IN THE HIGH COURT OF TANZANIA
(LABOUR DIVISION)
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

LABOUR REVISION NO.41 OF 2020

BULYANHULU GOLD MINE..... APPLICANT

VERSUS

MISOLO KIHUNA MISOLO
NIXON IGOKO
LEONARD KINGI MIKOMANGWA
AZALIAH MASSE **.....RESPONDENTS**
MASANJA MASHALLAH
BAHATI SIMON
JONSON MWANI

(From the decision of the Commission for Mediation and arbitration)
Magreth Kiwala, (Arbitrator)
Dated 1st day of April, 2020
in
Labour Dispute No. CMA/SHY/KHM/233/2018)

.....

RULING

13th November,2020 & 12th February,2021.

Mdemu, J.:

This labour revision has been preferred by the Applicant in terms of the provisions of sections 91 and 94 of the Employment and Labour Relations

Act, No.6 of 2004 as amended and Rules 24 and 28 of the Labour Court Rules, GN No.106 of 2007 so that:

1. *This honourable Court be pleased to revise and set aside the award of the Commission for Mediation and Arbitration at Shinyanga in dispute No. CMA/SHY/KHM/233/2018 delivered by Hon. Magreth Kiwara (Arbitrator) on 1/4/2020.*
2. *Any other relief (s) this honourable Court deems fit to grant.*

The application is supported by an affidavit of one Niwakweli Mushi sworn on 25th of August 2020. Briefly, the Respondents were employee of the Applicant serving in different positions and also recruited in different dates. It was in October 2007 when the Applicant terminated the Respondents for their allegedly participation in unlawful strike. Prior, TAMICO, on behalf of the Respondents underwent negotiations with the Applicants on a number of issues regarding welfare of its members. Before consensus, the Respondents issued notice intending to go on strike as from 25th of October 2007. This strike, according to the Board memo to TAMICO was considered unlawful. As the Respondents did not attend at work on 27th of October, 2007, the Applicant terminated them from employment.

After almost 10 years, the Respondents made referral to CMA first for condonation, which they were successful on 7th of December, 2018. Following this decision, determination of the labour dispute proceeded and on 1st day of April, 2020 the award was delivered in favour of the Respondents. It was observed that, termination of the Respondents both procedurally and substantively was unlawful, hence the instant application.

On 16th of October 2020, through consensus and by order of this court, hearing of the application proceeded by way of written submissions. The Applicant Company had the service of Ms. Carolyne Kivuyo and Mr. Joseph Nyerembe, both Advocates, whereas the Respondents had the service of Mr. Frank Samwel, learned advocate. Parties duly complied with court's order.

In his submissions in support of the application, Mr. Joseph Nyerembe filed his written submissions on 30th of October, 2020. He submitted on consolidation of the application, condonation and the award meted by the CMA. On the question of consolidation, his view was that, the record is silent on the manner such applications got consolidated. At times, there was no even ruling towards consolidation. He gave examples such that, one ruling consolidated the applications of Nixon Igoko and Azalia Masse and another was in respect of applications of Muhudin Salim Simba, Charles Lubigili, Iddi Busanji, Leonard Kingi Mkomangwa, Masanja Mashallah, Johnson Mawani,

Joseph Ntinda and Misolo Kihuna. Yet, in another ruling the applications of Kulwa Masasila, Selly Selly Kanoko, Yasini Rashid Hamis, and Mashaka Salim Simba were consolidated whereas, one Bahati Simon had independent application.

In all this, his view was that, Rule 26 of the Mediation and Arbitration Rules got violated. Thus, in the whole exercise of consolidation he noted the following: **one**, that the provisions of rule 24(i) was deployed instead of Rule 26(i) of the Mediation and Arbitration Rules. **Two**, number of the Respondents do not add up to the consolidated applications. **Three,** four employees got dropped. He thus concluded in this ground that, there are serious issues of law that transpired.

As to granting of condonation, Mr. Nyerembe was of the view that, the Respondent did not show good cause as required in Rule 31 of the Mediation and Arbitration Rules. He also referred to Rule 11(3) that the Respondents were required to establish the degree of lateness, reasons for lateness, prospectus of success in the dispute and if the same is prejudicial to the opponent. He also cited the case of **Allison Xerox Sila vs. Tanzania Harbours Authority, Civil Reference No.14 of 1998** insisting that, the Applicant must satisfy the court that the delay was for sufficient cause or reasons.

Looking facts in the instant application, Mr. Nyerembe was of the view that the fact that the Respondents were not informed by the Applicant their right to refer the dispute to CMA may not constitute sufficient cause. He added that, it is not true that they were not informed of their rights to have the matter referred to CMA. He submitted so because, there is no mandatory requirement that such information must be in writing. He said in this that the Respondents were also aware of the dispute, the reason why they pursued the matter to the level of the Court of Appeal.

As to being misled by TAMICO, in his view, may not constitute good cause bearing in mind that, the delay is counted down to almost 11 years. As each of the Respondents is responsible personally, belief that the case of Nicodemus Kajungu & Others vs Bulyantulu Gold Mine staged by TAMICO to represent them is unfounded. He also cited the case of **Alexander Augustino Tendwa and 15 Others vs. Bulyanhulu Gold Mine Ltd. Consolidated Revision Application No. 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 and 39 of 2020** (unreported) where the court refuted to extend time to Alexander and Others on account of being misled by TAMICO.

Regarding sickness of all the Respondents (work related sickness), Mr. Nyerembe submitted that, there is no evidence indicating that the said

sickness got contracted immediately after termination and it did exist throughout the ten years' period of delay. In this, the learned Advocate referred to the case of **Deus Morris Alexander vs. Sandvick Mining &Construction Revision No. 14 of 2011** (unreported). He thus submitted generally that, the Respondent never accounted for days of the delay, and more so, each day of the delay for the Commission to condone the application. He cited the case of **Dar es Salam City Council vs. S. Group Security CO Ltd, Civil Application No. 234/2015** (unreported) and that of **Deus Morris Alexander vs. Sandvick Mining & Construction** (supra)

Another ground submitted by Mr. Nyerembe was in respect of acknowledgment of the Respondent on the package of terminal benefits followed their termination. He thought therefore the arbitrator erred in holding that, termination was unfair. He cited the provisions of section 37(2) of the Employment and Labour Relations Act insisting that the Respondents were terminated on fair and valid reasons, that is, illegal strike. In this, his view was that, the strike mounted by the Respondents on 25th of October, 2007 was illegal because the Applicant warned the Respondent but they disobeyed, a fact which was confirmed by the Arbitrator at page 33 of the award.

He added that, the Applicant and the Respondents engaged in negotiations before the Applicant warned the Respondents not to go on strike. He went on saying that, it was not easy to follow other procedures as the environment was hostile to the extent of asking intervention from FFU. In his further view, the learned counsel was of the opinion that, disciplinary hearing was impossible to be functional due to big number of employees went on strike (1511 employees)

As to the award, his view was that, a 36 months' compensation is exorbitant. He thought the Arbitrator could have awarded a minimum amount prescribed in the provisions of section 40 of ELRA, which is 12 months. He justified this by submitting that, the strike was illegal and due to want of security, FFU had to be deployed to guard the premises. This, taking also an account on makinikia prohibition, leading to economic hardship, it was uncalled for on the side of the Arbitrator in exercise of her discretion to award 36 months' compensation.

He also challenged the award to have not being backed up by any evidence including an order that such compensation be effected within 21 days ignoring the statutory period of 42 days given to whoever is dissatisfied with the award to apply for revision to the High Court (Labour Division). He thought, under the premises, this application be allowed.

In reply, the Respondent through Mr.Frank Samwel, Advocate, filed his written submissions 13th of November, 2020 resisting this revision. In his submissions, the learned Advocate submitted in the following: **one** , that there was no valid order of consolidation during mediation and arbitration processes. **Two,** that there was no good cause for condonation. **Three**, that as the Respondents accepted terminal benefits, then the arbitrator erred in holding that termination was unfair and **four** that, the sum awarded to the Respondents was exorbitant. Point **five** observed by Mr. Frank is in respect of order of the arbitrator to have the said compensation effected within 21 days and **last** is on the entire award not being backed by any evidence.

As to the question of consolidation, the learned counsel replied that, consolidation orders were valid both during mediation and arbitration exercise. He added that, parties were involved and in certain instances as noted at page 2 and 3 of the award, the Applicant's counsel is the one initiated consolidation processes. He thus observed that, Rule 26 of the Mediation and Arbitration Rules got invoked after involving parties.

Regarding want of good cause for condonation, the learned counsel was of the view that, the award in Misolo Kihuna &10 Others emanated from the following condonation cases: Nixon Igoko and Azalia Masse (4th December,2018); Muhidin Simba &7 Others (2nd April,2018);Kulwa Masasila

&3 Others (3rd June,2019) and Bahati Simon (12th October,2018) all against Bulyanhulu Gold Mine. Having this and citing the provisions of section 91 of ELRA, the Applicant was to challenge the decision on condonation within 42 days from the date of the last condonation order which was on 3rd of June 2019. According to learned counsel, the Applicant cannot challenge condonation at this revision for the award filed on 12th of May 2020.

With regard to the terminal benefits accepted by the Respondents to be conclusive, Mr. Frank submitted that, the Respondents were not paid for unlawful termination and that, what constituted the contents of the claim in this application did not include what the Respondents got paid. As to the sum awarded to be exorbitant complained by the Applicant, it was his submission that the said complaint is not backed by any evidence as to why the compensation be of 12 months and not 36 months, the maximum awarded by the arbitrator. In his view, the award was in compliance with the law as 12 months' compensation is the minimum one. He cited the following cases to support his position: **African Barrick Goldmine vs. Edie Hamza; Revision No.491 of 2015** (unreported); **Kuwasa vs. Simon Maduka, Revision No.67 of 2019** (unreported) and **Juma Kanuwa vs. Eckenforde Tanga University, Revision No.17 of 2012** (unreported)

Submitting on miscalculations of the amount awarded and compensation payment to be effected within 21 days, Mr. Frank stated that, the order did not prejudice rights of the parties to refer the matter to the High Court because at last page of the award, that right was explained to parties. As to the award not being backed by evidence, his view was that, the record indicates that, the Respondents were terminated unlawfully. The evidence is to the effect that, the Respondents were terminated without conducting displinary hearing, thus denied the Respondents right to be heard. With that, the learned Counsel asked me to dismiss this application.

In rejoinder, the Applicant filed his written rejoinder on 20th of November, 2020. With respect to consolidation, he rejoined that the Respondent do not dispute on the irregularities towards consolidation and that following that defect, the award was improperly procured. On condonation, he reiterated his previous position that, it was without good cause and that as per the case of **Deus Morris Alexander vs. Sandvick Mining &Construction** (supra), the proper procedure to challenge condonation is during revision of the award on merits as in this case.

Rejoining on full payment of terminal benefits, he reiterated that, they were paid in full as per their termination letter. He added that, in event it is thought that they were paid for capacity related misconducts, then, in terms

of the provisions of section 42(2) (b) of ELRA, it was improper to award severance pay. As to the award of 36 months' compensation, his view was that, much as the law does not set the maximum compensation, yet 36 months' compensation in the circumstances of this case is high. He distinguished the case of **African Barrick Goldmine vs Eddie Hamza** (supra) where a compensation of 48 months was ordered because it was on unlawful termination which isn't the case here.

He added also that, when it comes to awarding beyond the statutory minimum compensation of 12 months in exercise of the discretionary power, that discretion must be judiciously with reason as stated in the case of **North Mara Gold Mine Ltd. vs Khalid Abdallah Salim, Labour Revision No.25 of 2019** (unreported). Regarding fairness of termination, he reiterated that, the same was fair as it did base on unlawful strike and that, Rule 14(6) of the Code of Good Practice allows certain procedure to be dispensed with where the circumstances do not permit. This was the end of parties' written submissions.

I have read and considered written submissions of both parties together with the entire record in this revisions. In resolving the controversy, along with the grounds raised in the affidavit and amplified by parties, I will consider two crucial areas. **One** is condonation, whether there was valid reason to do

so. **Two**, if the first one is in the affirmative, whether termination was unlawful leading to the award complained of.

I should first determine the issue of consolidation. It is not disputed that, the Respondents were employee of the Applicants employed on different dates and on different positions. It is also on record that, the Applicant terminated the Respondents on 27th of October, 2007, following the strike took place on 25th of October, 2007. On that account, I do not see the illegality complained by the Applicant regarding consolidation orders. In my view, had it been no such orders made, then there would be multiplicity of applications and mostly conflicting decisions on the same cause of action. Importantly, the Applicant never indicated how the said consolidation prejudiced rights of parties both during condonation and the resultant award.

Regarding condonation, it is obvious from the record that, the Respondents were terminated in October, 2007 and that it was until the year 2018, almost after 10 years when the Respondents filed an application for condonation. Why that delay? The CMA considered reasons as contained in that application and was satisfied that the delay was with sufficient cause. Essentially, the CMA took into account two reasons as good cause for the delay. **One** is failure of the Applicant employer to inform the Respondents employee their right to appeal to CMA in terms of Rule 13(10) of GN

No.42/2007 and **two**, belief that, TAMICO took charge of their dispute, a fact which later came to be incorrect.

As to failure of the Applicant to inform the Respondents their right to appeal to CMA, the counsel for the Applicant conceded that the Respondents were not informed of that right in writing. Where this is true, the question is whether they were not aware of such rights hence, the delay. This one need a careful appraisal. In one of the affidavit in support of the application for condonation at the CMA, Misolo Kihuna Misolo deposed in paragraph 11 of the affidavit that:

> *Kwamba mleta maombi pia alimkumbusha mwajili kuzingatia utaratibu wa makabidhiano (clearance process) ikiwemo kufanyika kwa medical exit examination lakini hilo pia halikutekelezwa na mjibu maombi. Kwamba baada ya hayo kushindikana, mleta maombi alianza kutafuta utaratibu wa kupata haki zake za kiajira baada ya kutoridhishwa na hatua alizokuwa amechukua mujibu maombi. Hata hivyo, wakati akichukua taratibu hizo alipata taarifa kutoka kwa chama cha Wafanyakazi (TAMICO) kwamba kilikuwa kimefungua kesi ya kudai haki zake na za wengine kupitia kwa Nicomedes Kajungu.*

My construction to this paragraph is such that, the Respondents were aware of their rights to appeal to CMA much as the affidavit is silent as to when the Respondents were informed that, their matter is with TAMICO. The affidavit is equally silent as to what steps the Respondents were taking in pursuing their rights. One would construe that it is in the course of referring the matter to CMA when they were informed that TAMICO has taken charge. I will also look on this. What I may conclude is that, the Respondents, though not informed by the Applicant, were aware of appealing to CMA. They are simply seeking a refuge to TAMICO. I therefore agree with the counsel for the Applicant that, failure to inform the Respondent their right to refer the matter to CMA does not mean that the Respondents were not aware that upon being dissatisfied with the decision of their employer, they were supposed to appeal to CMA. Granting condonation on this ground was without good cause.

Now to the belief that TAMICO was handling the dispute on their behalf only to learn that it was not. Before I resolve this, I think it is pertinent to reproduce paragraph 21(ii), (iii) and (iv) of the affidavit of one Misolo Kihuna Misolo in support of the application for condonation:

> *(ii)* ***kwamba tangu mwaka 2007 chama cha TAMICO kilimpotosha mleta maombi kuwa kilikuwa kimefungua***

kesi kwa niaba ya jambo ambalo ameligundua mapema mwezi Julai 2018 *kwamba, hakuna kesi yoyote iliyofunguliwa kwa niaba yake isipokuwa kesi iliyokuwa imefunguliwa ni ya Nicomedes Kajungu tu.*

(iii) Chama cha TAMICO hakikuwahi kutoa taarifa yoyote iwe ya mdomo, maandishi au kupitia matangazo ya magazetini au radio na television kwa mleta maombi juu ya kutokuwepo kwa kesi yoyote iliyokuwa ikiendelea katika Mahakama ya Rufani au sehemu yoyote nyingineyo au kuwepo kwa barua ya mwongozo kutoka kwa Jaji Mkuu wa Tanzania na ile ya Wakili Shayo.

(iv) ***kwamba taarifa ya kutokuwepo kwa kesi yoyote iliyofunguliwa kwa niaba yake amezipata mapema mwezi huu wa Septemba 2018*** *baada ya kufuatilia katika ofisi za chama cha TAMICO na kupewa nakala ya barua ya Jaji Mkuu ikiwa ni mwongozo wa namna ya kufuatilia haki zao.(emphasis mine)*

My reading to the quoted paragraphs of the affidavit reveals uncertainties and speculations. **One,** the Respondents deposed to have been misled from 2007 and later had a u-turn that it was in the year 2018.

Two, in that year 2018, he deposed facts relating to two months, that is July and September, 2018 is when he came to realize that, there is no case filed by TAMICO. This cannot be trusted easily that way. No evidence from TAMICO officials confirming the version of the Respondent in this affidavit. As it is, one cannot be certain if TAMICO was in-charge of the matter, and if so, when did the Respondents came to be aware. This factor is important to be established because of the requirement to account for each and every day of the delay when a judicial body, or an administrative tribunal, like CMA is in need to grant condonation.

As said, there is no evidence on record which the Respondents accounted that made them to delay from October, 2007 when the Applicant terminated them from work to 2018 when they alleged to have had information that TAMICO never took charge of their labour dispute. Again, the Respondents have failed in total to account what were they doing from when it came to their knowledge that TAMICO never represented them to when they lodged an application for condonation.

On that stance, I share the observation of Mr. Nyerembe that, the Respondent did not show good cause as required in Rule 31 of the Mediation and Arbitration Rules. Equally, in terms of Rule 11(3), the Respondents failed to establish the degree of lateness and reasons for lateness. In essence, and

as stated in the case of **Allison Xerox Sila vs. Tanzania Harbours Authority, Civil Reference No.14 of 1998** cited to me by the Applicant's counsel, the Respondent did not satisfy the CMA that, the delay was for sufficient cause or reasons.

On that account, the CMA had no justification to grant condonation as the Respondent did not establish sufficient cause for so doing. That said, this ground alone suffices to dispose the matter, thus I am not intending to deliberate on the award. The resultant is that, the award of the CMA is hereby nullified. Each part to bear own costs of this application. It is so ordered.

Gerson J. Mdemu
JUDGE
12/02/2021

DATED at **SHINYANGA** this 12th day of February, 2021.

Gerson J. Mdemu
JUDGE
12/02/2021