IN THE HIGH COURT OF TANZANIA

LABOR DIVISION

AT MWANZA

LABOUR REVISION CASE NO 80 OF 2018

(From the Original Award Decree of Decision No Original CMA/GAT/95/2017 of The Commission of Mediation and Arbitration delivered on 19th September 2018 delivered by Dickson Mayale)

GEITA GOLD MINE.....APPELLANT

VERSUS

WILLIAM SWAI.....RESPONDENT

RULING

28th November, 2018 & 31st January, 2019

Matupa, J.

The applicant has moved this court under sections 91(1)(a)& (2)(c), 94(1)(b)(i) of the Employment and Labor Relations Act No. 6 of 2004, Rule 24(1),(2)(a)(b)(c)(d)(e)(f)&(3)(a)(b)(c) (d) and 28(1)(c)9(d)(e) of the Labour Court Rules GN106 of 2007 and any other enabling provision of the

law for orders of revision. The notice provides the following reasons for the revision:-

a) That the Arbitrator erred in law and fact in making a finding that there was no valid reason for termination of the respondent despite of the evidence, which was tendered during the proceedings to prove commission of the offence.

b) That the arbitrator erred in law and fact in attributing procedural issues as substantive and proceeded to order reinstatement of the respondent.

c) That, the arbitrator failed to analyze the evidence adduced by the applicant, hence reaching into a wrong conclusion.

d) That the arbitrator erred in law and facts in holding that the investigator in a disciplinary offence cannot complain during the proceedings.

e) That the arbitrator erred in law and fact in holding that the senior manager plant was not supposed to be chairperson of the disciplinary committee.

f) That the arbitrator erred in law and facts in holding that the respondent was not given the outcome of the investigation.

g) That the arbitrator erred in law and fact in holding that it was necessary for the applicant to call persons alleged to have issued the receipt.

h) That the arbitrator erred in law and facts in acting as mediator and arbitrator without following of the procedure of the combined mediation and arbitration.

The applicant was represented by Ms. Yvone Muvanda to pursue the application. The Respondent enlisted services of Mr. Matiku to resist the application. The respondent swore an affidavit to deny all allegations made by the applicant. In short, the learned counsel for the applicant contended that the termination of the respondent was fair under section 37(1) of the Employment and Labour Relations Act and rule 12(1) of the Employment and Labor Relations Code of Good Practice GN 64 of 2007. She submitted that the respondent was guilty of falsification of receipts and pocketing the money on them. It was her further contention that the applicant was guilty of pocketing receipted money and falsified the receipts. The reasons were therefore valid and the procedure was fair.

Mr. Matiko attempted a shot on the legs, by raising a preliminary objection on a number of matters suggesting flaws in procedure. He

contended that the notice of application rather than the affidavit contains grounds of revision, which is not allowed under regulation 24 of GN 106 of 2007. The learned counsel attacked the affidavit for containing legal issues contrary to order XIX r of the Civil Procedure Code.

Let me dispose of the objections simply by reminding the learned counsel that both, the application and the affidavit are what the law directs them to be. Rule 24 (2) (c) directs that the application shall contain reliefs and sub rule (3) (c) and (d) of the same rule directs that the affidavit shall contain a statement of legal rules to be relied upon as well as reliefs sought. An application and the affidavit under the rule therefore are not those envisaged under the Civil Procedure Code. The grounds of objection, which the learned counsel for the respondent armed himself as arsenal, did not shoot the target. Accordingly overrule them.

On the merit of the application, the learned counsel for the applicant argued that the arbitrator combined both, mediation and arbitration processes but doing so, he did not give notice to parties as required by regulation 18 of the Labour Institutions (Mediation and Arbitration) Rules, GN 64 of 2007. The learned counsel for the respondent countered the

claim. He submitted that on facts, there was a notice and an agreement to combine the processes.

I have considered the proceedings myself. The two processes took place in two stages. The first stage of mediation took place between 13th January and 27th February, 2018. The second stage took place between 22nd March 14th September, 2018. During the first stage, the chairperson informed the parties that it was a combined mediation and Arbitration process. True, rule 18 (2) & (3) demands that where the Commission sets a combined process, it shall inform the parties of that intention. The person appointed to conduct the processes has to a fourteen days-notice to the parties, unless they agree to a shorter period. Parties have the right to be advised on when the mediation terminates and arbitration commences.

The proceedings of the 13th January, 2017 show that the parties were advised that the mediator was set to the combined mediation and arbitration. The respondent then went out to set out his claim. He made certain offers to the employer, which the representative of the employer took for clearance with the employer. The respondent proposed that they should resume during the second week of January, whatever that meant, given that at the time already it was the second week of the month. The

chairperson set the next day as 16th January. On that later date parties did not appear. When they eventually, parties appeared on the 27th February 2018 the mediator was informed that the employer was not inclined to the offer.

From the foregoing, I doubt if at all that the parties were aware of the mediation process, or if they were clearly aware when the mediation started and when it was supposed to end. There was no agreement of the combined processes in terms of rule 18 (3) of GN 64 of 2007. The essence of the process to ensure that parties are availed and opportunity to settle their differences amicably with the facilitation of the mediator, in accordance with rules 13 and 14 of the GN 64. Reading the rules, one clearly understands that what is supposed to combine is not the process but the person who conducts the processes. Here the person it would appear, combined both processes, and did not offer the facilitation to mediate. It is no wonder that the mediator did not even complete the relevant form under section 16, which evidence the finalization of the mediation. I agree with Ms. Yvonne that the combined process was meddled, and therefore it was irregular. This matter can therefore be disposed of on the ground h of the complaint only.

Since I have made a positive finding on the preliminary procedural issue, that the proceedings were patently irregular, I am not inclined to deal with issues of substantive fairness of the termination, as doing so will be pre-emptive. The best way is to vacate the decision of the mediator/ arbitrator. I will accordingly quash and set it aside and direct that the matter shall revert to the CMA for it to deal with the matter in accordance with the law. The matter shall be dealt by another person. I will not make an order as to costs.

Dated at Mwanza, this 31st day of January, 2019

S.B.M.G. Matupa
Judge

Date: 31.1.2019

Coram: Hon. Matupa, J

Applicant: M/s Yvone Muvanda Advocate

Respondent: present

B/c: Leonard

Court:

The Ruling was delivered in chambers in the presence of the parties M/s Yvone Muvanda Advocate and the applicant in person this 31st day of January, 2019.

Right of Appeal explained.

S.B.M.G. Matupa
Judge

At Mwanza
31st January, 2019