IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: SEHEL, J.A., KENTE, J.A And MASOUD, J.A.)

CIVIL APPEAL NO. 147 OF 2021

TANZANIA BREWERIES LIMITED.....APPELLANT

VERSUS

LEO KOBELO.....RESPONDENT

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

(Mashaka, J.)

dated 29th day of September, 2015
in
Labour Revision No. 211 of 2014
.....

JUDGMENT OF THE COURT

6th & 19th Feb., 2024

SEHEL, J.A:

The epicentre of this appeal is on termination of employment of the respondent, Leo Kobelo, on ground of poor work performance. The respondent commenced his employment with the appellant, Tanzania Breweries Limited, as a Boiler Engineer in 1989. He worked with the appellant for over a period of time holding various positions. In 1999, he saw an advertisement posted at the appellant's notice board seeking for a Packaging Unit Manager, a position for which he applied. He was

successful, as, on 6th October, 1999, he was issued with an appointment letter. The said letter informed the respondent that his immediate supervisor was the Packaging Manager, and that, the job description and responsibilities would be issued to him in the next few days. He worked in that position until he was terminated on 11th February, 2010.

Before his termination, four assessment meetings were held between himself and his immediate supervisor, the Packaging Manager (DW1). The first meeting held on 13th November, 2009 (exhibit TBL1) discussed nine focused points, to wit; problem solving; poor management performance of supervisors; prolonged pack change planning; poor timekeeping; non-adherence to the call out procedure; poor housekeeping; poor stock management; poor operator interaction and poor cost control on glue usage. In that meeting, parties agreed to have follow up meetings on 2nd December, 2009 (exhibit TBL2); 18th December, 2009 (exhibit TBL5) and 11th January, 2010 (exhibit TBL6). After each assessment meeting, warning letters were written by the appellant but the respondent claimed that he was not served. Since the appellant was still not satisfied with the respondent's capacity on 11th February, 2010, it held another meeting with

the respondent and with his representative, one Donald. After that meeting, the respondent was issued with a termination letter, exhibit, K38.

The respondent was not satisfied with the reasons and procedure for his termination. Therefore, he lodged a complaint to the Commission for Mediation and Arbitration (the CMA) where he sought for either reinstatement or to be paid his terminal benefits for unfair termination.

In its Award, the CMA found that the appellant contravened rule 18 (4) of the Employment and Labour Relations (Code of Good Practice), Government Notice No. 42 of 2007 (the Code of Good Practice) as warning was not issued to the respondent prior to his termination. It also found that the respondent was not informed of the poor performance inquiry meeting convened on 11th February, 2010. On that account, the CMA held that the respondent's termination was substantially and procedurally unfair. At the end, the CMA ordered for the re-instatement of the respondent.

Dissatisfied with the Award, the appellant filed an application for revision in the High Court. After hearing the parties, the High Court noted that the appellant had not set performance standards clearly known to his employees including the respondent. It therefore held that there was no fair reason for termination. On the issue of procedure, it concurred with the

CMA that rule 18 of the Code of Good Practice was not complied with by the appellant as no disciplinary hearing was conducted through which the offence could be ascertained. Accordingly, the High Court dismissed the application by upholding the CMA's Award. Still aggrieved, the appellant filed the present appeal.

In its memorandum of appeal, the appellant listed the following four grounds:

> *"1. That, the learned judge erred in law in confirming the decision of the CMA that the respondent was unfairly terminated while evidence on record and the law shows that termination was fair.*
> *2. That, the learned judge erred in law by failing to consider and confirm that the procedure used to terminate the respondent was proper and lawful.*
> *3. That, the learned judge erred in law in ordering the termination of the respondent was unfair while there was strong evidence to prove that termination was procedurally fair and lawful.*
> *4. That, the learned judge erred in law in ordering reinstatement in the circumstances of this case."*

At the hearing of the appeal, Mr. Nuhu Mkumbukwa, learned advocate, appeared for the appellant, whereas, the respondent, who was

present in Court, was represented by Mr. Richard Madibi, learned advocate. Both parties had earlier on filed written submissions in support and in opposition of the appeal, respectively which they adopted during the hearing of the appeal.

When the learned advocate for the appellant was invited to argue the appeal, he first sought and was granted leave to argue additional ground of appeal to the effect that:

> *"The learned judge grossly erred in law in not holding that it was incumbent for the successor arbitrator to inform parties of his decision to proceed with the recorded proceedings of his predecessor."*

In expounding this additional ground of appeal, Mr. Mkumbukwa pointed out that, in the CMA, the arbitrator, G. Tluway, heard, received and recorded the evidence of the appellant and the respondent while the Award was written and delivered by another arbitrator, A. Massay without giving reasons for such change. To support his contention, he referred us to the decisions of this Court in the cases of **Mariam Samburo (Legal Personal Representative of the late Ramadhani Abasi) v. Masoud Mohamed Joshi & 2 Others** (Civil Appeal No. 109 of 2016) [2019] TZCA

288 (11 September, 2019; TANZLII); **National Microfinance Bank v. Augustino Wesaka Gidimara t/a Builders, Paints & General Supplies** (Civil Appeal No. 74 of 2016) [2016] TZCA 2051 (20 December 2016; TANZLII) and **M/S Georges Centre Limited v. The Honourable Attorney General & Another** (Civil Appeal No. 29 of 2016) [2016] TZCA 629 (28 July 2016; TANZLII), where the Court held that recording reasons for taking over proceedings promotes accountability.

Further, the learned counsel for the appellant argued that the arbitrator has a duty to seek the consent of the parties on the way forward on the partly heard dispute. To cement his submission, he beseeched us to take inspiration from the South African's case of **Mhlanga v. Mtenengari & Another (1993) (4) SA 199 (ZS)**, where it was held:

> *"As a general rule, where a judicial officer is unable to complete a partly heard civil trial, be it due to supervening death or resignation on account of ill-health or some other form of incapacity his successor should commence the trial de novo, notwithstanding that to do so involves recalling those witnesses who have already testified and adducing their evidence afresh...The desirability of adopting such a course is self- evident. The second*

judicial officer would otherwise be deprived of the substantial advantage of seeing and hearing the witnesses for himself and of being able to compare their demeanor with that of the witnesses who testified in person before him...In such a situation the attitude of the litigants as to how best to proceed is, to my mind, of utmost importance. It is not for the judicial officer to dictate that the trial is to re-commence at the point reached by his predecessor... His duty is to consult the parties. He may bring his persuasive power to bear. But it is only in the event of it being agreed by the parties that he continues the trial, in the sense that the transcript of the proceedings so far be produced as evidence before him, that he is at liberty to do so. In the absence of consent, he must commence the trial afresh".

For the above reasons, Mr. Mkumbukwa urged the Court to quash and set aside the Award.

In response, the learned counsel for the respondent conceded that the dispute was heard by one arbitrator and the Award was issued by a successor arbitrator. However, he contended that the reason for taking over the proceedings were clearly stated in the Award. He added that

section 88 (2) (a) of the Employment and Labour Relations Act (ELRA) read together with rule 18 (1) of the Labour Institutions (Mediation and Arbitration Guidelines) Government Notice No. 67 of 2007 (G.N. No. 67 of 2007) empowers the CMA to appoint an arbitrator to resolve a dispute which was referred from mediation. In that respect, he argued that the law does not provide for mandatory legal requirement for the predecessor arbitrator to consult with the parties on the way forward upon resignation of the arbitrator as it is in the South African case cited by the learned counsel for the appellant.

He further distinguished the decisions of this Court cited by the learned counsel for the appellant. He contended that, in the cited cases, no explanation was given for taking over the partly heard cases, while in the present appeal, the successor arbitrator gave reason for taking over the proceedings as it was in the case of **Charles Christopher Humprey Richard Kombe t/a Humprey Building Materials v. Kinondoni District Municipal Council** (Civil Appeal No. 125 of 2016) [2021] TZCA 337 (2 August 2021; TANZLII). In that respect, the learned counsel for the respondent implored the Court to dismiss the additional ground of appeal.

Mr. Mkumbukwa acknowledged that the arbitrator is appointed by the CMA but he argued that the law is silent where the arbitrator is prevented from finalizing the hearing. He thus reiterated his earlier prayer that the Court be inspired by the decision of **Mhlanga** (supra).

From the submissions by the learned counsel for the parties, it is not in dispute that the dispute between the parties before the CMA was heard by the arbitrator, G. Tluway, and the Award was written and delivered by another arbitrator, A. Massay. The issue that stands for our deliberation is whether the successor arbitrator is required to obtain consent from the parties on the way forward in a dispute that was partly heard by his predecessor arbitrator.

Section 88 (2) (a) of the ELRA read together with rule 18 (1) of G.N. No. 67 of 2007 mandates the CMA to appoint arbitrators to resolve a dispute which was referred from mediation. However, the law is silent on the circumstances where an arbitrator is unable to complete the arbitration proceedings due to supervening circumstances such as death, resignation or some other form of incapacity. In contrast, Order XVIII rule 15 (1) of the Civil Procedure Code permits a successor judge or magistrate, in civil proceedings, to take over the proceedings, continue with the trial and act

on the evidence recorded by the predecessor judge or magistrate provided that the reason for taking over the partly heard proceedings is recorded – see: **National Microfinance Bank** and **M/S Georges Centre Limited** (supra).

The learned counsel for the appellant beseeched the Court to be inspired by **Mhlanga's case**, a South African case as he argued that it was more relevant to the present appeal. On this, we wish to interject that a copy of such decision was not supplied to the Court. This is in contravention of Rule 34 (1) of the Tanzania Court of Appeal Rules (the Rules). Therefore, we were denied an opportunity to assess the relevance of the said decision to the appeal at hand. Nonetheless, upon our online research we came across the case of **Mondi Shanduka Newsprint Pty Ltd v. Paul Murphy** https://www.saflii.org/za/cases/ZAKDHC/2018/24.pdf that referred to **Mhlanga's case** where it was observed that:

> *"**Mhlanga** is authority for the proposition that a record may be placed before another judge where a judicial officer is unable to complete a partly heard civil trial. His successor should commence with the trial de novo, notwithstanding that to do so would involve rehearing witness who had already testified*

and would be adducing their evidence afresh."
[Emphasis added]

Deduced from the above extract, it is crystal clear that the South African jurisprudence on a partly heard civil cases is different from that obtaining under our jurisdiction. We have alluded herein that Order XVIII rule 15 (1) of the CPC permits a magistrate or judge to take over a partly heard civil suit. Further, there is a plethora of authorities that reason for taking over should be stated in order to promote integrity of judicial proceedings. For instance; in the case of **David Kamugisha Mulibo v. BUKOP Ltd** [1994] T.L.R. 217, the appellant sued the respondent for wrongful termination of employment. Before the suit could be heard, the respondent raised a preliminary objection to the effect that the trial court had no jurisdiction because the appellant had been summarily dismissed. The trial judge stayed the proceedings so that the opinion of the labour officer could be obtained on the status of the appellant. After the opinion was obtained and given to the court, the case was decided by another judge without there being any reason for taking over. On appeal, the Court held:

"It was highly irregular and unprocedural for the matter, which was initially before a judge who had

stayed his ruling pending the opinion of the labour officer, to be heard and determined by another judge."

That said, each case should be determined according to its own peculiar facts. In the present appeal, as correctly submitted by the learned counsel for the respondent, the successor arbitrator, A. Massay, gave reason for taking over arbitration proceedings which was heard to completion by G. Tluway but Award was reserved. Hereunder is the translated version of the reason explained in the extract of the Award:

"The present dispute was heard by Hon. Gasper Tluway who upon his resignation, the CMA decided to assign the dispute to another arbitrator to compose the award, in accordance with section 88 of the Employment and Labour Relations Act No. 6 of 2004."

In our view, the case of **Charles Christopher Humprey Richard Kombe** (supra), cited to us by Mr. Madibi, posited well with the present appeal. Since the successor arbitrator exhibited transparency and accountability in taking over arbitration proceedings that was partly heard by his predecessor arbitrator, G. Tluway, we find that the additional ground of appeal lacks merit. We dismiss it.

We now turn to the merits of the appeal. In the first ground of appeal the appellant faulted the CMA and the High Court in holding that there was no fair reason for termination. The learned counsel for the appellant contended that the reason for termination was poor work performance contrary to the expectation of the employer. He pointed out that the respondent was a senior manager who had long experience in a managerial position but due to his continued incapability to meet the required standard, the appellant had to terminate his employment. He explained that, before terminating the respondent's employment contract, there were series of assessments and follow up meetings held between the respondent and his immediate supervisor, DW1 on focus areas. Despite the efforts, he said, there was no improvements but rather poor progress on part of the respondent. To support his argument that the respondent was engaged in the meetings, the learned counsel referred us to the minutes of the meetings which were admitted in evidence as exhibits TBL1, TBL2, TBL5 and TBL6. He pointed out that minutes were signed by the respondent evidencing that he was well informed of the required performance standard.

It was further argued that the respondent was also issued with three warning letters, TBL3, TBL4 and TBL6, which were sent to him through his email, as per the evidence of DW1, and that, in his cross examination, the respondent acknowledged that email was a proper means for communication. In the circumstances, the learned counsel contended that there was a valid and justifiable reason for terminating the respondent's employment on the ground of poor work performance. To cement his argument, he referred us to an English case of **Cook v. Thomas Linnel & Sons Ltd** [1997] IRLR 132 that quoted a passage from Bowers' J book titled '*A Practical Approach to Employment Law*', 7th Ed., Oxford Press, that:

> *"When responsible employers genuinely come to a conclusion that over a reasonable period of time a manager is incompetent, we think that is some evidence that he is incompetent."*

At the end, he contended that the High Court misapprehended the evidence tendered before CMA. He prayed for the appeal to be allowed.

On his part, the learned counsel for the respondent opposed the appeal by arguing that the employer bears the burden of proof on the balance of probabilities that termination of the respondent's employment

was based on valid reason and not on employer's will. Relying on the provisions of rules 17 & 18 of the Code of Good Practice, he argued that, even though the respondent was terminated on the ground of poor work performance, there was no evidence proving the respondent's incapacity as the agreed performance standards were not tendered before the CMA and no evidence was adduced to establish that the respondent was aware of the required performance standards. He contended that the only evidence available in the record of appeal are nine focused areas which cannot be equated with agreed performance standards. Responding to the argument that exhibits TBL1 – 10 were served on the respondent, he contended that the said exhibits do not indicate that they were served on the respondent. With that submission, the learned counsel urged the Court to uphold the decision of the High Court and that of the CMA.

It is common cause that the respondent was dismissed on poor work performance. Poor work performance falls under the broad heading of incapacity. In terms of rule 9 (4) of the Code of Good Practice, incapacity is one of the valid reasons for termination. Incapacity broadly includes employee's ill health, injury or poor work performance - see: rule 15 (1) of the Code of Good Practice. In the case of **Stanbic Bank (T) Ltd v.**

Sophia Majamba (Civil Appeal No. 31 of 2020) [2022] TZCA 401 (28 June 2022; TANZLII), the Court explained as to what entails proof on the reason of incapacity that:

> *"Incapacity requires proof that there was poor performance, and that, the employee failed to meet the work standards at the workplace."*

Further, rule 16 (1) of the Code of Good Practice stipulates that the set-out performance standards need not only be fair but sufficiently serious to justify termination, that is, a dismissal was the only fair sanction remained to be taken and no other option could be provided, such as, moving an employee to another position.

It must be observed that the onus of proof always rested upon the employer to establish on the balance of probabilities, that the dismissal was procedurally and substantively fair. For an employer, or arbitrator or judge to determine whether the reason for poor work performance was fair, rule 17 of the Code of Good Practice provides guidance on the criteria to be considered by the CMA and the judge. These are:

> *"(a) whether or not the employee failed to meet a performance standard;*

(b) whether the employee was aware, or could reasonably be expected to have been aware, of the required standard;

(c) whether the performance standards are reasonable;

(d) the reasons why the employee failed to meet the standards; and

(e) whether the employee was afforded a fair opportunity to meet the required performance standard."

The above envisages that the employee should be aware, or could reasonably have been aware, or could reasonably have been expected to be aware, of the required performance standards and that the said set out performance standards must be reasonable, lawful, and attainable within the work place. It is only from the set-out standards, that the employer will have to measure them against the employee's performance. We are therefore satisfied that the holding in the case of **Cook** (supra) is contrary to the laid down procedure because employers can only terminate employees' contracts basing on valid reasons and not at their own will or whims.

When probed by the Court as to whether the respondent was aware of the set-out performance standards, the counsel for the appellant quickly responded that it was not one of the issues framed before the CMA thus the respondent was aware.

Our scrutiny of the record of appeal revealed that there were three issues framed for the determination by the CMA. **One**, whether the respondent failed to perform his duties; **two**, whether a fair procedure for termination on incapacity was followed, and **three**, what relief are parties entitled. We strongly believe that for the first issue to be adequately addressed, the appellant was required to establish before the CMA the duties which the respondent was required to perform. The conspectus of record of appeal showed that the letter of appointment, exhibit K17, informed the respondent that he would be availed with the job description and responsibilities within the next few days. However, the said job descriptions and responsibilities were not detailed by DW1 nor tendered in evidence before the CMA. In the circumstance of the present appeal, the appellant was expected to establish on a balance of probabilities the agreed set out performance standards. We are of the firm view that if the specific job descriptions or set-out performance standards were described

or tendered in evidence, the CMA or the Labour Court would have been in a better position to gauge the reasonableness of nine focused areas, contained in exhibits TBL1, TBL2, TBL5 and TBL6, used in assessing the respondent's performance. In absence of such critical evidence, it was difficult to understand whether the assessment was reasonable, understandable, verifiable, measurable and equitable. Failure to bring such critical evidence, the appellant's claim that the respondent was underperforming remained mere allegation with no proven evidence.

The counsel for the appellant further argued that, after the respondent was given assessment reports, TBL1, TBL2, TBL5 and TBL6, which discredited his performance, he never appealed against them. Our perusal of the record of appeal revealed that the right of appeal was explained in the warning letters, exhibits TBL3 and TBL4. We shall come back to the issue of warnings when dealing with the second and third grounds of appeal that fault the procedure used in terminating the respondent's employment. Suffices to state here that, we find that the decision of the CMA which was upheld by the High Court that there was no valid reason to terminate the respondent's employment was justified and

correct. Accordingly, we do not find merit in the first ground of appeal. We dismiss it.

Let us now examine the second and third grounds of appeal dealing with the procedure used by the appellant in terminating the respondent's employment. The appellant's submission on this issue was on two-fold: **first**, the High Court erred when it condoned the appellant for not providing training to the respondent in terms of rule 18 (4) of the Code of Good Practice, whereas, rule 18 (4) of the same Code provides an exception to employees who are at managerial level. Mr. Mkumbukwa pointed out that the respondent was a senior manager who had a long work experience in the managerial position as reflected in his curriculum vitae, exhibit K18. He, therefore, contended that the respondent need no further training. To cement his argument, he cited the English case of **Taylor v. Alidair Limited** [1978] ICR 445 at pg. 455 where it was said that:

> *"...they suggest that such loss of confidence could be cured by further training. This was a man, as Lord Denning M.R. has pointed out, who had been qualified as commercial pilot as long as 1968. He had been a first officer on Viscount aircraft between*

1972 and 1975 and from March or April 1975 he had been a captain of Viscount aircraft. If such a person requires further training on how to land a Viscount aircraft...it is hard to see how it can be unreasonable to dismiss him on the grounds of lack of capability."

He added that the issue of training to improve work performance of the respondent was not at issue before the CMA. In any event, the learned counsel argued, the regular meetings held between the appellant and the respondent sufficed.

Secondly, the High Court erred by holding that no disciplinary proceedings was conducted, and that, the respondent was denied a right to be heard. The learned counsel for the appellant contended that rule 13 of the Code of Good Practice is applicable when dealing with misconduct whereas the respondent was dismissed on the ground of poor work performance. Mr. Mkumbukwa explained that the relevant procedure is provided under rule 18 of the Code of Good Practice. He pointed out that the appellant conducted several consultative meetings to discuss areas requiring special focus for improvement. It was his submission that despite efforts taken by the appellant still there was no improvement. In that

respect, he said, warnings were served on the respondent in terms of rule 18 (4) of the Code of Good Practice. Thereafter, the employer convened a meeting with respondent pursuant to rule 18 (6) of the Code of Good Practice. He added that the respondent attended the meeting with his representative, one Donald. With that submission, the learned counsel argued the procedure adopted by the appellant was in accordance with the law thus it was a fair procedure.

Mr. Madibi briefly replied that the appellant did not comply with the procedure stipulated in rule 18 (1) (2) (3) (4) and (6) of the Code of Good Practice when terminating the respondent from his employment. He detailed that the appellant did not conduct any investigation to identify the cause of the respondent's poor work performance, if there was any; the employer failed to give proper guidance or training to the respondent which would have assisted the respondent to improve his capacity, and that, the appellant did not issue any warning to the respondent on the consequences of his poor work performance. He contended that the failure to comply with the laid down procedure, rendered the termination of the respondent to be procedurally unfair. He thus urged the Court to dismiss the second and third grounds of appeal.

Generally, poor work performance is not based on fault, rather, on the failure of an employee to reach and/or maintain an employer's work performance standards. Therefore, the procedure for terminating an employee on a ground of poor work performance, as correctly argued by Mr. Mkumbukwa, is different from misconduct processes. This is clearly stipulated under rule 9 (2) of the Code of Good Practice that:

> *"Notwithstanding the procedures used in these Rules the procedure which may be used in respect of incapacity or incapability shall be different."*

The said different procedure governing termination on ground of poor work performance is provided under rules 18 of the Code of Good Practice. Rule 18 (1) requires an employer to investigate the reason for poor work performance in order to know the extent of such poor performance. It was argued by Mr. Mkumbukwa that the appellant conducted four meetings with the respondents in order to assess and consult with the respondent on areas that need improvement as per the assessment reports which were tendered and admitted in evidence as exhibits TBL1, TBL2, TBL5 and TBL6. We have held herein that the set targets or responsibilities were not explained before the CMA for it or the Labour Court to understand the reasonableness of the assessment reports.

In short, the assessments cannot be equated to the investigation envisaged under rule 18 (1) of the Code of Good Practice.

Moreso, we observed from the assessment reports that the intervals between one assessment to another was hardly two weeks, whereas, rule 18 (3) requires an employer to give an employee reasonable time for improvement. It is on record that the first assessment was done on 12th November, 2009; the second assessment was on 1st December, 2009; the third assessment was conducted on 18th December, 2009 and the fourth assessment was on 11th January, 2010. As such, the allowable period for improvement was too short for one to exhibit progress. Consequently, we find the allowable period for improvement was not reasonable.

Again, sub rule (4) to rule 18 requires the employer to give an employee a written warning after the employee has failed to mitigate his poor work performance. We have stated herein that the appellant alleged to have served the warning letters to the respondent through emails. Having revisited the record of appeal, we concur with the finds of the CMA and the High Court that the warning letters were not served on the respondent. We are alive that Mr. Mkumbukwa claimed that by the act of the respondent acknowledging emails being one of the means of

communication, then warning letters were served on the respondent through such means of communication. For ease of reference, we reproduce the translated extract of the arbitration proceedings hereunder:

> *"Q: What was the communication channels between yourself and the Packaging Manager?*
>
> *A: meetings, rarely through phone.*
>
> *Q: Was there any communication through emails.*
>
> *A: Yes."*

Indeed, the foregoing suggests that the respondent agreed that email was one of the channels of communication between himself and his immediate supervisor, DW1. Nonetheless, no evidence was tendered before the CMA to prove that warning letters were served on the respondent through emails. One would expect the witness of the appellant, DW1 to tender in evidence the sent email messages but he did not. There being no proof of sent emails, we find the contention that the respondent was served with warning letters unproven.

Relying to the provision of rule 18 (5) of the Code of Good Practice, the learned counsel for the appellant further argued that given the level of professional knowledge, skills and experiences which were extremely high

on the part of respondent, the appellant was dispensed from providing counselling, training and warning to the respondent. The said rule provides:

> *"(5) An opportunity to improve may be dispensed with if-*
>
> *(a) the employee is a manager or senior employee whose knowledge and experience qualify him to judge whether he is meeting the standards set by the employer;*
>
> *(b) the degree of professional skill that is required is so high that the potential consequences of the smallest departure from that high standard are so serious that even an isolated instance of failure to meet the standard may justify termination."*

Our reading of the above provision of the law that the employer may dispense from giving an employee an opportunity to improve. The dispensation does not extend to the issuance of warning. The law, as it stands, requires the employer to issue warning before terminating an employee on poor work performance.

In the end, we find that the appellant's termination of employment on the ground of poor work performance was procedurally unfair. Accordingly, we dismiss the second and third grounds of appeal.

In the fourth ground of appeal, the learned counsel for the appellant took an issue with the order of reinstatement contending that it was not practicable to comply with it. In trying to convince the Court that the order was impracticable, Mr. Mkumbukwa argued that; the CMA took two years from the date the respondent was terminated to finalize the dispute; the appellant being a going concern company could not have left the managerial position open for such period, and that, the managerial position which the respondent held was immediately filled by another manager. It was the view of Mr. Mkumbukwa that had the High Court considered rule 32 (2) of G.N. No. 67 of 2007, it would not have upheld the CMA's decision. He contended that the appropriate order was compensation of not less than twelve months salary, in terms of section 40 (1) (c) of the ELRA. In that regard, he implored the Court to find merit on this ground of appeal.

In reply, the learned counsel for the respondent submitted that the decision of the CMA ordering reinstatement of the respondent was made in terms of section 40 (1) (a) of the ELRA. In brief, he supported the concurrent findings of the CMA and the High Court. He thus beseeched the Court to find that the fourth ground of appeal is without merit.

Having heard, the contending submission, we are inclined to the submission of Mr. Madibi for sole reason that among the remedies which an arbitrator or a Labour Court may provide to an employee who was unfairly terminated was an order of reinstatement of the employee from the date he/she was terminated without loss of renumeration during the period that the employee was absent from work. If the employer finds that it is not practical to reinstate, sub-section (3) to section 40 of the same Act provides the solution that:

> *"Where an order of reinstatement or re-engagement is made by an arbitrator or court and the employer decided not to reinstate or re-engage the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment."*

It follows then that, the appellant's complaint is without substance. If the employer finds it difficult to reinstate the respondent, it has a right to invoke the provisions of section 40 (3) of the ELRA. Accordingly, we find that the fourth ground of appeal is devoid of merit.

From what we have endeavoured to discuss, we find that the High Court judiciously exercised its revisional powers. We thus, find the appeal is devoid of merit, accordingly, dismiss it. We make no order as to costs because the appeal arose from a labour dispute.

DATED at **DAR ES SALAAM** this 16th day of February, 2024.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 19th day of February, 2024 in the presence of Mr. Erick Denga, learned counsel for the Appellant and Ms. Joyce Shayo, learned Counsel holding brief for Mr. Richard Madibi, learned counsel for the Respondent is hereby certified as a true copy of the original.

W. A. HAMZA
DEPUTY REGISTRAR
COURT OF APPEAL