

TANZANIA / JUDGMENT

tanzania workers union tanzania tawuta vs tanzania zambia railway authority tazara two others 2023 tzhcld 1344 30 june 2023

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM APPLICATION NO.
181 OF 2023 TANZANIA WORKERS UNION - TANZANIA (TAWUTA) APPLICANT
VERSUS TANZANIA ZAMBIA RAILWAY AUTHORITY (TAZARA) 1ST RESPONDENT
MANAGING DIRECTOR OF TAZARA 2ND RESPONDENT TANZANIA
RAILWAY AUTHORITY WORKERS' UNION (TRAWU) 3RD
RESPONDENT

RULING

Date of last Order: 30/06/2023 Date of Ruling: 30/6/2023 B. E. K. Mganga, J. Tanzania Workers Union-Tanzania (TAWUTA), the herein applicant is a registered Trade Union in Tanzania and some of her members are employees of the Tanzania Zambia Railways Authority(TAZARA), the 1st respondent. It is undisputed that some employees of the 1st respondent are members of Tanzania Railway Authority Workers' Union (TRAWU), the 3rd respondent. Managed by the Managing Director of TAZARA, the 2nd 1 respondent is responsible to manage the 1st respondent and her employees that are both members of the applicant and the 3rd respondent. On 26th June 2023, applicant filed the complaint under certificate of urgency stating that on 21st June 2023 to 24th June 2023 the joint Industrial council of the 1st respondent held a meeting and invited the 3rd respondent without inviting the applicant. It is alleged by the applicant that she is a recognized Trade Union with majority members from the 1st respondent's employees. It is alleged by the applicant that in the said meeting, the 1st and 3rd respondent will deliberate and conclude a Collective Bargain Agreement that will be published on 1st July 2023. It was further alleged by the applicant that the said deliberation and proposed Collective Bargain Agreement will infringe rights of the applicant. Based on that, applicant is seeking the court (i) to issue an order directing the 1st respondent to issue an invitation to the applicant and afford right to be heard and give opinion, (ii) to grant a declaratory orders against the 1st respondent from enforcing the provisions of the Collective Bargain Agreement made by the TAZARA Joint Industrial Council of the 1st respondent expected to be gazzetted on 1st July 2023, (iii) issue an order 2 directing or declare the decision on the status of the decision to exclude applicant from the Collective Bargain Agreement as unjust and unlawful and (iv) issue an order directing or

declare the decision for recognition of the 3rd respondent as unjust and unlawful. Both the 1st and 2nd respondents filed a reply to the complaint stating inter-alia that applicant is recognized as a trade Union with minority members and that 1st respondent is bound to recognize the trade union with majority representative of employees. The 1st and 2nd respondents stated further that invitation to attend the consultative meeting is a distinct and separate matter in regards to the role of minority or majority trade union representing their members. The 1st and 2nd respondents stated also that the TAZARA joint council is a joint council between the TAZARA management and the Trade union representatives of both Tanzania and Zambia whose function is to negotiate wages/ salaries and conditions of service of all unionized employees of TAZARA. On the other hand, filed a reply to the complaint stating that she is a Trade Union recognized by the 1st respondent even before the applicant. 3rd respondent stated further that she was invited to attend the meeting to 3 discuss the collective Bargain Agreement expected to expire on 30th June 2023. When the application was called on orders, Ms. Mercy Chimtawi and Debora Mcharo, State Attorneys for the 1st and 2nd respondents raised two preliminary objections that (i) the complaint was prematurely filed before the court and (ii) the complaint is incompetent for wrong citation. In arguing these preliminary objections, Chimtawi submitted that, this labour complaint is triable by this Court and that in terms of Section 86(7)(b)(ii) of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] applicant was supposed to file it at CMA for mediation and that applicant was supposed to file it before this court upon failure of mediation. Arguing the 2nd limb of preliminary objection, State Attorney submitted that, the Court is not properly moved in the Notice of Application. Learned State Attorney submitted that, applicant did not cited Section 74 of Cap. 366 R.E. 2019(supra) which is the enabling provision. She submitted further that, applicant cited section 94(2) of Cap. 366 R.E. 2019 (supra) that relates to revision while this is not revision application. The learned State Attorney prayed the application be struck out. 4 Mr. Mwakyusa, the Zonal Secretary of the 3rd respondent only concurred with submissions and the prayers made on behalf of the 1st and 2nd respondent. Responding to submissions made on behalf of the respondents in relation to the 1st preliminary objection, Mr. Ukashu, learned counsel for the applicant submitted that section 74 of Cap. 366 R.E. 2019(supra) is applicable to disputes relating to application, interpretation or enforcement of the Collective Bargain Agreement. He went on that, the complaint at hand does not relate to Collective Bargain Agreement. Counsel for the applicant submitted further that, applicant is dissatisfied with due process and legality of making new Collective Bargain Agreement that will be gazzetted on 1st July, 2023 by the respondents. He maintained that, in this complaint, applicant is praying the Court to issue declaratory orders and there is nothing relating to Collective Bargain Agreement. He strongly submitted that, in terms of Section 94(3)(b)(ii) of Cap. 366 R.E. 2019(supra) the court has jurisdiction to hear and determine this complaint. He argued further that, in terms of Rule 10(1) and (2) of Labour Court Rules, GN. No. 106 of 2007, mediation is before the Deputy Registrar 5 or the mediator attached to the High Court. Therefore, the application was properly filed before the court. Counsel for the applicant submitted further that, the complaint was supposed to be filed under Rule 6 of GN. No. 106 of 2007(supra). When asked by the court as to whether the said Rule was complied with, learned counsel for the applicant readily conceded that it was not, because there are no legal issues in the said complaint to be determined by the Court hence the

complaint is incompetent. When further asked as to who is supposed to sign the complaint, counsel for the applicant correctly submitted that, the complaint must be signed by the party to the proceedings. Mr. Ukashu, learned counsel for the applicant conceded that, the complaint was signed by Boaz Nyakeke showing that he is the applicant but the Applicant is Tanzania Workers Union-Tanzania (TAWUTA). Counsel for the applicant was quick to submit that, the omission is curable under the overriding objective principle by amending the complaint to show that it was signed by the said Boaz Nyakeke, as the Secretary General of the applicant. During submissions, counsel for the applicant conceded that TAZARA, the 1st respondent is part of the 6 Government and that the Attorney General was not served with the complaint. Responding to the preliminary objection relating to wrong citation, counsel for the applicant submitted that, wrong citation or non-citation is not fatal. He cited the case of *The Director General LAPF Pensions Fund v. Pascal Ngalo*, Civil Appl. No. 76/08 of 2018, CAT (unreported) to support his submissions. He added that, the court should only insert the correct section if it finds that there was wrong citation and proceed to determine the complaint. Mr. Ukashu, learned counsel for the applicant prayed the court to invoke the overriding objective principle and allow applicant to amend the complaint by (i) adding the statement of legal issues and (ii) inserting the capacity of the person who filed this application. With all those, counsel for the applicant prayed preliminary objections be dismissed. In rejoinder, Ms. Mcharo, learned State Attorney for the 1st and 2nd respondent submitted that, applicant has not complied with Rule 6 of the Labour Court Rules, GN. No. 106 of 2007 (supra) and has not joined the Attorney General. She submitted further that, by failure to join the Attorney General, applicant violated the provisions of Rule 23(2) of GN. No. 106 of 2007 (supra) because the matter relates to the Government. Learned State Attorney submitted further that, the prayer to amend the complaint should not be granted because, the 1st and 2nd respondents have raised the preliminary objection relating to competence of the application. She therefore prayed the preliminary objections be sustained. I have carefully considered submissions of the parties on the two preliminary objections and all issues relating to competence of the complaint that arose during hearing. In disposing those issues, I will start with the preliminary objection raised by the 1st and 2nd respondent with reference to section 74 of Cap. 366 R.E. 2019 (supra) that the complaint was prematurely filed before this court as it was supposed to be filed at CMA and that, applicant was supposed to file it before this court upon failure of mediation. With due respect to the learned State Attorney, that submission is not correct for two reasons. One, the complaint at hand, as it was correctly submitted by counsel for the applicant, does not relate to section 74 of Cap. 366 R.E. 2019 (supra) that is to say; has nothing to do with interpretation, implementation or enforcement of the Collective 8 Bargain Agreement. The complaint at hand, relates to declaratory orders hence section 74 of Cap. 366 R.E. 2019 (supra) is not applicable. Even if the complaint would have been covered by section 74 of Cap. 366 R.E. 2019 (supra), yet, that preliminary objection would have been overruled because it was properly filed before the court. I am of that view because, Rule 6(1) of the Labour Court Rules, GN. No. 106 of 2007 is clear that, a statement of complaint must be filed before this court. It would appear that the learned state Attorney is of the view that the complaint was supposed to be filed at CMA so that it can be mediated thereat. That view, is not correct because, disputes and or complaints filed before this court can be mediated by the Registrar or the Mediator attached to the Court as it is provided for under Rule

10(1) and (2) of GN. No. 106 R.E. 2007(supra). See the case of Tanzania Union of Industries and Commercial Workers (TUICO) vs Serengeti Breweries Limited (SBL) (Labour Dispute No. 07 of 2022) [2023] TZHCLD 1293 and Tanzania Union of Industries and Commercial Workers (TUICO) vs Serengeti Breweries Limited (SBL) (Labour Dispute No. 07 of 2022) 9

[2023] TZHCLD 1296. For the foregoing I dismiss the 1st preliminary objection. It was correctly conceded by counsel for the applicant that the complaint is incompetent for lack of legal issues to be determined by this court because Rule 6(1)(b)(ii) of GN. No. 106 of 2007(supra) provides that the complaint must contain legal issues for determination. In the complaint at hand, there is no legal issue to be determined by the court hence the complaint is incompetent. It was submitted by counsel for the applicant that the court should invoke the overriding objective principle and allow amendment of the complaint so that applicant can insert legal issues. That prayer was strongly objected by counsel for the 1st and 2nd respondents. With due respect to counsel for the applicant, the omission of legal issues in the complaint at hand cannot be cured by the overriding objective principles. It was held by the Court of Appeal in the case of Martin D. Kumalija & Others vs Iron and Steel Ltd (Civil Application No. 70 of 2018) [2019] TZCA 542 that:- “...While this principle is a vehicle for attainment of substantive justice, it will not help a party to circumvent the mandatory rules of the Court. we are loath to accept Mr. Seka’s prayer because doing so would bless the respondent’s inaction and render superfluous the rules of the Court that the respondent thrashed so brazenly.” See also the case of Gidion Musajenge Mwakifamba & Another vs Republic (Criminal Appeal No. 451 of 2019) [2022] TZCA 589, Puma Energy Tanzania Ltd vs Dimond Trust Bank Ltd (Civil Appeal No. 54 of 2016) [2020] TZCA 263, Erick Raymond Rowberg & Others vs Elisa Marcos & Another (Civil Application No. 571 of 2017) [2019] TZCA 435. It is my view that, applicant is seeking the court so as to circumvent the provisions of Rule 6 of GN. No. 106 of 2007 (supra). That cannot be allowed. It is my view further that, the amendment sought by applicant, cannot be made without affecting to larger extent the complaint at hand. Amendments can only be allowed if they cannot affect and change the complaint at hand. For that reason, I decline that prayer. In terms of Rule 6(1)(c) of GN. No. 106 of 2007 (supra) the statement of complaint must be signed by the party to the proceedings. In the application at hand, the complaint was signed by Boaz Nyakeke who indicated that he is the applicant. The applicant in the application at hand, is Tanzania Workers Union- Tanzania (TAWUTA) and not Boaz Nyakeke. In short, the complaint was signed in violation of the afore cited Rule. It was submitted by counsel for the applicant that the said Boaz Nyakeke is the General Secretary of the applicant. With due respect, that is submissions from the bar hence has no legal wait. See the case of Rosemary Stella Chambejairo vs David Kitundu Jairo (Civil Reference No. 6 of 2018) [2021] TZCA 442 and Said Sultan Ngalema & Others vs Isaack Boaz Ng’iwanishi & Others (Civil Application No. 362 of 2021) [2022] TZCA 684. It is my view that, the prayer to amend the complaint to show that it was signed by Boaz Nyakeke, as the General Secretary on behalf of the applicant cannot be made at this time. It was further submitted and conceded by counsel for the applicant that, the 1st respondent is owned by and is part of the

Government and that, applicant did not serve the Attorney General. It was submitted by Ms. Mcharo, learned State Attorney that, Rule 23(2) of GN. No. 106 of 2007 (supra) was violated for failure to serve the Attorney General. I agree with those submissions. Rule 23(2) of GN. No. 106 of 2007 (supra) provides clearly that:- 12 “23(2) Where the dispute or complaint is against the Government it shall be instituted in the Court and a copy of complaint shall be served on the Attorney General.” It is my view that, the omission to serve the Attorney General cannot be cured by amendment or by the overriding objective principle. For all said hereinabove, I hold that the complaint is incompetent and cannot be amended at this stage. I hereby strike for being incompetent. Dated at Dar es Salaam on this 30th June 2023. B. E. K. Mganga JUDGE Ruling delivered on this 30th June 2023 in chambers in the presence of Emmanuel Ukashu, Advocate, for the Applicant and Debora Mcharo and Mercy Chintawi, State Attorneys for the 1st and 2nd Respondent and Benedict Mwakyusa, Zonal Secretary of the 3rd Respondent. B. E. K. Mganga JUDGE 13

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