

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

REVISION NO. 19 OF 2007

EDNA PENDAEL TENGA APPLICANT

VERSUS

PAROKIA YA BUGANDO RESPONDENT

(Original CMA/MZ/292/2007)

Ruling

16/3/2010 & 19/3/2010

R.M. Rweyemamu J.,

The applicant/employer seeks revision of the *Commission of Mediation Arbitration* (CMA) award dated 30/10/2007 on grounds contained in her affidavit basically that; the arbitrator erred in not ordering the employer/respondent to pay "twenty days salary worked by the applicant before termination" and "salary payment deducted from 1992 to 2005 after deducting 10% mentioned in ground 6 (iv) of the affidavit" grounds contained in ground 6 (iii) and (iv) of her affidavit. She adopted the said grounds at the hearing where she appeared in person.

The application was opposed by the respondent/employer in the counter affidavit filed in opposition, grounds of which were elaborated on by Mr. Malongo, advocate who appeared for the respondent at the hearing. He submitted that the applicant failed to substantiate her claims during arbitration and further that payment of salary underpayments for the claimed 21 years was time barred, she could only claim payments for 6 years.

In reply, the applicant submitted that the CMA failed to conduct arbitration proceedings according to law; that there was no arbitration hearing, instead, she was only instructed to give a breakdown of her claims and did not know how the final figure was arrived at.

I have checked the CMA record of arbitration proceedings; they indeed fall short of qualifying as arbitration proceedings as required by rule 32 of the Labour Institutions (Mediation and Arbitration) Rules, GN 64/2007 (**M&A rules**). The record does not show how the case commenced, what issues were up for arbitration; what evidence was lead and the like. It would appear the parties were only requested to file statements- themselves not indicated to be part of the record. In short, there was no record of proceedings properly so called.

This court has given directions in a number of cases on the necessity to keep a proper record of proceedings. Fortunately, most such records now emanating from the CMA comply with the requirements, and I that this decision was made way back in 2007, before the court had extensively discussed the issue. For benefit of the arbitrator in question however, I shall quote this court's discussion on the issue in one such decision. In that case, **Project Manager Barrick Gold Mine (Bulyanhulu) Vs. Adriano Odhiambo**, *Revision 290/2008*, the court observed among others that:

"I have checked the CMA 'arbitration record', the applicant's submission that the arbitrator failed to keep a record of proceedings as prescribed under rule 32 of the Labour Institutions (Mediation and Arbitration) Rules, GN 64/2007 (**M&A rules**) is founded. The record bears the applicant's submission out in that the proceedings are scanty, and mixed. Second, it is not clear where mediation ended and arbitration started an issue I address hereinafter."

"This court has stressed a number of times including the case cited by counsel of **BIDCO OIL SOAP vs ABDU SAID AND 3 OTHERS**, *Revision 11/2008*, where Mandia J, as he then was, made a number of observations which are applicable to the facts of this case. The Hon. Judge noted among others that in conducting arbitration proceedings;

"...emphasis (is) on regular and orderly progress in law and procedure from commencement of an action to execution of judgement...the functions of arbitration are quasi-judicial, so arbitrators should insist on basic characteristics of orderliness and regularity in execution of their duties. Luckily the Commission has made elaborate rules of procedure (published as GN 64/2007 and GN 67/2007)...These

rules of procedure are subsidiary legislation and arbitrators are bound to follow rules set therein"

In that case, the court held that failure to keep a proper record vitiated the whole proceedings including the resultant award, which it proceeded to quash. Building on that principle, this court observed in **Grace Wanna vs All Terrain Service, Application No 16/2007** that:

"To arrive at a proper record of proceedings prescribed under rule 32 of the (M&A rules), the CMA, using its powers under section 15 (1) (f) of the of the Labour Institutions Act 7 of 2004, issued the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN 67 of 2007, (hereinafter the Guidelines) which specifies stages and contents of arbitration proceedings and if I may add, seeks to give arbitration proceedings attributes of legal proceedings. The stages to be covered are contained in Rule 18 to 26 of the guidelines.

Proceedings complying with the guidelines will clearly show issues to be arbitrated upon, evidence led by each side to prove or disprove the issues, which evidence is received as per Rule 25; it will contained arguments by way of written submissions which should be indicated in the proceedings, or made part of the record where they are received orally, also where the arbitrator allows closing arguments, they should be systematically included in the record. Further, where there were preliminary issues, evidence and arguments by each side should be indicated in the record. Finally proceedings should contain the award which should indicating the decision and reasons thereof on each issue resized and a summary on matters itemized under guideline 27 (a) to (f).

To make such proceedings orderly would by necessity require numbering the pages in the cause of proceedings sequentially, it would require that the written notes be kept in a retrievable form and although Rule 32 (2) of the (M&A rules)

permit "legible handwritten notes", when the same are required by parties for their records, revision purposes etc., a typed copy certified by the arbitrator should be supplied where applied for under Rule 32 (4) of the Rules. That, in my opinion, is the only sure way this court can tell/understand what transpired during the arbitration process and what aspects are faulted or supported.

*I am aware that Rule 19 of the **Guidelines** empowers the arbitrator to determine how proceedings should be conducted, I wish to stress that such powers deal with matters like which party should start, how the dispute is introduced, whether closing remarks will be taken, whether to adjourn proceedings and the like, but such power do not allow an arbitrator to jump/skip the vital stages, or fail to keep a proper record".*

Due to failure to keep a proper record of proceedings, I hold as it was held in many other cases with a similar irregularity that, the mishap amounted to a fundamental irregularity which vitiates the whole proceedings. I accordingly revise and quash the whole of the CMA proceedings including the award, remit the file to the CMA with an order that the dispute be processed afresh according to law. It is so ordered.

R.M.Rweyemamu
Judge
18/3/2010

Date: 19/03/2010

Coram: Hon. R.M. Rweyemamu, J.

Applicant:

For Applicant: Absent

Respondent:

For Respondent: Pius Makelele Secretary to the Parish for Respondent

C.C. Josephine Mbasha

Court: This matter is for ruling.

Ruling delivered this 19th March, 2010 in presence of the parties as above. R/A Explained.

Order: Applicant to pick knew copy of the decision at the MZA CMA are Office.

R.M. Rweyemamu

JUDGE

19/3/2010