IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., MAIGE, J.A. And MDEMU, J.A.)

CIVIL APPEAL NO. 187 OF 2021

TANZANIA CIGARETTE COMPANY LIMITED..... APPELLANT

VERSUS

LUCY MANDARA ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Aboud, J.)

Dated the 1st day of April, 2021

in

Labour Revision No. 185 of 2020

JUDGMENT OF THE COURT

5th & 26th February, 2024

MDEMU, J.A.:

In the letter of offer of employment dated 29th November, 1979 the respondent was employed by the appellant in the capacity of Moisture Tester. She rose into various ranks till 5th September, 2016 when her service was terminated by the appellant. By then, she had attained the rank of Legal Affairs Manager. According to the termination letter (exhibit TCC-7), the respondent was terminated on grounds of misconducts, that is, gross insubordination and gross negligence. As per the disciplinary charges, the disciplinary committee formed by the appellant convicted the

respondent of the two disciplinary offences for failure to file TCC's opposition to the Registrar of Business Registration and Licensing Agency (BRELA) in an application to register a trade mark product and the other one was failure to process registration of trade marks. It was alleged that, the two duties were within the job description of the respondent. She was thus terminated from service and paid her terminal benefits. She later referred a labour dispute to the Commission for Mediation and Arbitration (the CMA) which found her termination substantively fair but frown on procedural aspect. The CMA thus awarded her six months' salary compensation and a certificate of service thereof.

Further aggrieved, the respondent filed a labour revision to the High Court of Tanzania, Labour Division at Dar es Salaam which decided in her favour by declaring her termination unfair substantively and procedurally. The High Court (Aboud J.) thus decreed a compensation of TZS 904, 863, 473.00 as pleaded in the CMA F1. This time around, the appellant rose fronting twelve grounds of appeal which we have so far summarized in the following main points of contention: **one**, it was wrong for the learned High Court Judge to hold that termination of the respondent was both substantively and procedurally unfair. **Two**, it was unhealthy on the High Court Judge to base her reliefs or award on voluntary agreement which is

applicable to retired employees and **three,** the High Court Judge erred in invoking the provisions of the Constitution of United Republic of Tanzania, 1977 (the Constitution) and the African Charter on Human and Peoples Rights (the Charter) in awarding reliefs to the respondent notwithstanding existence of a standalone labour law regime regulating labour relations of the parties.

The three grounds raise to two issues for determination by this Court as was to the High Court during revision. The first one is whether termination of the respondent from service was on fair and valid reasons both substantively and procedurally. In this one, we shall specifically explore disciplinary proceedings relating to gross negligence and gross insubordination allegedly to involve the respondent. Second, to what reliefs are the parties entitled. In this issue our main focus will be on the basis of the compensation awarded, that is voluntary agreement complained of, if at all is the one applicable.

At the hearing of this appeal on 5th February, 2024, the appellant company was represented by Mr. Paschal Kamala, learned advocate whereas the respondent had the services of Mr. Reginald Martin and Ms. Oliva Mkanzabi both learned advocates. Parties adopted their written

submissions earlier filed in the Court and also amplified orally at the hearing of the appeal.

We are mindful to begin with the third ground of complaint regarding invoking the Constitution and the Charter in determining matters of representation in the disciplinary committee. In this ground, Mr. Kamala argued briefly that, the learned Judge made reference to the Charter insisting on external representation at the disciplinary committee ignoring rule 13 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 on representation by a fellow employee or a trade union representative.

The respondent's counsel responded generally on matters of representation without invoking the Constitution and the Charter. We think this should not detain us. We are saying so because what the High Court Judge did at page 873 through 874 of the record of appeal is expounding on what she had earlier on ruled out that the respondent herein had the right to be represented by a person outside the appellant's company. We note further in the record of appeal that, the learned Judge went on elaborating that such right to representation is also enshrined in the Constitution under article 13 (6) and in article 7(1) (c) of the Charter. Essentially, she did not deploy the said legal requirements more so, as

said, she had already pronounced herself on the right of representation in line with the labour law regime. We do not find harm on this.

Turning to the first ground of complaint regarding fairness of the termination of the respondent, parties are at variance. Mr. Kamala on his part argued that, the evidence on record appeals to gross negligence and gross insubordination unlike what the learned High Court Judge twisted alleging poor performance, being the ground for termination and went ahead observing that, the appellant would have disciplinarily charged the respondent for poor performance. He argued further that, the issue of poor performance was not pleaded and in fact, was raised by the respondent during hearing after the appellant had closed its case. He thus urged us to consider such averment as an afterthought and cited to us the following cases insisting on the cardinal principle of law that parties are bound by their pleadings: **YARA Tanzania Ltd. v. Charles Aloyce Msemwa &Two Others**, Commercial Case No.5 of 2013 (High Court) (unreported); **Mojeed Suara Yusuf v. Madam Idiatu Adegoke**, SC.15/2002 http://www.nigeria; **Adetoun Olaji (Nig) Ltd. v. Nigeria Breweries Plc (2007)** LPELR-SC.91/2002 http://www.nigeria; **Itahi v. Maboko Distributors Ltd.** [2005] 1 EA 66 and **Galaxy Paints Company Ltd. v. Falcon Guards Ltd.** [2000] 2 EA 385.

The learned counsel also faulted the learned Judge to base her findings on the appraisal dialogue (exhibit TCC-2) and also by shifting liability to DW1, the Director of Legal Affairs, regarding responsibilities charged to the respondent. In his argument, the respondent was responsible for matters relating to trade mark and was also in-charge of keeping all records. The respondent also did not renew business license. Failure to discharge such responsibilities, according to the learned counsel, constituted gross negligence and gross insubordination as opposed to poor performance observed by the learned High Court Judge.

The learned counsel concluded in this ground of complaint by arguing that, the disciplinary committee was properly constituted and was impartial, unlike what the learned High Court Judge observed that, the chairperson of the committee was not impartial merely because she handled affairs of the company as a legal counsel. On the issue of impartiality of the committee, reference was made to us in the case of **Paschal Otendo v. Tanzania Cigarette Co. Ltd.,** Civil Revision No.364 of 2015 (unreported). The learned counsel argued in the alternative that, even if such irregularity existed, basing on **Felician Rutwaza v. World Vision Tanzania Ltd**., Civil Appeal No.213 of 2019 (unreported), not all procedural irregularities attract twelve months salary compensation.

In reply, Mr. Martin submitted that, the appellant has not proved existence of gross negligence and gross insubordination and instead, the issue of poor performance surfaced across. The basis of his argument was that, all through, there is no evidence indicating instructions issued by the appellant to the respondent which in turn, the respondent ignored. He referred to page 47 through 50 of the record of appeal that, disciplinary charges were framed to constitute elements of poor performance and not gross negligence and gross insubordination. Besides, he added, the evidence is lacking that the respondent has failed to renew business license.

As to fairness of procedure, it was his argument that, the procedure was not followed because Angella Mangesha who was the Director of Human Resources, prepared the charges, termination letter and served the same on the respondent which to him, constitutes evidence of biasness. He further faulted presence of the chairperson, much as he had an interest to serve, refused to allow the respondent to be represented. This to him was biased and violated rule 13(5) of GN. No.42 of 2007.

In resolving this controversy, the record of appeal is clear that gross negligence and gross insubordination require existence of direct instructions and obligation, in this case, by the appellant to the

respondent. It is through such instructions and obligations which, in the end, require evidence of disobedience by the respondent herein. As submitted by the learned counsel for the respondent, that evidence is lacking. Specific on renewal of license, the learned High Court Judge at page 866 of the record of appeal observed that:

> *"...Not only that, but also DW5, a Senior Assistant Registrar of BRELA testified that when trademark expires, BRELA issues a notice to the owner, but they failed to do so in time because of problems in their registry system."*

From the foregoing quoted passage, in our considered view, it was the responsibility of BRELA to notify the respondent regarding expiration of the trade mark. As the respondent was not informed, then negligence and insubordination be it gross or otherwise may not be directed to her. It is from this end the learned High Court Judge concluded that the alleged disciplinary charges of gross insubordination and negligence remain unproven. It was not correct therefore on the side of the appellant to allege that the learned Judge considered matters related to poor performance. We have that understanding because what the Judge noted regarding poor performance was, in our view, an *obiter dictum*. Let the record at page 868 speak by itself on this fact:

"The particulars of the offences charged, evidence on record and the whole circumstances of this matter indicated that the ***applicant may be, could have been charged for poor performance of her duties and responsibilities, specifically the trademarks and licenses portfolios and may be, if proved would have been the valid reason for the respondent to take appropriate disciplinary action*** *as stipulated in our Labour Laws and the Respondent's Disciplinary procedure and code"*
[Emphasis supplied]

In terms of procedure, there are two concerns gathered from what parties submitted. **One** is appointment of one Anthony Arbogast Mseke to chair the disciplinary committee, who in certain instances handled appellant's litigations, thus the High Court Judge thought he had conflict of interest and **two** is in respect of respondent's right of representation by a neutral part in the disciplinary committee. As to the appointment of the chairman of the disciplinary committee, rule 4 (2) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures annexed to the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007 provides that:

> *"4 (2) The chairperson of the hearing* ***should be impartial and should not, if possible, have been involved in the issues giving rise to the hearing****. In appropriate circumstances, a senior manager from the different office may serve as a chairperson."*
> [Emphasis supplied]

Going by the contents of the rules as quoted, we think in the circumstances of this matter, the fact that the chairperson was handling other legal affairs of the company and being in the payroll of the company in itself cannot make the chairperson not impartial. In our considered view, what the rule requires is for the chairperson not to have been involved in matters giving rise to the disciplinary hearing. There is no evidence indicating that at any moment, Mr. Anthony Arbogast Mseke was ever involved in handling the affairs relating to termination of the respondent. We do not therefore find conflict of interest unlike what was observed by the learned Judge. We thus take the view of the CMA at page 520 of the record of appeal regarding this matter as hereunder:

> *"The complainant faulted the respondent's engagement of a non-employee as chairperson of the hearing. She argued that Mr. Mseke, being on the company's payroil for handling the company's lawsuits, could not be fair to her in the ruling. Rule*

13(4) of The Code provides that the hearing should be chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case.

The Commission finds no fault with the chairperson of the hearing. Just as DW4 testified, he was brought in to remove the element of bias. ***If Mr. Mseke being paid by the respondent is an issue, then any other senior employee who would have chaired the hearing would not have sufficed for the complainant just because they were in the respondent's payroll"***

[Emphasis ours]

Regarding respondent's right to representation, our starting point should be rule 13 (3) of GN No. 42 of 2007 which we reproduce, thus:

"13 (3) the employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted in the hearing by a trade union representative or fellow employee. What constitutes a reasonable time shall depend on the circumstances and the complexity of the case, but it shall not normally be less than 48 hours".

On this one, we note that, the learned Judge rightly observed that the respondent herein was given the right to be represented. We are therefore unable to fault her in the circumstances. However, with due respect, we are unable to agree with her on her registered unknown fears of representation by fellow employees or trade union required by the law at page 873 through 874 of the record of appeal. She observed, and we quote:

> *"The applicant argued the provision of rule 13 (3) of GN. No. 42 of 2007 should not restrict her to have an external representative when the circumstances of the case call for that she being in a managerial position was not a member of a trade union so was not be able to get representation from that entity. Also, it was the applicant's concern that she worked with the respondent for more than 37 years where had good relationship with fellow employees in different levels. However, she hesitated to engage them as representative because their interest may be conflicted and, they may fear being victimized. And for the same reason no fellow employee would have agreed willingly to represent her in the hearing. Therefore, is my view that applicant was supposed to be availed*

right to be represented by someone from outside the work."

What we have so far gathered from the above passage is sentiments of the learned Judge that the law should also provide discretion to have representation besides by fellow employees and trade union in the disciplinary hearing. In the end and for the foregoing, we hold that termination of the respondent was procedurally fair but substantively unfair.

We now turn to the last ground on the reliefs. Section 40 (1) and (2) of the Employment and Labour Relations Act, Cap.366 [R.E 2019] (the ELRA) should guide us. We reproduce it as follows:

"40 (1) Where an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer:

(a) To reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or

(b) To re-engage the employee on any terms that the arbitrator or Court may decide; or

(c) To pay compensation to the employee of not less than twelve months remuneration".

(2) An order for compensation made under this section shall be in addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement".

Basing on that legal position, the CMA awarded six months' salary compensation which is equal to TZS 45,634,710.00 having found termination unfair procedurally but substantively fair. When the dispute was at the High Court, termination of the respondent both substantively and in terms of procedure was found unfair thus proceeded to award compensation, as said, of TZS 904, 863, 473.00. Both the CMA and the High Court awarded the respondent a certificate of service.

The appellant's counsel faulted the High Court award basing on the voluntary agreement (exhibit TCC-14) because the agreement is only applicable to retired employees. He also faulted it for being colossal and did not take into account promotion of economic development envisaged under section 3 (a) of the ELRA. In his argument, compensating the respondent that much will halt the company's businesses. In his further submissions, the learned counsel stated that what was awarded went far

beyond the prescripts of section 40 of the ELRA. He added therefore that, the respondent was duly compensated as per the termination letter (exhibit TCC-7) thus what the learned High Court Judge awarded has no legal basis and is only applicable to retired employees, which is not the case here.

Ms. Mkanzabi in response conceded that, reliefs following unfair termination are awardable in terms of section 40 of the ELRA. Where this to her remain the correct legal position, the provisions of section 71(5) of the ELRA on collective bargaining agreement should also be taken into account, thus the import of the voluntary agreement (exhibit TCC-14) by the learned Judge in compensating the respondent for unfair termination.

We should begin with the position of the learned High Court Judge in awarding compensation to the respondent. After having a concession that section 40 of the ELRA is the only law applicable, the learned Judge proceeded to make an award as at page 877 of the record of appeal that:

> "*Under the circumstances of this case, where the applicant was unfairly terminated both substantively and procedurally,* ***in my view she should be entitled to reinstatement.*** *However, according to what were claimed at the CMA through the applicant prayers sought in CMA*

Form No.1 unfortunately the remedy of reinstatement was not among them. She prayed for the retirement benefits for 37 years of service as per summaries below, I quote..."

[Emphasis supplied]

We note in the foregoing passage that, the learned Judge intended the respondent be reinstated in her employment, a remedy awardable under section 40 (1) (a) of the ELRA. She however refrained from so doing for two reasons, **one** that the respondent never prayed for the remedy in CMA F1 and **two**, that in CMA F1, the respondent prayed for retirement benefits. This, in our view, was wrongly underscored. We are saying so because, besides reinstatement, the remedy of reengagement and compensation awardable under section 40 (1) (b) and (c) of the ELRA were still open to the learned High Court Judge for consideration. Again, assuming that it was right for her to do so, yet there was no justification for just granting such compensation simply it was prayed without any analysis to justify that prayer.

It was also not correct, unlike what was observed by the learned High Court Judge, the Appellant through DW6 one Derick Stanley never objected the claims of retirement benefits. What DW6 testified at page 563 of the record of appeal was that, had this been a retirement issue,

then the claims were correct but he hesitated to say so because the matter is a disciplinary one. This evidence of DW6 was underscored by the CMA at page 521 through 522 of the record of appeal where claims of the respondent relating to retirement were rejected by the CMA on account that the respondent was not retiring from service. It was in this way:

> *"On the claim of retirement benefits, the Commission refers to DW6's testimony that retirement benefits can be claimed by an employee who has reached 60 years of age after retiring from employment. The complainant's employment was terminated on a fair ground of misconduct and in addition to that, she had not reached the 60 years age requirement for the retirement benefit claim. The complainant is not entitled to these benefits"*

What we have so far gathered from the High Court decision is that, the learned Judge made her award as if the respondent was a retiree, the reason why in her judgement she made an order to deduct the amount paid to the respondent in the termination letter. We are not at one with the learned Judge because, **one**, the respondents' legal regime was on disciplinary matters and not retirement benefits. **Two,** the respondent was not retiring from service. **Three**, in the voluntary agreement, there is no clause dealing with compensation on grounds of disciplinary matters

upon which the learned Judge would have based. **Four**, complaint of the respondent to the High Court regarding compensation was not pegged on the voluntary agreement. We are saying so because that is not the basis in the affidavit of the respondent in support of her application for revision to the High Court in which paragraphs (vii) and (viii) at page 654 through 655 of the record of appeal deposes that:

> "*(vii) That the award is illogical as it does not reflect realities between the Applicants 37 years of employment from 1979, the fact that the applicant has had no disciplinary issues prior to the one that cost her employment, the fact that the Applicant was not given a chance to rectify the situation on the Trade Marks in question with the Registrar of Trademarks, the fact that there was no proof of financial loss, reputational damage done to the Respondent or otherwise that would justify the Arbitrator's finding that the Applicant's termination was substantively fair.*
>
> *(viii) That the award is illogical as it does not clearly state the Applicant's entitlement per the Arbitrator's finding. While the award declares that the Applicant is entitled to 6 months salaries, in the same line, the award*

talks of 12 months salaries which is a contradiction by the Honourable Arbitrator (see page 22 of the Award)".

Given the above extract, if anything in respect to the voluntary agreement complained by the respondent to the High Court, was in respect of the conduct of disciplinary proceedings and not compensation as we note in paragraph (iii) of the respondent's supporting affidavit to the application for revision. It is provided at page 654 of the record of appeal, thus:

"(iii) *That the Honourable Arbitrator erroneously found the Applicant guilty of misconduct without due regard and weight of the Code of Conduct of the Respondent Organization and the voluntary Agreement in place guiding disciplinary matters of the Respondent and its employees such as should have been in my case".*

Five, reasons for not invoking section 40 (1) and (2) of the ELRA in full are not apparent in the judgement of the High Court. As it is, we are also not in agreement with the learned counsel for the respondent that in the circumstance of this labour dispute, the provisions of section 71 (5) of the ELRA applies in the circumstances. Our reading in the section note the binding nature of the collective bargain agreement which, as we

demonstrated above, neither the CMA nor the learned High Court Judge nor the circumstances of this labour dispute permit deployment of the principle in the award.

In the end, and as we alluded to, the respondent's termination was on fair procedure but unfair substantively. The remedy, as in the foregoing analysis, is stipulated in section 40 of the ELRA. As observed by the learned High Court Judge, this is not a fit case to invoke the provisions of section 40 (1) (a) (b) of the ELRA relating to reengagement and reinstatement. The circumstances do not permit. We note that, the CMA awarded 6 months compensation having found termination frown in procedure but on fair ground. We observe the other way round that, the procedure on termination were followed but on invalid reasons. As we said in **Flavio Ndesanjo v. Serengeti Breweries Ltd.** Civil Appeal No.357 of 2020 (unreported), there was no justification as to why the learned High Court Judge awarded such a huge amount of compensation.

On that note, this appeal is partly allowed as discussed above. We thus quash and set aside the judgement and decree of the High Court forthwith. In the circumstances we award 12 months' salary compensation being the minimum provided for under section 40 (1) (c) of the ELRA. In terms of section 40 (2) of the ELRA, this compensation is in addition to

the terminal benefits awarded to the respondent in the termination letter found at page 99 through 100 of the record of appeal. This being a labour dispute, we do not award costs.

We order accordingly.

DATED at **DAR-ES-SALAAM** this 23rd day of February, 2024.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 26th day of February, 2024 in the presence of Ms. Esther Msangi, learned counsel for the Appellant and Ms. Oliva Mkanzabi, learned counsel for the Respondent, is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL