IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: KIMARO, J.A., MUGASHA, J.A., And MZIRAY, J.A.)

CIVIL APPEAL NO. 150 OF 2015

SERENGETI BREWERIES LIMITED ..... APPELLANT

VERSUS

JOSEPH BONIFACE ..... RESPONDENT

(Appeal from the Ruling and Drawn Order of the High Court of Tanzania At Mbeya)

(Aboud, J.)

Dated the 2nd day of October, 2015
in
Revision No. 25 of 2015

.....

JUDGMENT OF THE COURT

4th & 11th April, 2016

MUGASHA, J. A.:

In the year, 2008 the respondent entered into employment contract with the appellant for a specific period. Parties kept on renewing the contract up to 1st July 2011 whereby the last contract was to subsist for two (2) years. However, on 30 January, 2012, the appellant prematurely terminated the employment contract due to alleged respondent's soliciting bribe at a tune of 2.5 million from the appellant's company stockiest one Mr. Poly Kavuli and respondent's documented false claims on fuel consumption.

The termination precipitated the respondent's complaint which was referred to the Commission for Mediation and Arbitration (CMA), disputing fairness of termination on both the procedural and the substantive aspects.

On 16/10/2013 the Arbitrator under the auspices of CMA made an award in favour of the respondent and against the appellant concluding that, during the conduct of the initial disciplinary proceedings, the appellant denied the respondent an opportunity to question the witness of the employer as required under Rule 13 (5) of the employment and Labour Relations (Code of Good Practice) rules, 2007. Furthermore, the appellant was found to have contravened guideline 4(6) of The Employment and Labour Relations (Code of Good Practice) Rules GN 42 of 2007, because it is the employer's chairman who assumed the role of management and interrogated the respondent at the hearing of the disciplinary proceedings. The arbitrator awarded the respondent a total sum of Tshs. 14,891,750 being compensation for the seventeen (17) months' salary and the related unpaid balance of the terminal benefits.

Having obtained the permission of the High Court to file revision out of time, on 14/5/2015 the appellant filed an application seeking to have the award of the Arbitrator revised and quashed. At the hearing of the application, the respondent raised a preliminary objection which is to the effect that, the application was time barred as it was filed beyond 42 days from the date of the arbitration award of the Arbitration delivered on 16/10/2013. As such, section 91(1) (1) (a) of the Employment and Labour Relations Act [CAP 366 RE, 2002] was not complied. The preliminary

objection was upheld and the application was struck out for being time barred. Moreover, Aboud, J. viewed that, since the CMA is not duty bound to serve the awards to the parties, the respective parties ought to have followed up the award in order to comply with the required statutory time limit for lodging a revision application which is not later than six weeks from the date the award was issued.

Further aggrieved, the appellant has preferred an appeal to the Court raising five grounds of appeal in the memorandum of appeal as follows:

1. *That determining whether the appellant filed an application for revision in time, the Honourable Court erred in law by misinterpreting the meaning of word "service" as envisaged under the provisions of section 91(1)(a) of the ERLA, 2004 and other legislations.*

2. *The Honourable Court erred in law in holding that there are no clear provisions of the law imposing duty on CMA to serve an Award to the parties.*

3. *The Honourable Court erred in law while interpreting Rule 27(2) of GN 67 OF 2007 relation to Rule 2 read together with Rule 6 of GN 64 of 2007 and section 83 of the Interpretation of laws Act.*

4. *That in reckoning the time limitation which is provided under section 91(1)(a) of ERLA, the Honourable Court erred in law in not excluding the period between when the Award was delivered (October 16, 2013) and when the award was actually served on the appellant (November 5, 2013).*

5. *The Honourable Court erred in law by referring the date filing Revision no. 68 of 2013 (December 6, 2013) as the date of filing Revision No. 25 of 2015 which was filed on 14th May, 2015.*

The appellant was represented by Mr. Ayoub Mtafya learned counsel who was allowed to proceed *exparte* following the non-appearance of the respondent's counsel who also did not file a reply to appellants written submissions filed on 20/1/2016. Mr. Mtafya adopted the submissions to constitute an integral part of the appeal.

Addressing the first and fourth grounds of appeal, Mr. Mtafya submitted that, the High Court Judge misinterpreted the meaning of word service as envisaged under section 91(1) (a) ERLA which categorically requires an application to revise the award to be filed within six weeks after the award is served to the applicant. He argued that, it was improper

for the High Court to hold that, an application to revise an award must be filed within six weeks from the date of issue of the award. As such, he urged the Court to provide guidance on the meaning of the word 'service' under section 91(1) (a) or else if the decision of the High Court remains intact, this will set a dangerous trend on the issued summons being left in the court file and later on asserted that, the unaware party was duty bound to follow up the summons. Mr. Mtafya added that, the situation defeats the legislative intent because an aggrieved party can pursue a right of appeal or otherwise only after receiving a copy of the impugned decision.

As for the second and third grounds of appeal, Mr. Mtafya argued that, the duty on CMA to serve the award to the parties is derived from; **One,** section 91(1) which has improvised service on the applicant who wishes to prefer an application for revision; **Two,** rule 27 (1) and (2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 GN 67 of 2007 which require the arbitrator to write and sign the award and such award shall be served on all parties to the dispute in the manner specified in the rules for mediation and arbitration proceedings. **Three,** under rule 8(1) of the Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrators) Rules, 2007 G.N 66 of 2007 an arbitrator is barred from disclosing the award to any part prior to its distribution to the parties.

In the light of the cited provisions of the law, Mr. Mtafya pointed out that, the High Court Judge erred to hold that the law does not impose the duty on CMA to serve the award to the parties.

He also submitted that, in the matter at hand, the award was delivered in the absence of the parties and each party collected the award on a different date. When asked by the Court if the Arbitrator is permitted by law to deliver the award in the absence of the parties and without notifying them, Mr. Mtafya replied that the employment laws do not require the arbitrator to deliver the award in the presence of the parties or issue to the parties notice of the intended date of delivery of the award. He argued that this position sounds awkward compared to what obtains under Order XX rule I of the Civil Procedure Code [**CAP 33 RE, 2002**] which requires the court to give notice of the date of Judgment which has to be pronounced in the open Court. He also referred us to Rule 20 (2) and 21 of the Tax Revenue Appeals Tribunal Rules, 2001, which require the Board or the Tribunal as the case may be, after the conclusion of the hearing, to deliver judgment in the presence of the parties.

Addressing the fifth ground of appeal, Mr. Mtafya learned counsel reiterated that, since the appellant was granted extension to file the application for revision, the High Court Judge erred to refer the date of filing the revision No. 68 of 2013 (December 6, 2013) as dated of filing Revision No. 25 of 2015 which made her to conclude that the application was time barred.

After a careful consideration of the submission of the appellant and the record before us the questions for determination are:

(1) What is the limitation time for lodging an application for revision against the award of the arbitrator?

(2) Was the applicant's application for revision before the High Court time barred?

Initially, we wish to point out that the appointment of arbitrators and their role when a complaint is lodged in CMA is regulated by the Employment and Labour Relations Act **[CAP 366 RE, 2002].** Under section 88(1) of ERLA, and rule 3 (3) of The Labour Institutions (Mediation and Arbitration Guidelines) (supra), the arbitrator is required to make the award not later than thirty (30) days after conclusion of the hearing. Where the award is not finalised, according to rule 3(4), the parties may agree in writing to extend the period. In terms of section 89(1) of ERLA, the arbitration award is binding on the parties to the dispute. However, the aggrieved party may lodge an application for revision under section 91(1) (a) and (b) of ERLA which states as follows:

" Any party to an arbitration award made under section 88 who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for a decision to set aside the arbitration award:-

(a) within six weeks of the date that the award was served on the applicant unless the alleged defect involves improper procurement;

(b) If the alleged defect involves improper procurement, within six weeks of the date that the applicant discovers the defect

At page 517 of the record Aboud, J among other things concluded as follows:

> *"It has been the practice of the court that an application for revision before the court has to be filed within six weeks from the date the award is issued....."*

In **REPUBLIC VERSUS MWESIGE GEOFREY AND ANOTHER, CRIMINAL APPEAL NO 355 OF 2014** (Unreported), the Court discussed the familiar canon of statutory construction and quoted with approval the decision of the US Supreme Court in **CAMINETTI V. UNITED STATES, 242 U.S 470 (1917)** the Court categorically ruled that:

> *"It is elementary that the meaning of a statute must in the first instance, be sought in the language which the act is framed, and if it is plain..... the sole function of the courts is to enforce it according to its terms."*

In this regard, the Court in **MWESIGE'S** case ruled that: when the words of a statute are unambiguous, "judicial inquiry is complete" there is no need for interpolations, lest we stray into the exclusive preserve of the legislature under the cloak of overzealous interpretation. This is because:-

"Courts must presume that a legislature says in a statute what it means and means in a statute what it says:" **CONNECTICUT NAT'L BANK v GERMAIN, 112 s. Ct 1146, 1149 (1992).**

In the light of the cited decisions, the plain and clear meaning of section 91(1) of ERLA is that, the limitation period of six weeks begins to run against the applicant after the award is served on the applicant. The law is so couched because it is not open to the applicant to know if he is aggrieved with the award unless it is served to the applicant. Therefore, what the Labour Court concluded in its decision appearing at page 517 of the record that the time to file an application begins to run after the award is issued is a clear misinterpretation and misapprehension of the law. We agree with Mr. Mtafya that, the position as stated by the Labour Court defeats the ends of justice and it poses a danger on the unaware parties to be victims of issued summons lying in the registry without being served to the respective parties who will end up to be condemned that their applications are time bared. We wish to reiterate that, there is no ambiguity in section 91(1) (a) and it has to be invoked as stated.

Pertaining to the whether or not the application for revision was time barred, it is on record that the appellant was on 30/4/2015 granted permission to file the application for revision out of time not later than fourteen (14) days from the date of the order by Nyerere, J in revision application no. 68 of 2013 filed on 6th December, 2013. The applicant complied with the court order as on 14/5/2015 she filed the revision application No. 25 of 2015 which ought to have been determined by Justice

Aboud because it was not time barred and thus properly before the Labour Court. Therefore, Justice Aboud, misdirected herself to conclude that, the application was filed on 6/12/2013 which refers to Application No. 68 of 2013 which was already determined and it was no longer before the court.

While addressing us on the inadequacy of the labour laws on the aspect of serving the award to the parties, Mr, Mtafya invited us to give a guideline on the matter. We agree with Mr. Mtafya that, a revision cannot be pursued unless the applicant is served with the award which remains in the domain of the arbitrator. Since according to section 88 (9) of ERLA the award is required to be issued within thirty (30) days from the conclusion of the arbitration or at a later date as agreed in writing by the parties, parties can only predict the initial probable date after the expiry of stated period or the extended date. Thereafter, to demand parties to make a follow up of the award whose date of issue is not known is indeed not fair to the parties who might end up meddling or loitering on the corridors of CMA pursuing the unknown.

In **JAMS EMPLOYMENT AND ARBITRATION RULES AND PROCEDUERS** Effective July, 1 2014, rule 24 under item (i) states that, *"after the award has been rendered... the award shall be issued by serving copies to the parties....."* Similarly the **LAW WRITER OHIO LAWS AND RULES ON EMPLOYMENT DISPUTE RESOLUTION 4901:** specifies:

> *"The arbitrator shall have the authority allowed by law. The arbitrator shall issue the arbitration award in writing and serve it upon the parties. The award*

shall be served on all parties to the dispute in the manner specified in the rules for mediation and arbitration proceedings."

The cited practice is one of the best practices which is not structured in our labour laws and regulations which were enacted in 2004 and came into operation in January 2002. The current position of the law mandates the CMA to appoint the arbitrator whose business is to arbitrate and render the award. Under rule 27 of GN. 67 of 2007, "*the award shall be served on all parties to the dispute in the manner specified in the rules for mediation and arbitration proceedings".* In terms of rule 17(2) of G.N 67 of 2007, "*an arbitration award can be served and executed in the Labour Court as if it were a decree of a court of law."* However, there is no rule in the Labour Institutions (Mediation and Arbitration Guidelines) Rules (supra) which prescribes the duty and the manner in which the arbitrator or CMA shall serve the award to the parties. This is the inadequacy in the employment laws as pointed out by Mr. Mtafya. We are of a considered view that, this uncertainty is not conducive for the timely adjudication of labour disputes. As such, we hereby direct that, the respective labour legislation be amended to require the arbitrator to notify parties on the date of delivery of the award and the arbitrator be required to serve the award to the disputing parties so as to enable them to pursue their rights in case they are aggrieved.

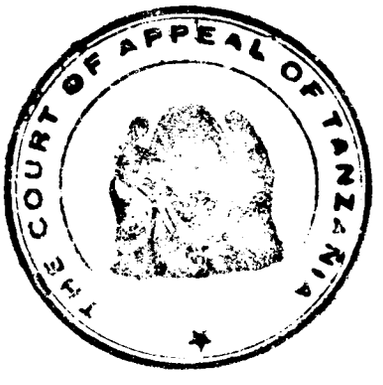
In view of the aforesaid, the appeal is merited and the decision of the High Court striking out the application No. 25 of 2015 is quashed and set

aside. We order the application to be placed before the Labour Court for the expedited hearing and determination before another Judge with competent jurisdiction. Since this is a labour matter, we make no order as to costs.

DATED at MBEYA this 8th day of April, 2016.

N.P. KIMARO

JUSTICE OF APPEAL



S.E.A. MUGASHA

JUSTICE OF APPEAL

R.E. MZIRAY

JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E.Y. MKWIZU

DEPUTY REGISTRAR

COURT OF APPEAL