IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISIONS No. 65/2019

(Original Labour Dispute No. CMA/MUS/73/2018)

BETWEEN

GEITA GOLD MINE LIMITED .....APPLICANT

VERSUS

AMRI MRISHID.....RESPONDENT

JUDGMENT

14st April & 13th July, 2020

TIGANGA, J

In this matter the court has been moved under sections 91(1)(a),(2),(c) and 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004, Rule 24(1),(2)(a),(b),(c),(d),(e),(f), and (3)(a),(b),(c) and (d), and Rule 28 (1)(a),(c),(c) and (e) of the Labour Court Rules, 2007 GN No.106 of 2007. The application has been preferred by chamber summons which was supported by the affidavit sworn by Nestory Ishigita, who introduced himself as the principal officer of the applicant in the capacity of investigation officer. Together with these two documents the notice of application and notice of representation were also filed. The orders sought in the chamber summons are for this court to call for the records and examine the proceedings of the Commission for Mediation and

Arbitration hereinafter referred to as CMA in Labour Dispute No. CMA/GTA/62/2017 and the award issued on 07/05/2019 with the view of setting aside the said arbitration award on the ground that;

(i) The said award is tainted with errors material to the merits of the subject matter causing injustice to the applicant,

(ii) The CMA acted in exercise of its jurisdiction illegally with material irregularity,

(iii) The award is unlawful, illogical or irrational,

The applicant also asked for costs and any other relief as the court may deem just to grant.

The affidavit filed in support of the application over and above pointing out the historical background of the dispute, it raised three complaints that the award is tainted with fatal irregularities leading to injustice to the applicant, to the effect that;

(i) That the application for condonation before the CMA was incompetent as the respondent did not sign the CMA.F1 and CMA.F2,

(ii) That the arbitrator erred in law and in fact in holding that the applicant breached the rule of natural justice,

(iii) That the arbitrator erred in law and in facts in concluding that the investigator sat in the disciplinary Committee when it deliberated the case against the respondent without evidence supporting that conclusion,

(iv) That the arbitration award is illogical and irrational on ground that the fact that the investigator was also the

complainant did not deny the respondent his right to be heard.

The applicant prays that the court be pleased to revise the CMA proceedings and set aside the arbitration award.

The application was contested by the counter affidavit of **Amri Mrishid,** the respondent. In that counter affidavit, he noted very few facts particularly introductory paragraphs which are introducing the parties, and their representative as well as the fact that the respondent was employed by the applicant in the capacity of Dump Track Operator. He disputed the rest of the facts and put the applicant to strict proof of those facts. He asked the court to be pleased to maintain the arbitrator's findings and the CMA award.

By the leave of the court the application was argued by way of written submissions. The applicant was represented by Mr. Libent Rwazo learned counsel from IMMMA Advocates, Mwanza Branch, while the respondent was represented by Mr. Erick Lutehanga learned Advocate from Komba & Associates Law Attorney.

The submissions by the applicant did not only advance the arguments in support of the application, but also gave a brief background of the disputes between the parties. The background is that the respondent was employed by the applicant as a Dump Truck Operator and was terminated on 28/02/2017 from his employment after being accused, charged and found guilty of the disciplinary offence of being responsible in fuel loss which occurred on DT 404 fuel draining on DT 406 and cutting of the GPS antenna of DT 406. He referred the dispute to the CMA via CMA

forms F1 and F2 the later being an application for condonation, as he was late in referring the matter to the CMA. Mr. Rwazo submitted that both forms CMA F1 and F2 were not signed by the respondent the fact which made the applicant to object the application by filing the preliminary objection which was overruled on 16/10/2017. Following the order overruling the objection, the arbitrator went on and determined the matter that the applicant had valid reasons to terminate the respondent's employment. Regarding the fairness of procedure, it found that the applicant though followed the procedure; it breached the principle of natural justice because the investigator became the complainant in the disciplinary hearing and on that basis the commission awarded the respondent a compensation of 20 months salaries. It is following that findings, this application was filed. In his submission in chief Mr. Rwazo adopted the content of the affidavit sworn by Nestory Isingita.

Submitting in support of the first ground of appeal, which is to the effect that, the application for condonation before the CMA was incompetent as the respondent did not sign the CMAF1 and CMAF2. He submitted that section 86(1) of the Employment and Labour Relations Act. No. 06/2004 requires a dispute referred to the CMA to be in the prescribed form, then Rule 5 (1) Labour Institutions (Mediation and Arbitration) Rules GN. 64 of 2007 provides that a document instituting the complaint or referral, shall be signed by the party or any other person entitled under the Act or these rules to represent that party in the proceedings. He cited case of **Security Group (T) Limited vs Samson Yakobo & 10 Others**, Civil Appeal No. 76 of 2016 (Unreported) at page 14 the Court of Appeal stated

that; the documents referred to under Rule 5(2) included the document which institutes a labour dispute, a pleading synonymous to a plaint which by definition is also a document.

Further to that, rule 12(2) of the Labour Institution (Mediation and Arbitration) Rules, GN.64 of 2007 provides *inter alia* that, a party referring the dispute must sign the referral documents in accordance with rule 5. While Rule 12(3) of GN.64 of 2007, provides that the commission shall refuse to accept a referral document until the requirements of sub rule (2) have been complied with.

He submitted that the provision referred to above is mandatory. He made reference to section 53(2) of the Interpretation of the Laws Act [Cap 1 RE 2019] that by the use of shall, section 5(2) must be interpreted to mean that, it is mandatory that the forms, F1 and F2 must be signed before they are admitted by the CMA.

He further submitted that, the commission erred and misdirected itself by relying on section 88(4) of the Employment and Labour Relations Act (supra) which is applicable during arbitration proceedings and not at the referral or filing stage.

Looking at the content of ground No.2 and 3 they are raising complaints of similar nature which for the purpose of brevity, I will combine them. Now, summarising what Mr. Rwazo submitted with regard to the second ground, he submitted that, the arbitrator erred in law and in fact in holding that the applicant breached the rule of natural justice, while in the third ground, it was submitted that, the arbitrator erred in law and in facts in concluding that the investigator sat in the disciplinary committee

when it deliberated on the case against the respondent without evidence supporting that conclusion.

In support of these two grounds he submitted that the arbitrator held that there were valid reasons for termination save that the procedure was not fair for violation of the principle of natural justice. That finding was grounded on the facts that DW3 was an investigator and later on became a complainant and cited the authority in the case of **Jimmy David Mgonya vs NIC Ltd** (1994) T.L.R 28 to back up the his decision. However Mr. Rwazo distinguished the decision of **Jimmy Mgonya's case** with this case, as in the cited case, the applicant was not given the right to be heard, and the case was decided before coming into force of the new labour laws. He submitted that in this case, the applicant was given the right to be heard, and the case was decided basing on the new labour laws, it is therefore distinguishable.

In further buttress of that point, he submitted that the rule against bias is premised in a latin maxim that "*Nemo Judex in causa sua*" meaning that a decision makers must refrain from making decision in cases which they have interest. He cited that case of **Consolidated Labour Revision No. 105/2019 and 110/2019 Between Geita Gold Mining Limited vs Nkaina Harun HC** - Labour Division, in which it was held that the investigator to be a complainant is not fatal, and cannot be taken to be, in violation of the principle of natural justice. He also referred to another case of **TREDCOR Tanzania Ltd vs William F. Green,** Revision No. 28 of 2016 HC Labour Division- Mbeya.

He submitted that in the case at hand no rule of procedure has been offended by the investigator becoming a complainant, and there is no evidence that, the investigator sat in the disciplinary committee.

Regarding the fourth ground which raises the complaint that, the arbitration award is illogical and irrational. He submitted that, the fact that the investigator was also the complainant did not deny the respondent his right to be heard. He submitted that the investigator was a mere complainant; his complaint did not in any way violate the rule against bias. He recited the authority in **Consolidated Labour Revision No. 105/2019 and 110/2019 Between Geita Gold Mining Limited vs Nkaina Harun HC (supra)**

He submitted that, even if we find for the sake of argument that, the procedure was unfair, yet still the award of 20 months salaries is not justified. He cited the case of **TREDCOR Tanzania Ltd vs William F. Green (supra)** to support his argument. He in the end, submitted that, the court be pleased to uphold the ground of revision and quash the decision of the arbitrator.

Responding to the submission in chief, the counsel for the respondent submitted that, the complaint in ground number one has already been decided in the preliminary objection, as section 91(1)(a) provides that any party to an arbitration award, made under section 88(10) of the Employment and Labour Relation Act No.6 of 2004 who alleges a defect in any arbitration proceedings under the auspices of the commission may apply to the Labour Court for a decision to set aside the arbitration award within six weeks of the date the award was served on the applicant,

unless the alleged defect involves improper procurement. He submitted that the decision complained against, has never been challenged before the High Court by way of revision within six weeks. He asked the first ground to be dismissed for want of merits.

Responding to ground number 2 and 3 as discussed on the applicant's submission, he cited Rule 13(1) of the Employment and Labour Relations (Code of Good Practice) GN.No.42 of 2007 which mandates the investigator to conduct investigation to ascertain whether there are grounds for a hearing to be held.

He relied on the Book titled the **Formation and Termination of Employment Contracts in Tanzania, by Hamidu M. M. Millulu ChemChem Publishers** 1st Print 2013 at pg 48 and 49. That one of the most important area in handling discipline at work place is strict adherence of the rule of natural justice which requires that, there should be full investigation by an unbiased individual to establish the fact of the case and those conducting the disciplinary hearing should keep an open mind and not to prejudice that case.

He submitted that, the person likely to be biased is the investigator who investigates the incident. He insisted that the investigator who knew that he will be a complainant cannot be free from biasness as he in his investigation will struggle not to loose the case.

Lastly, he submitted that the affidavit in support of the application did not give the true account of what transpired at trial. He actually complained that there was no justification to hold that the evidence proved that there were concrete reasons for termination. He also submitted that

the issue of the handing over report and the percentage of fuel involved as well as the applicant taking over the said report with malice were not cross examined by the other party this means they were not disputed. However, out of expectation, the arbitrator put himself on the issue and came up with holding that there were reasons for termination. He cited the case of **Maganga Lusinde vs Republic,** Criminal Appeal No.6 of 2019 HC. Shinyanga which held that failure of the party to cross examine a witness on certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said.

In rejoinder, the counsel for the applicant submitted that, the submissions made by the respondent in respect of the first ground of appeal is baseless because the applicant objected the admission of the documents but the objection was overruled on 19/10/2017, he said the ruling was not an arbitration award, rather it was an interlocutory order which did not have the effect of finally determining the dispute. He submitted that section 91(1)(a) of the ELRA is irrelevant because it deals with an arbitration award not interlocutory orders.

He cited the authorities in the case of **Cami Apparel vs Balozi Msuya &231 others** (2011-2012) LCCD No. 106, Hon. Rweyemamu, J, and **Sao Hill Industries Ltd vs Mbuli Ambrose** (2013) LCCD No. 179 Aboud, J. also relied upon in the case of **Ultimate Security Ltd vs Kapunga Ndimila Dotto,** Revision No. 11 of 2011 HC Labour Division Dodoma, in which it was held that;

> *"The impugned ruling was an order granting the respondent's application for condonation of delay that is permitting him to*

file the dispute in the CMA out of time. That order did not have the effect of the dispute to finality because the applicant had a chance to challenge it at the end if not satisfied with the final decision following arbitration".

He also referred to the **SGS Society General de Surveillance SA VS VIP Engineering and Marketing Ltd,** [2004] TLR 135 in which it was held that,

"a decision or order of preliminary or interlocutory nature is not revisable unless it has the effect of final determination of the suit"

Regarding the 2nd, 3rd, and 4th grounds he actually reiterated what he submitted in chief in respect of those grounds, he in the end asked the application to be allowed and order that the termination was fair.

Now having summarized at length the contents of the application and the affidavits of both sides as well as the submissions made by the counsel for the parties, I will, for the reasons to be adduced in the due course start with the second and third grounds of appeal. These grounds center their complaint, on the violation of the principle of natural justice. The gist of the complaint is that the DW3 who was an investigator of the case later on became the complainant before the disciplinary committee. While the respondent strongly takes that to be the violation of the principle of natural justice, citing the jurists in the book of **Formation and Termination of Employment Contracts in Tanzania, by Hamidu M. M. Millulu ChemChem Publishers** 1st Print 2013 at pg 48 and 49, which was to the effect that, investigator is likely to be biased in his investigation where he

conduct investigation while knowing that he will be a complainant of that case before the disciplinary committee. The counsel for the applicant was of completely different view, he submitted that the rule against bias is premised in a latin maxim that "*Nemo Judex in causa sua*" meaning that a decision makers must refrain from making decision in cases which they have interest. He cited that case of **Consolidated Labour Revision No. 105/2019 and 110/2019 Between Geita Gold Mining Limited vs Nkaina Harun HC** - Labour Division, in which it was held that the investigator to be a complainant is not fatal, and cannot be taken to be, in violation of the principle of natural justice. He also referred to another case of **TREDCOR Tanzania Ltd vs William F. Green,** Revision No. 28 of 2016 HC Labour Division- Mbeya.

The principle of natural justice in our jurisdiction is not strange; it can be traced from the importation of English common law. It is premised on two main rules which were imported in a latin maxim "*Nemo Judex in causa sua*" meaning that, "no one should be a judge of his own cause" this there to make sure that justice should not only be done, but manifestly and undoubtedly be seen to be done. This principle is nothing but what we call the rule against bias. Now as rightly submitted by Mr. Rwazo, this principle provides for decision makers not to act as judges in the matter which they have interest whether direct or indirect, actual or perceived. Now the issue is whether in this case an investigator who later became a complainant was a decision maker who adversely affected the principle of natural justice against the respondent before the disciplinary committee?

This issue is not new before this court, it was once raised in the case of **Consolidated Labour Revision No. 105/2019 and 110/2019 Between Geita Gold Mining Limited vs Nkaina Harun HC,** now before I refer this wholesomely, I find it important to point out that the case was referred before some rectification was made on the citation, now after such rectification the proper citation of the case is **Consolidated Labour Revision No. 105/2018 and 110/2018 Between Geita Gold Mining Limited vs Nkaina Harun HC** -Labour Division Mwanza. When it was confronted with similar circumstance, it held that;

> *"Since the investigator became a mere complainant and was not the one who later made the decision to terminate the applicant's employment, then I agree with Mr. Malongo that it did not in any way cause injustice or contravene the principle of natural justice as claimed by the employee"*

In the same vein, in this case DW3 was employed as an investigator by the applicant, he conducted the investigation of the incident in his official capacity, and thereafter became a complainant thereby presenting evidence he collected in his investigation. What he presented were mere accusations with evidence against which the respondent was obviously given an opportunity by the disciplinary committee before which the evidence by the investigator was presented. He obviously countered the accusations and the presented evidence. Thereafter the disciplinary committee deliberated on the evidence of both sides and reached at the decision.

There is no evidence to show or indicate that the said investigator presided either as a chairman, or a member of the disciplinary committee which participated in the decision making. That being the case then, it is instructive to find that, the arbitrator erred in holding that the employment was unprocedurally terminated on the ground of the violation of the principle of natural justice. Instead, I find that the fact that the investigator became the complainant did not violate the principle of natural justice, this leads to the conclusion that the termination of the respondent was therefore procedurally fair.

Now as these grounds have determined the application, I find no need to deal with the rest of the grounds. That opinion bases on the simple reason that, even if we proceed with the rest of the grounds, no result there from, will overturn this finding. Having so found, the award is thus revised to the extent explained above, the award issued by the Commission for Mediation and Arbitration is set aside, and it is hereby found that the respondent was properly terminated.

It is so ordered

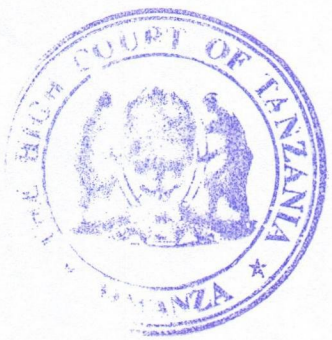
DATED at **MWANZA** this 13th day of July, 2020

J.C Tiganga

Judge

13/07/2020

Judgment delivered in open chambers in the presence of Mr. Kyariga Advocate for the Applicant and Mr. Erick Lutehanga Advocate representing the respondent.



J.C Tiganga

Judge

13/07/2020