IN THE HIGH COURT OF TANZANIA

HIGH COURT LABOUR DIVISION

AT SHINYANGA

REVISION NO. 4 OF 2014

BETWEEN

VEDASTUS S. NTULANYENKA & 6 OTHERS .... APPLICANTS

VERSUS

MOHAMED TRANS LTD .... RESPONDENT

JUDGMENT

23/06/2014 & 27/06/2013

Mipawa, J.

The applicants namely Vedastus S. Ntulanyeka and 6 others have filed the present revision under Section 91 (1) (a) (b) (2) (b) (c) of the Employment and Labour Relations Act No. 6 of 2004, Rule 24 (1) (2) (a-f) (3) (a-d) (4) (a-b) (5) (6) as well as Rule 28 (1) (2) of the Labour Court Rules GN. No. 106 of 2007. The application is supported by the applicants who are Vedastus S. Ntulanyeka, Abita Mashem, Emmanuel Lyimo, Shadrack Joseph, Yusuph Ibrahim, Leornard John and Asha Said Hussein.

The applicants through the services of their personal representative Mr. Nyanjugu Masoud seeks revision of the Commission for Mediation and Arbitration styled "CMA" which was

procured on 20th January, 2014 Nnembuka (Esq) Arbitrator in favour of the respondent [Mohamed Trans Ltd] and their erstwhile employer. Vide "mgogoro wa kikazi" (trade dispute) na CMA/SHY/75/2013 in which the applicants were complaining before the Commission for Mediation and Arbitration of ***unfair termination based on misconduct*** as against their erstwhile employer the respondent herein.

The gist of the matter before the Commission for Mediation and Arbitration was that the applicants were employed by the respondent as bus conductors at various times and were receiving salaries at different rates except Asha Said who was employed as an accountant and was terminated by the respondent for being absent at place of work inspite of the fact that he was granted leave by the respondent to go and attend her sick mother who was admitted in the Hospital at Nyamagana Mwanza. She was terminated however without being paid her salaries of May and June 2013, unpaid leave and "mapunjo ya mshahara" from the year 2008 – 28/06/2013. Her salary was 80,000/= per month instead of 200,000/=, Vedastus Ntulanyeka was receiving the salary of 80,000/= instead of 150,000/=, Emmanuel Lyimo was being paid a salary of 150,000/= per month, Shadrack Buzenganwa was being paid 150,000/= Tzs per month and Yusuph Ibrahim was being paid 80,000/= instead of 200,000/= Learnad Umbe was being paid 150,000/= per month.

According to the respondent witness Mr. Steven Tungu manager of the respondents company, the applicants were terminated for a misconduct of gross dishonesty to wit; they offered false accounts of the money they were getting in the course of their duties and this was discovered after the respondent decided to inspect their accounts in comparison with the cash they had:-

> *... Kosa kubwa la walalamikaji ilikuwa ni kutoa takwimu za uongo katika hesabu zao na hili liligundulika baada ya wahasibu wa kampuni kufanya ulinganisho wa hesabu.*

The witness produced before the Commission for Mediation and Arbitration exhibit D1 which showed the shortage of money they were handing over to the respondent especial for Shadrack Joseph who on 20/02/2012 did not handover 30,000/= Tzs and on 25/02/2012 he had a shortage of 86,000/= on 20/04/2012 he had the shortage of 268,540/= Tzs, Vedastus Simon on exhibit D2 had a shortage of 61,000/= on 16/01/2012, on 17/01/2012 he had a shortage of 47,000/= and on 30/09/2012 he had a shortage of 238,000/=.

The respondent witness further argued that the applicants were given time to pay the shortage of money they incurred but the applicants never complied with the employer's request. The applicants also did not cooperate with the respondent shortly after being found with shortage of money of the employer. They were terminated as the result and told to take their benefits in the office of the company of the respondent but they went to the Commission for Mediation and

Arbitration. The applicants were given chance to be heard but did not cooperate with the respondent employer.

The witness of the respondent further told the Commission for Mediation and Arbitration that the respondent has the auditors and inspectors of the company's accounts. The applicants had shortage of money in their collections and that the amount of money lost is not an issue but the issue is that the applicants were dishonesty and had lost trust relationship with the employer respondent and this resulted to the respondent loss of business money at the expense of the company.

The second witness of the respondent Mr. Charles Nyande was the one who received the payment list from the bus conductors "listi za malipo" and put them in the computer in order to make a comparison if they tallied .If the company founds that there was shortage and loss of money the applicants are asked to pay back the shortage or loss of money. However the applicants in the present case never paid a single cent. Fahima Mohamed the company's accountant told the Commission for Mediation and Arbitration that as an accountant her duty was also to check the applicant's revenue (mapato) and how they use the money "matumizi ya kondakta" she told the Commission for Mediation and Arbitration that Emmanuel had a loss of 147,000/= in his accounts on 13/01/2013 he did not hand over to the respondent Tzs 553,500/= and on 07/02/2013 he owed the company 571,000/= exhibit D3. Yusuph Ibrahim on 06/08/2013

had a loss of 100,000/= and on 10/08/2012 had a loss of 108,200/= Tzs, on 22/11/2012 had a loss of 215,509/= exhibit D4 all the money the applicant Yusuph Ibrahim owed the company has not been paid. On the evidence of Peter Kalinga who was the fourth witness of the respondent told the Commission for Mediation and Arbitration that on the termination of Asha Said he was given leave to attend her sick mother as prayed, and he was give a seven days leave from 02/05/2013 to 09/05/2013, she was supposed to be on duty the 10th May, 2013, but he requested an extension of time when it was discovered that the she was in Dar es Salaam and therefore she returned after three days where the employer wanted her to give explanation and told the employer that she was in Mwanza. The applicant was terminated because of telling lies that she was in Mwanza while in fact she was in Dar es Salaam.

On the applicant Leonard the witness told the commission that, the applicant was terminated because of telling lies, to put his mobile phone off at time the employer wants to give him duties or directions for work. He was given chance to be heard where he explained himself but the Director decided to terminate him for telling lies.

The applicants on their part told the Commission for Mediation and Arbitration that the allegations which were put infront of their doors by the respondent were not true Vedastus Simon PW2 for example told the Commission for Mediation and Arbitration that he did not know his wrong, also the accusation in the letter of termination he

does not agree with them, that there was no disciplinary hearing that was held. Abilla Mashamu Pw3 told the Commission for Mediation and Arbitration also that he was not given chance to be heard and the allegations against him were not true. Likewise Pw4 Shadrack Joseph, Pw5 Yusuph Ibrahim, Pw6 Emmanuel Lyimo, while Pw7 Asha Said insisted before the Commission for Mediation and Arbitration that she was given leave by the respondent for seven days to attend her sick mother he was granted and went to Mwanza, however on return he was surprised to be told that she was supposed to explain where he was, she was terminated without any disciplinary meeting being held Pw8 Mr. Leonard John was terminated as a driver because of putting off his mobile phone at the time when the employer wants to give him duties. He told the Commission for Mediation and Arbitration that there was no disciplinary hearing ever held against. The commission after hearing the parties, said that the applicants in the Commission for Mediation and Arbitration F1 never put the claims of unpaid salaries, unpaid leave etc. ***The respective CMA F1 showed only of unfair termination*** the arbitrator refrained therefore to include the claims not indicated in CMA F1 when he said that:-

> *Kwa mujibu wa CMA F1 zilizowasilishwa mbeleTume nawalalamikaji hakuna hata moja inayoeleza kwamba mgogoro huu unahusu madai hayo, bali zinaelekeza kwamba mgogoro huu unahusu kuachishwa kazi isivyo halali ...*[1]

[1] Record: CMA Arbitration award at Page 12

The Commission for Mediation and Arbitration went further by saying that the claims of unpaid salaries and the like were included by the applicants only when they were testifying before the Commission for Mediation and Arbitration and were not indicated in CMA F1 [CMA form No. 1] and therefore the arbitrator has no powers to change the claims of the applicants and relied by quoting the case of ***Power Roads (T) Limited Vs. Haji Omari Ngomaro*** Revision No. 36 of 2007 where this court held that:-

> *... There is no provision in the Employment and Labour Relations Act, or in the Labour Institution Act, particularly Section 20 on powers of mediators and arbitrators to make changes suo mutto, on what appears on the referral form ...*[2]

That the claims of unpaid wages leaves and the like which were not in CMA F1 were supposed to be tabled before the Commission for Mediation and Arbitration in 60 days time from when the applicants realized that they were not paid the same. This is in accordance to Rule 10 (2) of the Labour Institution (Mediation and Arbitration) GN. No. 64 of 2007 and in case of the applicants are not in time to table their claims within the said 60 days, they have to apply before the Commission for Mediation and Arbitration as per Rule 29 in order for the dispute to be received by the Commission for Mediation and Arbitration out of time. The arbitrator therefore refrained from considering the claims because they were time barred and no condonation had been sought and granted. The learned arbitrator was of the view that since the applicants did not dispute or cross-examine

[2] Record: Power Roads (T) Limited case Vs. Haji Omari Ngomaro as quoted in the CMA award at Page 12

the respondent witness on the copies of revenue written by their own hands handwriting and which later were put in the computer, but they never asked if there was balance between what was written by their hand writing and signed by them and that which was typed later by the computer and signed by the accountant. He cemented his arguments in the award that the applicants never had problem with the document concerning revenue "mapato" because they did not query or ask anything about it. He quoted ***Sarker on Evidence*** 14th ed. 1993 Vol. 2 at Page 2007:-

> *...Whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed ...*[3]

The learned arbitrator found that the employer had valid reason(s) to terminate the applicants because though the exhibits on shortage of money, many of them were of the year 2012 January, to November and the applicants were terminated in the year 2013. They had showed and demonstrated ***Gross dishonest*** for refusing the request by the employer respondent to seat together with him on the table of accounts reconciliation and balance of their accounts because they knew that their accounts were not in a proper balance lest they could be found to have appropriated a great sum of employers money for their own benefits and therefore the employer lost trust relationship with them:-

[3] Record: Sarker on Evidence as quoted at Page 14 of the CMA arbitration award.

> *...na kwa kuwa ushahidi unaonyesha mwajiri aliwaita walalamikaji kwa ajili ya kwenda kufunga hesabu na wakashindwa kutoa ushirikiano kwa kwenda kufunga hesabu zao basi inatosha sana kwa mwajiri kuwa na sababu ya msingi ya kuwaachisha kazi walalamikaji. Kwani kwa kitendo cha kutokubali kwenda kufanya mahesabu kunaonyesha kuna maovu ambayo walalamikaji hawakutaka yajulikane na hivyo kumtia mashaka mwajiri na kumfanya asiwe na imani [nao] ...*[4]

On the part of Asha Said the learned arbitrator found that the applicant was granted leave of seven days to go and attend her sick mother in Mwanza, but she used that chance to go to Dar es Salaam the act which caused the employer to lost his trust on the applicant and that the act of producing a medical chit does not prove the fact that she was attending her sick mother. As regard to the applicant Leonard John evidence showed clearly that he had put off his mobile phone during the night and he had the right to get a rest as a driver. However exhibit A15 showed that the applicant as a driver has had the habit of putting off his mobile phone often, he failed to explain on the other days as to why he was putting his mobile phone off. The arbitrator also found that the aim and policy of the employer was in line with Rule 11 (1) of GN. No. 42 of 2007 when he wanted [the] driver as a policy not to put their mobile phones off so that in case of emergency they may be available for the emergency duties even at whatever time it may. On whether the employer respondent followed the fair procedure in terminating the applicants, the learned arbitrator found that the employer did not follow the fair procedure because

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[4] Record: CMA arbitration award at Page 14

there was no any disciplinary hearing committee that was convened to discuss the applicants and neither did the applicants served with charges and given opportunity to respond; in fact the applicants were not given chance to defend themselves and therefore there was unprocedural fairness i.e the respondent did not follow the procedure before he had terminated the applicants employment. The commission ordered the respondent to pay the applicants compensation of six months salaries each for not following the fair procedure in terminating the applicants employments though he had a fair and valid reason to terminate. He found that the applicants could not be reinstated because the employer had a valid and fair reason to terminate but only that he did not follow the procedural fairness before he had terminated them [applicants] the learned arbitrator relied and cemented his decision by following the decision of this court in ***Sodetra [SPRL] Ltd Vs. Njellu Mezza*** and another Revision No. 207 of 2008 unreported in which this court held that:-

> *...a reading from other sections of the act gives a distinct impression that the law abhors substantive unfairness more than procedural unfairness, and if compensation is for redressing a wrong done to the employee, the remedy for the former attract heavier penalty than the later...* ***The arbitrator is mandated not to order reinstatement where termination is unfair because the employer did not follow a fair procedure****...the clear intension of the above is to make consequences of substantive unfairness direr than those of procedural unfairness...The arbitrator who has found unfair termination, has the discretion to award an appropriate amount of compensation found fair and just to both parties. Section 40 (1) (c) does not*

mandate the arbitrator to order compensation of twelve months (12) pay in all cases of unfair termination ...[5]

The applicants also did not prove their place of engagement in order to be repatriated to their respective homes. The learned arbitrator relied in the case of ***Ayubu Christopher Vs. Viajilal's Agencies*** Miscellaneous Civil Appeal No. 05 of 2010 (HC) where the court held:-

> *...I would have for example expected from the appellant to produce such evidence as transport charges from Tarime to Mwanza for him and his family paid by the respondent soon after he has been employed. There was no such evidence even if for the sake of argument the appellant had used his own money from Tarime to Mwanza, one would have expected him to seek for the refund from the respondent. Again such evidence was forth coming. This being the position, the trial magistrate was entitled to find that the appellant was recruited from Mwanza ...*[6]

Prosecuting the revision Mr. Nyanjugu personal representative of the party's own choice, who appeared for the applicants submitted ***Viva Voce*** that the offence of stealing was not proved in the Commission and even the amount was not known. He argued further that the commission did not do just for not granting the applicants their terminal benefits, since the Commission for Mediation and Arbitration had already found that procedure was not followed in terminating the applicants, but there was a valid reason. That the applicants rejected the exhibits because they were brought before the

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[5] Record: Sodetra [SPRL] Ltd case Revision No. 207/2008 as quoted by the CMA at Page 16-17 of the arbitration award.

[6] Record: Ayubu Christopher Vs. Vrajita's Agencies case as quoted by the arbitrator in the arbitration award at Page 18

Commission for Mediation and Arbitration after the respondent had terminated the applicants, the representative also argued that the employees were entitled to the payment of their salaries on the period of interdiction as per GN. No. 42 of 2007 Rule 27, but the Commission for Mediation and Arbitration did not order the respondent to pay the salaries to the applicants. The applicants were also not paid their leaves not taken contrary to Section 31 of the Employment and Labour Relations Act No. 6 of 2004. He concluded that this court should set aside the Commission for Mediation and Arbitration award and order the respondent to pay the applicants compensation of twelve months (12) salaries for unfair termination. On his part Mr. Kayaga learned counsel for the respondent concurred with the CMA arbitration award when he submitted that:-

> *...I have heard no point from the applicant's representative to show that the CMA has gone contrary to Rule 28 (1) [of GN. No. 106/2007] in order for its award to be revised ...the respondent ...brought witnesses who talked of the stealing ...on terminal benefits the CMA directed itself clearly ...that the matter before it was unfair termination ...there were no other claims which were brought by the applicants See Page11-13 of the award. The CMA ...was satisfied that there was a valid reason to terminate [See Page 17] the CMA concluded that the applicants be paid 6 months salaries and other benefits. We don't know why the applicants are now complaining of not being paid terminal benefits the CMA said that the applicants were not supposed to be paid severance allowance because of their misconduct ...*[7]

I have duly considered the submission of both parties and read the commission record in ***ex-abandunt cautela*** [with eyes of

[7] Record: Proceedings in Revision No. 4 of 2014 Vedastus Ntulanyeka and 6 others Vs. Mohamed Trans. Ltd

caution]. The nagging question now is whether or not there was fairness of the reason in terminating the applicants employment i.e did the employer respondent had a valid and fair reason in terminating the employment of the applicants employees. Whether or not termination was the appropriate sanction to be taken by the employer. What relief(s) if any the parties are entitled. Now, the Commission for Mediation and Arbitration record shows that there was evidence adduced by the respondent to the effect that the applicants who were bus conductors namely Vedastus Simon Ntulanyeka, Emmanuel Lyimo, Shadrack Buzenganwa, Yusuph Ibrahim save Leonard Umbe had incurred shortage of money in their accounts as shown in this judgment and when the employer had wanted them to sit together with him [employer] for the purpose of reconciling and putting the accounts proper in respect of each conductor also to know if there was any loss in their accounts and hence the call by the employer was neglected or refused by the applicants and in view of that the learned arbitrator found that the applicants acts was ***a gross dishonest***:-

> *Na kwa kuwa ushahidi unaonyesha mwajiri aliwaita walalamikaji kwenda kufunga hesabu zao, basi inatosha sana kwa muajiri kuwa na sababu ya msingi yakuwaachisha kazi walalamikaji kwani kitendo cha kutokubali kwenda kufanya mahesabu kunaonyesha kuna maovu ambayo walalamikaji hawakutaka yajulikane na hivyo kumtia mashaka hata mwajiri na kumfanya asiwe na imani na walalamikaji na hata kufikia hatua ya kuwaachisha kazi ...*[8]

[8] Record: CMA arbitration award at Page 14.

I entirely and respectfully agree with the learned arbitrator although the exhibits used by the employer most of them were of 2012 from January to November, which the applicants have also disputed before this court in the hearing of this revision, as the exhibits were of 2012 and the applicants were terminated in the year 2013, however as rightly pointed out by the learned arbitrator the act of the applicant to neglect, or refuse to the call directives issued by their employer which required the applicants to sit together with the employer respondent and make reconciliation of their accounts i.e to detect if there were loss or shortage of money was ***a gross dishonest*** on part of the employees, which dishonest hit the employer to the effect that he lost faith and trust to the applicants employees conductors. The result of which he had only one option to terminate the applicants as bus conductors. In fact apart from that gross dishonest committed by the employer it was also ***a gross insubordination*** on part of the employees to their employer. The two offences may justify termination and valid reasons to terminate. The misconduct committed by the applicants to wit; ***gross dishonesty*** and ***gross insubordination*** for refusing to comply and obey lawful and reasonable instructions or/and orders by the employer respondent issued to them is/are a misconduct which constitutes fair and valid reason for termination. Although the Employment and Labour Relations Act No. 6 of 2004 does not contain any provisions which may tell when a misconduct constitutes a fair reason for termination, suffice it to say that the Code of Good Practice

Rules GN. No. 42 of 2007 does contain a number of guidelines in cases of termination for misconduct Rule 12 (3) of the Code of Good Practice Rules No. 42/2007 provides for the acts of misconduct which may justify termination:-

> *12 (3) The acts which may justify termination are;*
> *(a)* ***Gloss dishonesty***
> *(b) Willful damage to property*
> *(c) Willful endangering the safety of others;*
> *(d) Gross negligence;*
> *(e) Assault on a Co-employee, supplier, customer or a member of the family, of any person associated with, the employer and*
> *(f)* ***Gross insubordination.***

I entirely and respectfully agree with the learned arbitrator that the acts of the applicants employees conductors of refusing the lawful orders by their employer to sit together and make accounts reconciliation of their respective accounts was a gross dishonest and gross insubordination committed by the applicants. As rightly observed by the learned arbitrator the applicants had feared that the loss of money in their accounts could be unveiled or uncovered by the employer. In fact that was proven by the respondents witnesses who made the inspection and found a great loss of money in each of the applicants employees bus conductors as shown in the evidence on record. It is obvious therefore to say here that, the applicants had contravened ***a rule or standard regulating conduct relating to employment***, as the result of their misconduct Rule 12 (1) (a) of the Employment and Labour Relations [Code of Good Practice] Rules GN. No. 42 of 2007 reads on fairness of the reason that:-

12 (1) Any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider;
(a) Whether or not the employee contravened a rule or standard regulating conduct relating to employment.
(b) If the rule or standard was contravened, whether or not;
(i) It is reasonable;
(ii) It is clear and unambiguous;
(iii) The employee was aware of it;
(iv) It has been consistently applied by the employer, and
(v)Termination is an appropriate sanction for contravening it.

Where can we say the rule(s) of standard regulating conduct relating to employment may be found? Indeed at work place ***rules or standard however may not be included in the written code of the employer, but this does not mean that the employee's termination is unfair***. Like in the present case the respondent has not shown any written code embodying the rule or standard regulating conduct relating to employment. We can found the particular rule, may be included or contained in the employee's written contract of employment. It may also be included ***in the policy or personnel manual or in notices placed on the notice boards in the work place***. Other sources where rules regulating the conduct of employees can also be found, other than unilateral decision of the employer are:-

(i) ***Common law sources.***
*(ii)****Legislations.***

Common law is an important source of rules regulating the conduct of employees at the work place. According to the common law, the employee must act in good faith towards the employer. An

employee who is guilty of misconduct breaches this common law duty. Examples of misconduct which breach the employee's duty to act in good faith towards the employer are like:-

(1)Theft
(2)Assaulting the employer a superior or Co-employees.
(3) ***Insubordination.***
(4) ***Failure to obey a reasonable and lawful order.***
(5) Drunkness, if it affects the employee's work or is persistent or results in prejudice.
(6) Absence without leave.
(7) Repeated absence.
(8) Misappropriation of company's property.
(9) Unfair competition with the employer.

The serious misconduct which may result in a disciplinary enquiry and possible termination of employment for a ***first occurance*** include the following:-

(i) ***Gross dishonest.***
(ii) Willful damage to property.
(iii) Willful endangering of safety of others.
(iv) Physical assault on the employer a fellow employee, client or customer.
(v) ***Gross insubordination.***

See Rule 12 (1) (3) a-f of the Employment and Labour Relations Act [Code of Good Practice] Rules GN. No. 42 of 2007. The applicants in the instant case especially the bus conductors and those who were involved in accounts and collection of money breached the common law rule or standard for committing the misconduct relating to gross dishonesty and gross insubordination as the evidence on record shows and as found also by the learned arbitrator. The applicants who were the employees of the respondent were not performing their duties as

expected. ***Under the common law, duties expected of the employee*** may be summarized as follows:-

> *(i)* ***To enter into service****. Here the primary duty of the employee is by and large to place the employee's labour potential at the disposal and under control of the employer.*
>
> *(ii)To perform diligently and competently the employee is expected to do his work competently and without negligence to work with due diligence according to his contract of employment and policy of the employer.*
>
> *(iii)* ***To obey all lawful and reasonable instructions of the employer****. This is an implied duty. It is not necessary for the contract of employment to spell out explicitly that the employee is under control of the employer.*

The applicants in the case at hand had failed to obey their employer's orders and instruction, for the conductors, they refused to obey the lawful order by the employer to sit together with him and make a reconciliation on the accounts of each of the applicants money collection and to see if their were loss of money and shortage thereof. The applicant employee who was a driver also failed to obey the respondents lawful order and instruction for keeping his mobile phone open all the time as a driver who would be needed in cases of emergency:-

> *(iv)****To promote the employer's business and act in good faith****. This duty is automatically the consequence of any employment. This duty exists even if it does not expressly form part of the employment contract. It is not even regarded as an implied term of the contract, but an integral part of the contract.*

The applicants in the present case at hand as the record clearly reveals that they appropriated money and had a great amount of loss in their accounts after the respondent's inspectors had inspected their accounts the loss are clear in the record when the respondent's witness was testifying before the Commission for Mediation and Arbitration. The respective loss in each applicant were detailed by the witness and as rightly found by the arbitrator, the applicant had feared the uncovering of the loss when they refused to obey the orders of the employer to sit together and make the accounts known if there was a loss of money of the employer. The applicants therefore were not acting in good faith towards their employer respondent and were thus not promoting the employers business in that regard. Hence the employer lost faith and trust relationship with the applicants due to applicants ***gross dishonesty*** and ***gross insubordination*** and hence this constitute a valid and fair reason to terminate the applicants. In a South African case of ***Council for Scientific and Industrial Research Vs. Fijen*** [1996] 17 ILJ 18 (A) at 26 D-E [Per Harns J.A] The South African Labour Laws are in Parimateria with our Labour Laws and indeed heavily borrowed from South Africa. The South Africa Court of Appeal held [Per Harns J.A]

> *... It is well established that the relationship between, employer and employee is in essence one of trust and confidence and that at common law, conduct clearly inconsistent there with entitled the "innocent party" to cancel the agreement ...it does seem to me that, in our law, it is not necessary to work with the concept of an implied term. The duties referred to simply flow* ***naturalia contractus*** *...*

In entirely and respectfully subscribe to the above holding and apply the same in the instant case before me. The dishonesty of the applicants as correctly found by the learned arbitrator which I share hands and in addition to what I may call or term as ***gross insubordination*** on part of the applicants to the employer as I have pointed out in the judgment supra, are by and large one of the easiest way of understanding the duty of the employee to act in good faith in respect of the employer. Therefore, dishonest of an employee with regard to the employer's affairs [in other words, Fraud or theft on part of the employee] will be a breach of good faith. Similarly ***if an employee or employees were obtaining secret commission while doing the work of the employer, the same would also constitute a breach of good faith on part of the employee***. A serious breach of the duty to act in good faith as found in the applicant's duties for having had a great loss of money collection while in the course of their duties as indicated by the respondent's witnesses who inspected their accounts for each bus conductors amount to the break of common law duties to act in good faith and trust. In fact an inference may be drawn that the loss of money incurred by the applicants was an evil move to obtain a secret commission while doing the work of the employer and the same would constitute a breach of good faith and trust relationship. On the foregone the employer respondent was entitled to "***cancel the agreement***" because employer and employee relationship is in

essence one of trust, faithfulness and confidence and the conduct clearly inconsistent therewith entitled the "innocent party" [the employer] to cancel the agreement. Therefore I entirely and respectfully agree with the learned arbitrator that the respondent had a valid and fair reason to terminate the employment of the applicants. This is in compliance with the needs and requirement of the International Labour Organization (ILO) convention No. 158 of 1982 which has been incorporated in our local statues it reads in Article 4 of ILO convention No. 158/1982 that:-

> *... The employment of the worker* ***shall not be terminated unless there is a valid reason for such termination*** *connected with the capacity or conduct of the worker or based on the operational requirement of the undertaking establishment or services ...*

As regards the procedural fairness I entirely and respectfully agree with the learned arbitrator that the employer respondent did not follow the procedure in terminating the applicants. He did not comply with Rule 13 of the Code of Good Practice Rules GN. No. 42 of 2007 which talks of the fairness of the procedure because:-

> *(i)The employer did not conduct an investigation to determine whether there are grounds for termination.*
> *(ii) The employer did not inform the employees applicants of the charges against them the charge usually must be in writing.*
> *(iii) As there were no charges laid down on the beds of the applicants employees then the right of an employee to be given a reasonable time to prepare the response to the charges was denied.*
> *(iv)The employees were not told if they are entitled to the assistance of a trade union or a fellow employee during the enquiry (if any)*
> *(v)The applicants employees were not sent before a disciplinary hearing committee for the purpose of being*

heard. Hence their decision of termination was not made by a disciplinary hearing.

In the case of ***SA food Restaurant and allied workers union oboishack Vs. Grahamstown [2001] 22 ILJ 800*** a South African Labour Court [our Labour Laws are in parimateria with the South African Labour Laws] held that the position which I entirely and respectfully agree:-

> *... Usually the decision whether or not an employee is guilty of the alleged misconduct and what penalty should be where the employee has been found guilty, is the responsibility of the chairperson of the disciplinary enquiry ...*

There was no such disciplinary hearing committee held by the respondent and on the foregone I rightly think that the learned arbitrator was justified to hold that the respondents did not follow the fair procedure before terminating the applicants employees. Nevertheless the respondent employer failure to follow the fair procedure or procedural fairness in terminating the applicants employees will not thwart the naked fact that there was a substantive fairness in terminating the applicants employees as discussed in this judgment ***C'est-a-dire*** [that is to say] the respondent had a fair and valid reasons to terminate the applicants employees. Now since the respondent did not follow a fair procedure, the commission was right to order compensation to the applicants according to the circumstances of the case and not reinstatement of the applicants to their employments and the commission correctly relied in its decision by following the holding of this court in ***Sodetra [SPRL] Ltd Vs.***

Njellu Mezza and Another Labour Revision No. 207 of 2008 unreported where the court held that:-

> *...a reading from the other Section of the Act gives a distinct impression that the law abhors substantive unfairness more than procedural unfairness, and if compensation is for redressing a wrong done to the employee, the remedy for the former attracts heavier penalty than the later... the arbitrator is mandated not to order reinstatement "where termination is unfair because the employer did not follow a fair procedure" ...the arbitrator who has found unfair termination has discretion to award an appropriate amount of compensation found fair and just to both parties. Section 40 (1) (c) does not mandate the arbitrator to order compensation of 12 months pay in all cases of unfair termination ...*

The commission was therefore correct to order ***the respondent to pay the applicants employee compensation of six months salary and other benefits if they were not paid*** save for the severance allowance pay because the applicants were terminated of the misconduct. On repatriation costs and subsistence allowance the commission rightly held that since the applicants employees did not prove that they were recruited at different places other than Shinyanga by showing if they used fares, [receipts given to them] when coming to Shinyanga as it was held in the case of ***Ayubu Christopher Vs. Vrajita's Agencies*** relied by the learned arbitrator in which this court held that [Miscellaneous Civil Appeal No. 05 of 2010:-

> *... I would have for example expected from the appellant to produce such evidence as transport charges from Tarime to Mwanza for him and his family paid by the respondent soon after he has been employed. There was no such evidence even if for the sake of argument, the appellant had used his own money from Tarime to Mwanza, one would have*

expected him to seek for the refund from the respondent. Again such evidence was forth coming. This being the position, the trial magistrate was entitled to find that the appellant was recruited from Mwanza ...[9]

In the event and on the foregone I found that this revision has no merits to cause this court revise the CMA arbitration award. It follows therefore that the revision application is dismissed and the CMA arbitration award is confirmed in all aspects.

I.S. Mipawa
JUDGE
27/06/2014

Further rights of Appeal explained.

I.S. Mipawa
JUDGE
27/06/2014

Appearance:-

1. Applicants: Present
2. Respondent: Present

COURT: Judgment has been read over to the parties present as it appears in the appearance above.

I.S. Mipawa
JUDGE
27/06/2014

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[9] Record: Ayubu Christopher Vs. Vrajita's Agencies as quoted by the CMA in the award at Page 18