**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY OF MWANZA)**

**AT MWANZA**

**LABOUR REVISION NO. 34 OF 2020**

**GEITA GOLD MINING LIMITED ..... APPLICANT**

**VERSUS**

**ERIC MBOYI ..... RESPONDENT**

**JUDGMENT**

*25th February, 2021 & 10th March, 2021*

**ISMAIL, J.**

These revisional proceedings have been commenced at the instance of the applicant, a loser in the arbitral proceedings in Labour Dispute No. CMA/MZ/ILEM/615-152/2018, presided over and determined by the Commission for Mediation and Arbitration (CMA) at Mwanza. In said proceedings, the respondent was challenging termination of his services. The respondent's contention was that his termination was unfair, both substantively and procedurally. He, therefore, prayed for payment of compensation. The arbitrator held the view that the respondent had been maliciously terminated from his employment position as no valid and fair

reasons for termination were given, and that the procedure was also unfair.

The dispute arose following the applicant's decision to terminate services of the respondent for a misconduct which involved illegally dumping (tipping) 130 tons of high grade ore instead of taking the said materials to Rompad. Aggrieved by applicant's disciplinary committee's decision and, subsequent appeal proceedings, the respondent instituted arbitral proceedings which were determined in his favour. The award ordered the applicant to pay compensation to the tune of TZS. 45,508,401.20, an aggregate of salaries for 24 months, and a further sum TZS. 257,700.80, being severance allowance.

It is this decision which has raised the applicant's 'fury', hence the decision to prefer the instant application. Grounds of the applicant's disenchantment are stated in paragraph 16 of the supporting affidavit. These are:

(i) That the award was improperly procured and irrational;

(ii) The arbitrator took into consideration irrelevant factors and failed to take into consideration all relevant factors related to the case; and

(iii) That the arbitrator had misdirected himself in arriving at the conclusion that there was no reason for termination of the respondent's employment contract and that, there was procedural irregularity in the termination of the matter.

In his counter-affidavit in opposition to the application, the respondent took the view that the arbitrator was correct in holding the view that the respondent was unfairly terminated, and that this conclusion was arrived at after a thorough evaluation of the evidence. He denied that the arbitrator indulged in any irregularity or impropriety in resolving the dispute.

At the hearing of the application, the applicant was represented by Mr. Gregory Lugaila, learned counsel, while the respondent enlisted the services of Mr. Saleh Nassor, learned advocate.

Submitting in support of the first issue, Mr. Lugaila argued that the testimony was taken without indicating if it was made under oath or affirmation. He contended that Rule 25 (1) of the Labour Institutions (Mediation and Arbitration) Guideline Rules, GN. No. 67 of 2007 makes it mandatory that witnesses testifying at CMA should take oath or affirmation, and that such oath or affirmation is taken under section 4 of

the Oaths and Statutory Declarations Act, Cap. 34 R.E. 2019. It was his assertion that the record is clear that none of the witnesses was sworn or affirmed during the testimony, and that such omission rendered the proceedings incurably defective. He prayed that the proceedings be nullified and the matter be remitted back to CMA for re-trial. To fortify his view, he cited the Kenyan decision of ***TMM v. Republic*** [2018] eKLR.

With respect to the second issue, the contention by the applicant's counsel is that correctness of the proceedings is suspect. He argued that, whereas the proceedings at CMA were conducted in Kiswahili, the award was issued in English, contrary to Rule 35 of GN. No. 64 of 2007. Mr. Lugaila argued that the award is in a broken English which is hardly comprehensible. He argued further that the record is incorrect and not legible, and it is contrary to Rule 32 (1) of GN. No. 64 of 2007. He urged the Court to weigh in and guide on whether the arbitral proceedings are correct, legible and reflect the record of the proceedings.

Mr. Nassor's rebuttal was equally vociferous. He began by leaping to the defence of the proceedings at CMA, saying that the same were in order. The learned counsel argued that all witnesses swore before they testified as required by Rule 25 (1) of GN. No. 67 of 2007. He argued

further that, while the cited provision is merely a subsidiary legislation, section 20 (1) (c) of the Labour Institutions Act, Cap. 300 R.E. 2019 allows mediators and administrators to administer oaths. Reverting to Rule 25 (1), Mr. Nassor argued that since the word used is "may" then compliance with it is, in terms of section 53 (1) of the Interpretation of Laws and General Clauses Act, Cap. 1 R.E. 2019, a matter of discretion. He took the view that the Rules are a mere guide for mediators and arbitrators. The counsel contended that Rule 32 (2) of GN. No. 64 of 2007 provides a leeway for arbitrators not to follow strict rules of recording proceedings in verbatim.

The respondent's counsel was insistent that the proceedings were unblemished as all witnesses were asked their personal particulars of their religions after which they took oath. It was his contention that the only missing part is the words they used during their oath or affirmation, meaning that they all testified on oath.

Still on this point, the respondent's counsel drew my attention to section 3 (a) and (f) of the Employment and Labour Relations Act, Cap. 366 R.E. 2019 (ELRA), which recognizes CMA as a quasi-judicial body whose operation has to uphold the need for promoting social justice. With respect to **TMM v. Republic** (supra), Mr. Nassor contended that the same

being a criminal case, it was distinguishable from the present case as it does not say which rule of evidence was flouted. In any case, the counsel argued, this is a labour case whose conduct is guided by section 88 (4) and (5) of the ELRA. He argued that if the said case refers to Rule 25 of GN. 64 of 2007, then the same was duly complied with. Mr. Nassor was adamant that the proceedings were okay save for the typed proceedings whose arrangement is problematic.

Submitting on the language, Mr. Nassor argued that the proceedings were in English and the award is also in that language. He, in view thereof, took the view that Rule 35 (2) of GN. No. 64 of 2007 was complied with. He urged the Court to hold that the proceedings were legible and go ahead and determine the matter. He took the view that remitting the matter to CMA will flout the objects of sections 3 and 88 (4) of the ELRA.

In his terse rejoinder, Mr. Lugaila argued that, while it is true that the CMA is a quasi-judicial body, he was insistent that justice must be seen to be done and, in that respect, proceedings take a very crucial role as they are the basis on which this Court can make a decision. On **TMM v. Republic** (supra), the learned counsel submitted that the same is quite relevant. He held the view that testimony given under oath carries a

probative value that can be relied on, and that such omission is not a mere technical issue that can be ignored. Rather, it goes to substantive justice. Mr. Lugaila was emphatic that procedures must also be considered, given their importance in the administration of justice, adding that their non-conformity may lead to anarchy.

Defending a retrial, the learned counsel argued that the same is intended to uphold justice to all parties as that will address legal issues which are crucial in determining the substantive matters raised through this application.

From the parties' rival submissions, the question is whether the arbitral award irrational and improperly procured. Deducing from the submissions, it is clear that the contest between the disputants has been narrowed to issues of procedure. These are the arbitrator's alleged failure to subject the witnesses to oaths and/or affirmations; and alleged lack of legibility and correctness of the proceedings.

With respect to the first issue, Mr. Lugaila has taken the view that the provisions of Rule 25 (1) of GN. 67 of 2007 were given a wide berth when the arbitrator he recorded an unsworn testimony. Mr. Nassor has

disputed this contention, arguing that the testimony was given on oath, and that, after all, this is not an imperative requirement.

Noting that the counsel's contestation revolves around the compliance or otherwise of Rule 25 (1), I find it apposite that the substance of the said provision be reproduced as hereunder:

> *"The parties shall attempt to prove their respective cases through evidence and witnesses* ***shall testify under oath*** *through the following process:*
>
> *(a) Examination in Chief-*
>
> *(i) The party calling a witness who knows relevant information about the issues in dispute obtains that information by not asking leading questions to the person;*
>
> *(ii) Parties are predicted to ask leading questions during an examination in chief.*
>
> *(b) Cross examination:-*
>
> *(i) The other party or other parties to the dispute may, after a witness has given evidence ask any questions to the witness about issues relevant to the dispute;*
>
> *(ii) Obtain additional information from the witness or challenge any aspect of the evidence given by the*

*witness; leading questions are allowed at this stage of the proceedings.*

(c) *Re-examination, the party that initially called the witness has a further opportunity to ask questions to the witness relating to issues dealt with during cross-examination and the purpose of re-examination.*

[Emphasis added]

While this is the requirement under this provision of the law, the view held by Mr. Nassor is that the requirement under the cited provision is subordinate and plays second fiddle to section 20 (1) (c) of Cap. 300, which has used the word "may" to connote that the doing of it is not imperative. Having scrupulously gone through the typed and hand written copies of the proceedings in the CMA, I am as convinced as Mr. Lugaila is, that none of the witnesses who testified for the parties affirmed or swore before they testified. The witnesses were only asked about their other particulars, including their denominations, after which they went ahead and testified. This is contrary to what Mr. Nassor submitted on. At one rare point, when the respondent was about to testify, the word ***"oath"*** has been thrown into the fray but without stating whether that meant that the respondent had taken oath. In my considered view, mere dropping of the

word **"oath"** cannot, in any way, be said to be a swearing or taking an oath within the meaning envisioned in the cited provision.

The respondent's counsel has contended that the provisions of section 20 (1) (c) of Cap. 300 have an overriding effect over Rule 25 (1) and that the arbitrator has a choice to conform or ignore it. With respect, I find this position misconceived. While section 20 (1) is a high level legislation which provides for a bigger framework, it is the Rules which provide for the nitty-gritty aspects of the procedure that govern the conduct of the arbitral proceedings in the CMA. They are not to be wished away where the practice in the conduct of the proceedings in CMA is known to conform to the imperative requirements of having the witnesses testify on oath. The arbitrator is no doubt aware that there is a requirement of having the witnesses testify on oath, and this explains why there was an attempt to show that an oath was taken when the respondent testified. It cannot be said that the arbitrator has a choice to swear or affirm a witness of his choice in the same case while leaving the rest of the witnesses to testify without oath or affirmation.

This Court and the Court of Appeal have emphasized, in several of their decisions, that swearing or affirming of a witness before he testifies

constitutes an imperative requirement whose non-compliance renders the testimony worthless and liable to expunging. These include ***Mashauri Jeck v. Grumeti Reserves Ltd***, HC-Revision Application No. 79 of 2017; and ***Huawei Technologies Tanzania Co. Ltd v. Ramadhani Hassan Mshana & Another***, HC-Revision Application No. 49 of 2018; and ***Catholic University of Health and Allied Sciences (CUHAS) v. Ephiphania Mkunde Athanase***, CAT-Civil Appeal No. 257 of 2020 (all unreported). In the latter, the superior Court held in respect thereof as follows:

> *"From the provision which has been reproduced above, it is mandatory for a witness to take oath before he or she gives evidence before the CMA. This is also in conformity with s.4 (a) of the Act cited by the appellant's counsel. That provision states as follows:*
>
> *"4*
>
> *Subject to any provision to the contrary contained in any written law, an oath shall be made by-*
>
> *(a) any person who may lawfully be examined upon oath or give or be required to give evidence upon oath or before a court."*
>
> *Under s.2 of Cap. 34, the word court has been defined to include every person or body of persons having authority*

*to receive evidence upon oath or affirmation. In our considered view, the CMA falls under that definition and particularly so because as stated above, rule 25 (1) of GN No. 67 of 2007 compels a witness to testify under oath.*

*Where the law makes it mandatory for a person who is competent witness to testify on oath, the omission to do so vitiates the proceedings because it prejudices the parties' case. – See for example, the cases of* ***Nestory Simchimba v. Republic*** *(supra) cited by the appellant's counsel and* ***Hamis Chuma @ Hando Mhoja and Another v. Republic****, Criminal Appeal No. 371 of 2015 (unreported).*

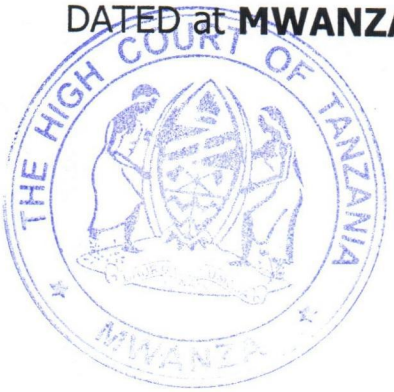
*On the basis of the above stated reasons, we find that the omission vitiates the proceedings of the CMA. In the event, we hereby quash the same and those of the High Court."*

As I subscribe to Mr. Lugaila's reasoning, I find nothing tacky in Mr. Nassor's contention that the spirit of social justice should override the mandatory requirements of the law in this respect. The arbitrator's omission is simply fatal and intolerable and, applying the wisdom in ***Catholic University of Health and Allied Sciences (CUHAS) v. Ephiphania Mkunde Athanase***, (supra), I quash the proceedings of the

CMA, set aside the award and remit the matter back to CMA for trial de-novo before another arbitrator. This ground alone disposes of this matter.

It is so ordered.

DATED at **MWANZA** this 10th day of March, 2021.




***M.K. ISMAIL***

***JUDGE***

**Date:** 10/03/2021

**Coram:** Hon. M. K. Ismail, J

**Applicant:** Present online.

**Respondent:** Present online.

**B/C:** J. Mhina

**Ms. Lugaila, Advocate:**

The matter is for the ruling and we are ready.

***Sgd: M. K. Ismail***
***JUDGE***
***10.03.2021***

**Mr. Nassoro, Advocate:**

The matter is for ruling and we are ready.

***Sgd: M. K. Ismail***
***JUDGE***
***10.03.2021***

**Court:**

Ruling delivered in chamber, in the virtual appearance of Messrs Gregory Lugaila and Saleh Nassor, learned Counsel for the Applicant and respondent respectively, this 10th day of March, 2021.

***M. K. Ismail***

***JUDGE***

***At Mwanza***

***10th March, 2021***