

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
(HIGH COURT LABOUR DIVISION)**

AT SHINYANGA

REVISION APPLICATION NO. 7 OF 2020

*(Arising from an award of the Commission for Mediation and Arbitration of
Shinyanga in Misc. Labour Application No. CMA/SHY/57/2019)*

PANGEA MINERALS LIMITED APPLICANT

VERSUS

JOSEPH MGALISHA BULABUZA.....RESPONDENT

JUDGMENT

Date of the last Order: 30th June, 2020

Date of the Judgment: 28th August, 2020

MKWIZU, J.:

Joseph Mgalisha Bulabuza was employed by the applicant Pangea Minerals Limited as an equipment Operator until on 15th August, 2018 when his employment was terminated on the ground of incapacity (ill health). Aggrieved with the termination, he filed a Labour Dispute No. CMA/SHY/KHM/264/2018 at the Commission for Mediation and Arbitration at Shinyanga through statutory form No. 1 challenging the said termination on both procedurally and substantively.

After the hearing, the CMA found in favor of the respondent. It awarded him thirty (30) months salaries as compensation for unfair termination at the tune of Tsh. 55, 528, 744/=, subsistence allowance to the tune of 18, 900, 952.73 from 21/8/2018 to the date of the award plus all terminal benefits itemized in the termination letter.

Applicant was unhappy with the CMA's award. He has filed the present revision under the provisions of section 91 (1) (a), 2 (b) and (c), 94 (1) (b) (i) of the Employment and Labour Relations Act, 2004, Rules 24 (1) (2) (3) and Rule 28 (1) (c) (d) and (e) of the Labour Court Rules, 2007. The application is supported by an affidavit sworn by the Applicant's counsel Mr. Geoffrey Kange on 6th February, 2020. The Respondent contest the Application, hence the counter affidavit sworn by the respondent, Joseph Mgalisha Bulabuza on 28th February, 2020.

This revision was disposed of by way of written submissions. Applicant through the services of Mr. Geoffrey Kange learned advocate filed the written submissions in support of the application on 4th June, 2020 whereas the reply submissions were filed by Mr. Dotto Benjamin, respondent's

representative from TAMICO Branch on 18th June, 2020. No rejoinder submissions were filed in this matter.

Paragraph 7 of the affidavit in support of the application raised 4 issues for determination.

- i. Whether the applicant did not prove the reason for respondent's termination
- ii. Whether the applicant did not prove statutory procedures for the respondent's termination
- iii. Whether the respondent was not paid terminal benefits listed in the termination letter
- iv. Whether it was proper for the arbitrator to award the respondent subsistence allowance while the terminal benefits were paid immediately after the respondent's termination.

On the first issue, applicant's counsel submitted that the respondent's termination was grounded on incapacity (ill health) which is regulated by Rule 19 (1) of GN No. 42 of 2007. He said, the respondent's complication started on 24/9/2012 when he visited the Mines clinic complaining of lower

back pain. He was kept on oral analgesics since then, and in the year 2016 he was referred to a Neurosurgeon at Muhimbili Orthopedic Institute (MOI) for further treatment where he was found to have a mild protruded disk at L4-L5 and L5- S1. He was later treated at TMJ hospital DSM at the respondent's costs. The Medical Review Board was conducted to investigate the incapacity, the Board concluded that the respondent's incapacity is a Partial permanent as the disk shifted from its normal position. The Medical Review Board further recommended that there should be a redeployment Meeting to determine whether the respondent will be able to perform his normal duties or get an alternative duty. As it was difficult to secure alternative duty, the applicant had no option but to terminate the respondent's employment.

Mr. Kange went on elaborating that, on termination, respondent was paid all his terminal benefits totaling at 12,497,457.4 plus 38,257,350.00 life insurance. Mr. Kange said, it was therefore wrong for the arbitrator to conclude that termination was without reasons.

On the second issue, Mr. Kange submitted that the arbitrator did not consider the evidence on the records. He said, it is on records that several meetings were conducted before the respondent was terminated. He referred to exhibit M.K. 2.1; M.K 3; M.K 2.2 and M.K 3.1. Mr. Kange expounded that the purpose of all the meetings was to investigate on the respondent's incapacity as per Rule 21 (10 of the ELR (Code of Good Practice) Rules. The respondent was well consulted all along and therefore it was wrong for the arbitrator to conclude that the respondent was terminated in a meeting without following the procedure

On whether the respondent was paid his terminal benefit, Mr. Kange said, Exhibit MK 5 proved that respondent was paid 12, 497,457.4 as benefits listed in the termination letter (Exhibit MK 6) but the arbitrator ignored the same.

On the last issue, applicant's counsel was of the view that, since the respondent was paid all his terminal benefits immediately after the termination, arbitrator should have not ordered for the payment of the subsistence allowances. He expounded that; the arbitrator based his finding

implemented by the General Manager for calling a meeting with the employee before giving a final decision which was done. He referred the court to the case of **Martine Oyier V. Geita Gold Mine Limited**, Labour revision No. 226 of 2008 (unreported).

On whether respondent was paid his terminal benefits, Mr. Dotto was brief. He said, Applicant's own witness had admitted at the CMA that respondent was not paid his dues until he signs the termination letter. The terminal benefits were affected in the respondent's account after the CMA awards in February 2020.

On the same line of reasoning, respondents' representative argued that arbitrator was right in awarding the respondent subsistence allowance because respondent was not repatriated to his place of domicile from 21st August 2018 when his employment was terminated to 28th February, 2020 when he was paid his terminal benefits. The case of **Gasper Peter V. Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal No 35 of 2017, was cited on this point.

Rule 19 (6) and (7) of GN No 42 of 2007 depending on the nature and cause of the incapacity. See also the cited case of **Martine Oyier v. Geita Gold mine Ltd**, (Supra).

It is uncontroverted facts from the record that respondent had a lower back pain which he was attended at Buzwagi Mine sites Clinic and later referred to the a Neurosurgeon at Muhimbili Orthopaedic Institute (MOI) and later to TMJ Hospital for further treatment. It is also an agreed fact that, the degree and nature of the respondent's incapacity was duly investigated through the Medical Review Board Meeting which recommended among other things that redeployment Committee Meeting should determine whether respondent will be able to perform his duties or there is an alternative job for him. The Committee, did digest the recommendations not only of the Medical Review Bord but also that of the specialist doctor who recommended that respondent should not work on a vibrating surface. Having considered the recommendations, the Redeployment meeting found nothing suitable for the respondent and therefore recommended for termination. However, review of the records reveals that, though employer, applicant in this matter was able to investigate on the nature of the incapacity facing the respondent,

she failed to indicate how she considered to accommodate such incapacity. This is so because, reading the records, it is clear that the Re deployment Committee was held and recommended for termination while the respondent was still on medication , his doctor, neurosurgeon ,had suggested in the progress report that there is a prospect of improvement and that no final report was issued which would have enable the applicant or the Redeployment committee to justify termination. Reading from the original records, DW2, Dr. Antoinette George had this to say during cross examination:

" Swali: Final report ilitolewa lini

Jibu: Tuliomba final report tukaletewa progress report

Swali: Tarehe 15/8/2018 mlalamikaji aliachishwa kazi

Jibu: Wakati wa kumwachisha kazi lazima kuwe na maoni ya dactari. Mgalisha alirudishwa hospitali kwa specialist October 2018 akiwa hana kazi"

Exhibit MK 6 termination letter, tallies with the above explanation that respondent's employment was terminated on 15/8/2018 while respondent was still on treatment. Again, there is no indication that the redeployment

Committee meeting investigated on the alternative duties for the respondent. The discussion on the meetings conducted focused on the respondent's incapacity and whether he could manage to perform his original duties. Considering nature of the respondent's duty and the restrictions by his doctor that he should not work on the vibrating surface, the redeployment committee recommended for termination. There is nothing showing the efforts made to invite for other alternative jobs or seek respondent's opinion or suggestion on the available opportunities. I therefore find nothing to fault the arbitrator's finding on this issue.

Similar conclusion is arrived at in the second issue as to whether the applicant followed the stipulated procedure before termination. Rule 21(1) requires the employer to consult the employee on the whole investigation processes. It is evident that, respondent was represented in the meetings conducted , However, as alluded to above, there was no indication that applicant investigated on the alternative available duties for the respondent, and if so such opportunities were not communicated to the respondent for him either to accept or refuse, or suggest otherwise .At the end, the outcome of the meeting which suggested termination was not communicated to the

Applicant in writing as required by the law. Respondent was also not informed of the termination promptly after the said decision until October 2018 when he learnt of his salary cut. The termination was therefore procedurally unfair.

On whether the respondent was not paid terminal benefits listed in the termination letter, applicant's counsel said, immediately after the termination, respondent was paid his terminal benefits itemized in the termination letter as exhibited by Exhibit MK 5. I have gone through the said Exhibit, it is the respondent's salary slip indicating that respondent was paid the terminal benefits itemized in the termination letter. However, in her evidence before the Commission, DW1, Pulina Malaba Said the applicant could not release the terminal benefits because of the respondent's failure to sign the termination letter and clearance forms. The arbitrator quoted DW1's evidence at page 13 of the CMA's award that:

"Na miscellaneous ni report ya sehemu ambayo hakukamilisha alitakiwa exit ili mwajiri achie Terminal benefits na kwamba atalipwa kama akisha sign termination letter na clearance Form"

The above justifies the CMA's conclusion that the respondent was yet to be paid his terminal benefit at the time of the hearing of the dispute. The payment was subject to the respondent's signing the termination letter and clearance form. A careful perusal of MK 5 one would hardly say whether the payments were done on the date indicated therein. This becomes more convincing when added with the evidence presented for the applicant as indicated above. The Arbitrator, was therefore right at that particular moment to award the same.

This takes me to the last issue regarding the award of the subsistence allowance. Applicant contends that, respondent was not entitled to the award of the subsistence allowance as terminal benefits were paid immediately after termination. Respondent's counsel was of the contrary view. He said, terminal benefits that were itemized in Exhibit MK5, which included repatriation costs from Kahama to Dar es Salaam were paid to the respondent on 28/2/2020 after the CMA's award. This being the position respondent was entitled to subsistence allowance from 21 August 2018 to 28 February, 2020 the date he was officially repatriated. Section 43 (1) of the ELRA which reads:

"43.-(1) Where an employee's contract of employment is terminated at a place other than where the employee was recruited, the employer shall either-

(a) transport of the employee and his personal effects to the place of recruitment,

(b) pay for the transportation of the employee to the place of recruitment, or

*(c) pay the employee an allowance for transportation to the place of recruitment in accordance with subsection (2) and **daily subsistence expenses during the period, if any, between the date of termination of the contract and the date of transporting the employee and his family to the place of recruitment.**" (Bold is mine).*

As stated in the third issue above, there is no clear evidence as to whether the applicant deposited into the respondent's account the terminal benefits itemized in the termination letter and exhibit MK 5. Therefore, I find as concluded above that terminal benefit were not yet paid at the conclusion of the hearing at the CMA meaning that, on termination, respondent was not repatriated to his place of recruitment and therefore ,under section 43 (1)

(c) of the ELRA, he was entitled to subsistence allowance. The CMA's award is therefore not to fault. This issue also crumbles.

On the basis of the foregoing, I find the revision without merit. It is dismissed in its entirety. Being a labour matter I make no order as to costs.

Order Accordingly.

DATED at **SHINYANGA**, this 28th Day of **AUGUST**, 2020


E. Y. MKWIZU
JUDGE
28/8/2020

COURT: Right of appeal explained.



E. Y. MKWIZU
JUDGE
28/8/2020