirements under the rules.

After considering the rival submissions from counsel for both parties, I find it important to look at what rule 43(1)(a)(b) provides before determining whether it has been complied with or not. It provide that;

"A representative who acts on behalf of any party in any proceedings shall, by a written notice advise the Registrar and all other parties of the following particulars-

- (a) The name of the representative*
- (b) The postal address and place of employment or business and any available fax number e-mail and telephone number"*

From the above cited provision, it is the requirement that, if any party in a labour matter chooses to be represented, then the representative of that party must comply with the provisions of rule 43(1)(a)(b) of the Labour Court Rules (supra).

The counsel for the respondent claimed that, lack of the said notice vitiates the whole application. The applicant's counsel claimed on the contrary that, the same has been cured by the notice of application in which the name and address of the advocate is stated.

It can be observed from the above quoted rule that the notice of representation is mandatory and that any person intending to represent a party must file a written notice, with the aim of advising the Registrar and the other party on his representation. There is no dispute that the applicant filed no notice as required by law. This is evidenced by the records and the submission of the counsel for the applicant who in essence admitted in his submission that, the notice was not filed but the same was to be cured by the address of the counsel appearing on the notice of application.

However, I do not subscribe to his argument that, the notice of application cures this defect, because these are two different documents and thus cannot be used as substitute for one another. Section 53 of the Interpretation of the Laws Act [Cap 1 RE 2002] provides that where the word "shall" is used in conferring any function, that function is mandatory, in that it must be so done as directed. The requirement of the notice of representation where the party in labour matter chose to be represented is mandatory. The first ground of preliminary objection is found to have merit, it is sustained.

On the second ground of objection regarding the issue of the affidavit in support of the application, it was claimed by the respondent's counsel that the same does not include the reliefs sought as required by rule 24(3) of the Labour Court Rules (supra), therefore it is defective. The applicant's counsel however was of a different view that the same did not include reliefs sought because the chamber summons did include them.

In my view, what needs to be looked at is the rule governing what the affidavit should contain when filed in support of applications of this nature, which in this matter is rule 24(3) which stipulates that;

"The application shall be supported by an affidavit, which shall clearly and concisely set out-

(a) names description and address of the parties,

(b) a statement of the material facts in a chronological order on which the application is based,

(c) a statement of the legal issues arising from the material facts and

(d) the reliefs sought."

It can be gathered from the above quoted rule that all affidavits in support of applications like this (labour matter) must contain all what has been stipulated in the above provision. I have gone through the affidavit filed by the counsel for the applicant and have found that the same lacks some of the requirements set out under the above rule. It does not contain the statement of the material facts, does not contain a statement of the legal issues on which the application is based, and it does not contain the reliefs sought. The affidavit filed by the learned counsel for the applicant does not meet the criteria set by the law, it is thus defective.

The principle of interpretation of statutes as enshrined in the provisions of section 53(2) of the Interpretation of Laws act, Cap1 R.E 2002 clearly stipulate that;

*"Where in a written law the word **shall** is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."*

In both rules cited above, the word "shall" was used in conferring functions, it means therefore that the functions conferred were mandatory. Counsel ought to have done what he was supposed to do under the law. I find that both the grounds of preliminary objection raised by counsel for the respondent to have merit, they are therefore sustained.

Consequent to sustaining the preliminary objection, the application is hereby struck out for being incompetent before this court. This being the labour matter, no order as to cost is made.

It is accordingly ordered

DATED at MWANZA this 11th day of May, 2020.

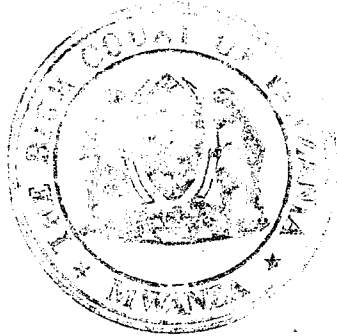


J.C.Tiganga

Judge

11/05/2020

Ruling delivered in chambers in the absence of the parties with reason. Court clerk has been instructed to inform them through their mobile phones immediately after the delivery of the ruling.



J.C.Tiganga

Judge

11/05/2020