IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)
AT ARUSHA

REVISION APPLICATION NO. 39 OF 2019
(Originating from CMA/ARS/ARB/97/2014)

DUSAN TROVIC ..... APPLICANT

VERSUS

MOUNT MERU MILLERS LTD..... 1st RESPONDENT

MOUNT MERU PETROLEUM LTD ..... 2nd RESPONDENT

RULING

21st April & 11th August, 2020

Masara, J.

The Applicant, **Dusan Trovic,** filed an employment dispute in the Commission for Mediation and Arbitration (CMA) claiming unfair termination of his employment with the Respondents. The CMA found that the Applicant was not unfairly terminated as alleged, but that it was the Applicant who terminated himself from employment when he went on leave without authorisation. The CMA further stated that the Respondents were therefore justified to terminate the Applicant's employment for indiscipline. The Respondents were ordered to compensate the Applicant six months' salary to the tune of Tshs. 6,000,000/=, for failure to adhere to the procedures in conducting disciplinary hearing. The Applicant has preferred this Revision challenging the CMA award.

Before delving into what was argued by the parties in relation to the merits of the application, it is imperative that I narrate brief facts leading to the application as extracted from the CMA records and the affidavit in support of the Application.

The Applicant alleged to have been employed by the first Respondent in March 2012 and later by the second Respondent as Transport and Communication Manager from 1st September, 2013. A copy of the contract between the Applicant and the second Respondent was admitted as exhibit D1. The contract was for two years renewable. The first and the second Respondents are a Group of Companies owned by two brothers (Artul Mittal and Arvid Mittal). They operate almost under the same management. On that account, the Applicant worked for both Respondents as Communication and Transport Manager cum Chief Security Officer.

The dispute arose on 31st March, 2014, a day before the Applicant went for his annual leave. The Applicant's claim was that he was summoned by the Director, Mr. Arvind Mittal, who explained to him his intention to end the Applicant's employment. According to the Applicant's testimony, Mr. Arvind told him that he did not need him after the expiry of his contract.

On the 27th May, 2014 the Applicant instituted Labour dispute No. CMA/ARS/ARB/97/2014 claiming for reliefs arising out of unfair termination which he put at US$ 296,400. The CMA dismissed the application on the ground that the Applicant's termination was fair since he communicated to

his Employer through an email that he would not continue with employment after his leave ended and he handed over the company properties. The CMA further found out that although it is the Applicant who terminated his employment but the employer (Respondents) had a duty to conduct disciplinary hearing to ascertain why the Applicant decided to end his employment prematurely. Consequently, the Commission decided that the Applicant's employment was terminated substantively fairly but procedurally unfairly. Therefore, the CMA having ruled that the Applicant's salary of Tshs. 1,000,000/= per month, it ordered the Respondents to compensate the Applicant six month's salary, equal to Tshs. 6,000,000/= for failure to adhere to the mandatory requirements of the law of conducting a disciplinary hearing before concluding that the Applicant's employment had come to an end.

It is that order that the Applicant is challenging on the grounds that the Arbitrator erred for failure to consider that the Applicant's employment was terminated by the employer. He further faults the procedure adopted by the CMA in admitting exhibit D1 as well as the procedure adopted in raising issues without affording the parties the right to argue on the same. The Applicant maintains that he was unfairly terminated by the Respondents, and prays to this court to reverse the award by the CMA and order the Respondents to pay him the claims arising out of unfair termination as pleaded in CMA form 1.

The application is supported by an affidavit deposed by Mr. Elibariki Maeda, the Applicant's advocate. The Respondents did not file a counter affidavit but resisted the application at the hearing of the application. At the hearing of the application, the Applicant was represented by Mr. Elibariki Maeda, learned Advocate, while the Respondent was represented by Mr. Issa Rajab Mavura, learned advocate. Hearing proceeded *viva voce*.

Submitting in support of the application, Mr. Maeda craved to adopt the affidavit in support of the application. In arguing the first issue, whether the Tribunal erred in admitting exhibit D1 which was a photocopy, Mr. Maeda contended that the Arbitrator should not have admitted a copy of the employment contract as an exhibit as the Applicant was not given an opportunity to challenge its admission. He added that the objection raised by the Applicant was not recorded as he insisted that the original copy of the contract be tendered instead. Although the CMA ordered the original copy of the contract to be brought on June 13, 2016 at 14:00hrs, the original could not be procured and the Arbitrator still relied on the photocopy in making his decision. He was of the view that the admitted copy was faint giving the possibility of forgery, and the contents therein contradicted the evidence tendered.

Submitting on the second issue, which centres on the termination of the Applicant, Mr. Maeda contended that the Respondents did not give any evidence to suggest that the Applicant terminated his own employment. It was the testimony of DW1 and DW2 that the Applicant decided to quit

employment vide an email to the directors but such email was not tendered as exhibit. The learned advocate faulted the Arbitrator's finding arguing that he came up with facts which were not pleaded by the parties by holding that there was no evidence that the Applicant was on leave. Also, the CMA decision was not justified in discussing on the issue of the Applicant's salary as it was never raised and the parties were not afforded the right to submit on the same. He added that the issue of the Director terminating the Applicant was never responded to nor did any of the directors testify to the contrary. The issue whether the Applicant was employed by both the Respondents and whether the procedure for termination was adhered to was raised but it was never decided or even feature in the proceedings. Mr. Maeda was thus of the view that the Commission's decision was not based on evidence.

On the issue whether it was within the Arbitrator's mandate to award the Applicant six month's salary for unfair termination, Mr. Maeda cited section 40(1)(c) of the Employment and Labour Relations Act which provides for 12 months as the minimum compensation. He argued that the award ordered by the Arbitrator was beyond his mandate. He thus prays for 12 months compensation and other damages suffered.

The advocate for the Applicant also implored the court to look into the issue whether the Applicant was employed in Tanzania or whether he was invited by the Respondents. In his view, this issue would best be answered had the original contract been tendered. He added that the disputed

exhibit D1 on paragraph 5 states that leave package was provided for to home place indicating that he was recruited from outside the country. Also, paragraph 1 stated that it was the responsibility of the employer to look for the Applicant's work permit. On the basis of the submission made, Mr. Maeda prays that the decision of the CMA be revised and set aside for being improperly procured.

Contesting the submission of the Applicant's advocate, Mr. Mavura, resisted the application contending that the alleged contract was admitted as exhibit D1 as reflected on page 4 of the award and page 3 of the proceedings. The salary indicated there is Tshs. 1,000,000/=, and the same was not admitted for identification purpose rather as an exhibit. On that basis, Mr. Mavura insisted that this issue is devoid of merits.

The Respondent's advocate was of the view that the issue of cross examining the validity of the document tendered was misconceived arguing that the witness was cross examined on exhibit D1 as reflected at page 4 of the proceedings. Also, the CMA at page 22 of the proceedings concluded that it would proceed with the certified copy as the original one could not be procured. DW2, testified that she was copied the email by the Applicant terminating himself, therefore the Director's absence is not fatal as DW2's evidence was direct evidence.

Regarding the issue of awarding the Applicant six month's salary as compensation, the learned advocate averred that the CMA decision was

justified as the Arbitrator at page 8 of the award was guided by Court decision in ***Paschal Bandiho Versus Arusha Urban Water Supply and Sewage Authority,*** Labour Rev. No. 76/2015 (Nyerere, J). He added that it is on record that the Applicant was employed by the second Respondent only and not the first Respondent. That is what was testified by DW1, DW2 and exhibit D1.

Submitting on the last issue, Mr. Mavura stated that the application has no legs to stand on as the same is supported by the affidavit of advocate Elibariki Maeda while, according to the chamber Summons, it says it is supported by the affidavit of the Applicant. Mr. Mavura added that the affidavit is defective as it contains statement of legal issues, reliefs sought and the statement of material facts. He cited the case of ***Uganda Versus Commissioner of Prisons, Ex parte Matovu***, [1966] EALR 514 to back up his argument. He argued that an affidavit is to contain facts true in the deponent's knowledge or from information he believes to be true but it should not contain prayers, legal arguments and conclusions. He concluded by supporting the CMA award and implored for the revision to be dismissed.

In his rejoinder submissions, Mr. Maeda, while responding to the issue of the affidavit, referred to Rule 24(3) of the Labour Court Rules which provides on how affidavit supporting a labour application should be. That it should contain facts, law and reliefs sought. He contends that it was a slip of a pen that in the former application which was decided before Gwae, J,

the affidavit was deponed by the Applicant but after re-filing the application he did not change the Chamber Summons after he took out the affidavit. He added that the Respondents were not at all prejudiced that is why they never raised it in their counter affidavit.

On exhibit D1, Mr. Maeda reiterated that it was wrongly admitted as the Applicant was not given opportunity to challenge it. He cited section 67 of the Evidence Act, which provides a test for admission of secondary evidence arguing that a certified copy is not the same as original copy; it can only be taken when the original is shown to the court and to the parties. That the Arbitrator was not neutral as he ought to have expunged the exhibit from the record.

I have dispassionately considered the arguments of the parties' advocates and the respective affidavits. The pertinent issues for determination in this revision are whether the Applicant was terminated by the Respondents and, in case he was, whether the termination was fair.

Before dealing with the substantive issues in this application, let me comment briefly on the argument raised by the Applicant's advocate regarding the admission of the employment contract, Exhibit D1. The record of the CMA at page 3 shows that DW1 tendered the employment contract which was admitted as exhibit D1. There is no record to show that the Applicant or his advocate was asked to comment on the said document before it was admitted. At page 19 of the Proceedings, the Applicant stated

that he never signed Exhibit D1 as the contract he signed had a different figure as salary. He, however, did not provide any evidence to prove that his salary was US$ 2800. The complaint by the Applicant's advocate that the document was a photocopy which could not be admitted as exhibit was dealt with at page 20 of the typed proceedings. The Arbitrator directed that the original copy of the contract be submitted in Court on 13th June, 2016. On 13th June, the lawyer representing the Respondent asked the CMA to give them more time as the holder of the original contract was in India undergoing treatment. The original contract was to be presented on 01/08/2016 at 14.00 hours. That is the last order and the proceedings end with a phrase: *"Fursa imetolewa na ikiwa vinginevyo Tume itachambua nakala ya Mkataba uliopokelewa..."*. That seems to be the cause taken by the Arbitrator as according to pages 4 and 5 of the typed judgment, the Arbitrator considered the admitted copy as the authority for the terms of employment.

At the very outset, I am inclined to agree with Mr. Maeda that the CMA findings that the document qualified as an exhibit was wrong. Section 67(1)(a)(ii) and (2) read together with section 68(f) of the Evidence Act, [Cap 6 R.E 2002] gives court powers to admit as exhibit the contents of a secondary evidence when the person possessing the original document is out of reach, or not subject to the process of the court. In this case, apart from saying that one of the directors had travelled to India, there is no other explanation to suggest that the original contract could not be procured at the Respondents' offices. It is hard to fathom that the said

director had travelled to India with the original contract of an employee. Such contract is expected to be kept in the employee's file. It is against that background that I consider the admission of a copy to have been improperly made, let alone the fact that no explanation was made on what happened on the day set for the original contract to be submitted.

I am aware that section 88(4) of the Employment and Labour Relations Act, No. 6 of 2004, empowers the CMA while entertaining labour matters to do away with legal technicalities so as to attain substantial justice. Unfortunately, in this case, the employment contract of the Applicant cannot be regarded as a mere legal technicality. It is the centre of the dispute that was referred at the CMA. The Respondents were duty bound to ensure that the original contract of the Applicant is submitted. They seem to have deliberately avoided to submit the same. I am incline to agree with the doubts raised regarding the authenticity of the admitted exhibit D1. There are myriads of reasons to suggest that the said document was not genuine. First, the said exhibit suggest that the starting date of employment was September 2013 while there was uncontroverted evidence that the Applicant was working for the Defendants since March 2012. Furthermore, the said contract states that the Applicant only worked for the second Respondent, this contradicts the evidence that he was working for both Respondents. The job position stated in the said exhibit appear to be fabricated and there are obvious deletions. Lastly, the place of domicile of the Applicant in Exhibit D1 is said to be India while the uncontroverted evidence at the trial was that the Applicant was from

Serbia. Had the Arbitrator taken these inconsistencies into consideration, he would have disregarded Exhibit D1. It is therefore my finding that Exhibit D1 was wrongly admitted and should not have been relied in the final award of the Tribunal. The same is accordingly expunged.

Without the impugned contract of employment, the issue of the Applicant's salary has to be decided on the basis of the oral evidence given by the parties. The Applicant's salary was discussed by the parties at pages 3, 5 and 6 by DW1 and pages 17, 18, 19 and 20 of the proceedings by PW3 (the Applicant). It was one of the framed issues to be determined by the CMA, and it was determined at pages 4 and 5 of the CMA award. Therefore, the complaint by the Applicant's advocate that the parties were not afforded opportunity to argue on the Applicant's salary is untrue. What remains outstanding is whose version carries weight. The contention by the Applicant that he was paid US$ 2800 per month, as already stated, is not supported by any evidence. The same applies to the amount relied to by the Respondents. In order to arrive at the right verdict regarding salary, one has to consider other factors, including whether or not the Applicant worked for both Respondents. Whether the Applicant was employed by both Respondents or by the Second Respondent alone is not backed by any documentary evidence. The original file does have attached emails, which suggest that the Applicant was an employee of both Respondents. DW1 and DW2 who testified for the Respondent, in my view, did not rule out that the Applicant worked for both Respondents. The Applicant, in his evidence at pages 17 and 19 of the typed proceedings, stated that he was

employed by both Respondents as Chief Security Officer and it was supported by his two witnesses. I find this evidence credible. Unfortunately, the Arbitrator did not make any finding on this issue.

As stated earlier, the proceedings of the CMA appear to be short on important matters. Whereas there are a series of attached emails, there is nowhere on record to suggest that the same were admitted in evidence or whether the CMA considered them in arriving at its verdict. They, however, appear to contain important clue as to the reasons why the contract indicating a salary of Tshs. 1,000,000/= was signed, the fact that the Applicant worked for both companies, the true salary and when the contract of the Applicant commenced. I will, however, desist from making reference to them considering that the record of the CMA does not refer to them, other than the evidence of the Applicant himself. Regrettably, none of the directors of the Applicant appeared before the Tribunal, despite there being evidence that the Applicant was reporting to none other than the directors. Were they avoiding something? I will revert to this matter later in the judgment.

The next question to consider is what the Applicant's advocate asked the indulgence of this court to ascertain. That is, whether the Applicant was employed in Tanzania or whether he was invited by the Respondents. Whereas DW1 stated that the Applicant was recruited in Tanzania, his only evidence was drawn from the impugned contract of employment, exhibit D1, which shows that the Applicant would be paid in Tanzania currency.

That cannot be sufficient evidence that the Applicant was employed in Tanzania. If that was the case, then it would not be in the Respondent's interest to facilitate work permit for the Applicant. I agree with the evidence by the Applicant that he was invited by the Respondents from Serbia on expatriates' terms. In that regard, in the absence of the offer letter or original contract of employment, I have no reasons to doubt that the salary referred to by the Applicant was the actual salary agreed to.

Having so held, I now turn to the substantive issues in this Application. The Applicant's advocate was of the view that the Applicant was terminated by the Respondents' director, Mr. Arvind Mittal, on 31st March, 2014 when he called him in the office and explained to him his intention that he no longer wanted him in his office after the expiry of his contract. The record of the CMA at page 17 & 18 of the typed proceedings provide what the Applicant stated in part, as follows:

> *"Mr. Alvin Mittal March 31, 2014 he called me to his office for short meeting and said I don't need you any more if* ***your contract expire*** *you have to go home and it was one day before starting my leave and that time I had already prepared to travel for my leave and I asked him if we can adjourn such a meeting until I came back after my leave but he said I have to know that after* ***expiration of my contract no renew****."*(emphasis supplied)

The record is clear that the Applicant was told that his contract would not be renewed upon its expiration. The expunged Exhibit D1, at paragraph 2, stipulates that the Applicant was on a two years contract which could be extended upon agreement by the parties. DW1 testified to the effect that

the Applicant's contract was to expire on 06/10/2015. I believe he said it based on the duration of the work permit given to the Applicant. The Applicant, however, testified that he commenced work in March 2012. Whichever version one has to agree with militates against expiry of the Applicant's contract at the time his contract was terminated. If he commenced work in March 2012 on a two-year duration, then his contract must have expired in March 2014. That would mean that he was still serving another term in March 2015. If, on the other hand, his contract commenced in September 2013, he still had 6 months to go before the contract expired.

The Respondent's witnesses testified that the Applicant terminated himself from employment through an e-mail to the Director. The said e-mail was not tendered in evidence. I am alive that in cases of unfair termination, according to section 39 of the Employment and Labour Relations Act, and Rule 9(3) of the Employment and Labour Relations (Code of Good Practice) G.N 42/2007, the employer bears the burden of proving that the termination was fair. There is any record tendered by the Respondent to support the version taken by the Tribunal. If the Applicant did abscond from work, there should have been a letter to that effect. The insistent of the Respondents' witnesses that the Applicant terminated his employment suggest that the Respondents, through Alvin Mittal, the group director, did in fact unlawfully terminate the Applicant's employment.

The CMA finding that the Applicant's termination was substantively fair but procedurally unfair looks naval. It is naval in the sense that it was not based on cogent evidence. It should be pointed out that, once the procedure for terminating an employee is not followed, as was the CMA's finding, automatically the termination becomes unfair for non-adherence to the procedure. This is provided under section 37(2) (c) of the Employment and Labour Relations Act as well as Rules 8(1) (c) and 13 of G.N 42/2007. Therefore, for argument's sake, whether the Applicant was terminated by the Respondent on valid reasons but since the procedure to terminate him as provided in Rule 13 above was not adhered to, then the termination was basically unfair.

It should be borne in mind that there is no proof that either the Applicant or the Respondent terminated the employment, as there is no evidence whether the Applicant was given termination letter or referred to a disciplinary hearing as per the law. Failure of the Respondents to act either way is a breach of the law. The obvious conclusion is to agree with the Applicants that he was terminated by the Respondent, and, in my view, that termination cannot be said to be lawful. The Applicant was unlawfully terminated by the Respondents. The two issues are thus answered in the affirmative.

Before concluding, let me address the concern raised by the Respondent's counsel regarding the competency of the affidavit in support of this application. As correctly put by Mr. Maeda, although it was deponed by

him, and in the Notice of Application it was stated that the application would be supported by affidavit of the Applicant, such assertion cannot be held to be fatal. It has not prejudiced the Respondents. With the overriding objective in justice delivery machinery, courts are obliged to handle all matters before them with a view to attaining justice and timely disposal of the cases at a cost affordable by the respective parties. That is the spirit behind the introduction of the overriding objective. See the case of ***Mondorosi Village Council and 2 Others Vs. Tanzania Breweries Ltd and 4 Others***, Civil Appeal no. 66 of 2017 and ***Puma Energy Tanzania Limited Vs. Ruby Roadways (T) Limited***, Civil Appeal No. 3 of 2018 (both unreported). Therefore, since the defect pointed out in the affidavit occasioned no injustice to the Respondents, I see no reason to fault the application.

What has to be contained in an affidavit in labour cases, as explained by Mr. Maeda, is provided under Rule 24(3), paragraphs (a) to (d) of the Labour Courts Rules, G.N 106/2007. They include names, description and address of the parties; statement of the material facts in chronological order, on which the application is based; statement of the legal issues that arise from the material facts and the reliefs sought.

Next issue for consideration relates to the reliefs. As stated earlier, the trial Tribunal condemned the Respondents to pay to the Applicant Tshs. 6,000,000/= as compensation for non-adherence to procedural rules regarding termination which amounted to unlawful termination. He justified

his departure from the provisions of Section 40(1) (c) of the Employment and Labour Relations Act by citing the decision in the case of ***Pachal Bandiho*** (supra). That decision was cited out of context considering that, unlike in ***Paschal Bandiho's*** case where minutes of the disciplinary proceedings were not signed, in this case there was no disciplinary hearing at all. In that regard, the Arbitrator ought to have adhered to the provisions of Section 40(1) (c). There is no dispute that the Applicant was not on permanent terms of employment. His contract was for fixed duration. Considering the Work Permit that was admitted as ID1, the Applicant had 6 months left in his contract. Section 14(1) of the Employment and Labour Relations Act provides as follows:

> *"A contract with an employee shall be of the following types-*
> *a) a contract for an unspecified period of time;*
> *b) a contract for a* ***specified period of time for professionals and managerial cadre****; and*
> *c) a contract for a specific task."*(Emphasis added)

The Applicant's employment fall under Section 14(1) (b). Having determined the duration of his contract from the Work Permit, it is imperative that any compensation be limited to the duration of the remaining contract. Mr. Maeda faulted the Tribunal Arbitrator for awarding compensation of less than 12 months. He relies on Section 40(1) of Cap. 366 in that regard. The section provides:

> *"If 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.*** *"*(emphasis added)

The above bolded words may seem not to segregate the types of contracts that will attract such penalty. It is important to note that Courts in Tanzania and elsewhere have treated unlawful termination of specified contracts of employment different from unspecified agreements. It has also been held that the use of "may" in Section 40 (1), suggests that a discretion exist. In the case of ***Deus Wambura Versus Mtibwa Sugar Estates Limited,*** Revision No. 3 of 2014 (unreported), Madam Judge Rweyemamu (as she then was) held:

> *"Under the law (the ELRA), an arbitrator has discretion to award or not to award any of the remedies provided under Section 40 (1) (a) or (b) or (c) following a finding of unfair termination. It is my view that, with such discretion, an arbitrator can award compensation which is more or less than 12 months, provided that he has justifiable grounds for doing so, grounds such as those enumerated under rule 32 (5) (a) to (f) of the GN 67/2007"*

The above position was also stated in the case of ***Michael Kirobe Mwita Versus AAA Drilling Manager***, Revision No. 194 of 2013 (Unreported) where His Lordship Mipawa, J (as he then was) at held:

> *"In my opinion the learned arbitrator trekked in the correct avenue when he ordered the compensation of six months, he had discretion*

to order compensation of less than twelve months remuneration where appropriate".

Lastly, in ***Joakim Mwanikwa Versus Golden Tulip Hotel,*** Rev. No. 268 of 2013, Labour Division at Dar es Salaam (Unreported) it was held, inter alia, that:

> *"Section 40 of the ELRA gives direction of the court to decide which amount to be paid as compensation and such discretionary powers should not be applied suo moto, but only when the complainant has indicated in CMA F.1 the amount he claims as compensation.* ***When an employer terminates a fixed term contract, the loss of salary by the employee for the remaining period of the employment contract of the unexpired term is a direct foreseeable and reasonable consequence of the employer's action.*** "(Emphasis added)

Guided by the above decisions, and as I have already stated earlier that the salary of the Applicant was US$ 2800 as opposed to the Tshs. 1,000,000/= relied by the Arbitrator, I therefore vary the award of the CMA by changing the compensation amount from Tshs. 6,000,000/= to US$ 16,800.00. The compensation has been arrived at based on the remaining period of the Applicant's contract at the time of termination. The Respondents shall also be responsible to repatriate the Applicant to his country of origin, Serbia.

In sum the application succeeds to the extent stated above. The award of Tshs 6,000,000/= by the CMA as compensation is set aside and replaced with compensation of US$ 16,800.00 plus repatriation costs to Serbia. Considering this to be a labour dispute, I make no order as to costs.

It is so ordered.

Y. B. Masara
JUDGE

11th August, 2020.