IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

LABOUR REVISION NO. 64 OF 2020

GEITA GOLD MINING LIMITED ..... APPLICANT

VERSUS

NICHOLAUS BAKAYEMBA ..... RESPONDENT

JUDGMENT

9th March & 19th May, 2021

ISMAIL, J.

These revisional proceedings have been instituted by the applicant, a losing party, in the arbitral proceedings which were preferred by the respondent, vide Labour Dispute No. CMA/GTA/35/2018. The respondent's complaint is that his termination of employment was substantively and procedurally unfair. Termination of the respondent's services followed the decision of the applicant's disciplinary committee, that convened on 12th February, 2018, to hold him responsible for breaching Clauses 12.4.4; 12.4.5; 12.4.6 and 12.4.7 of the applicant's Disciplinary Policy and Procedures. The allegations levelled against the respondent were that "on 25th January, 2018 at approximately 1243 hours, while on duty at HME Rotable store, the respondent unlawfully handed over the applicant's

properties to Boom Truck LT 94 driver, named Eugene, who took them up to the Hot seat area where the broken n Excavator RH 340 was down." This act was interpreted to constitute theft or unauthorized possession of the Company property; attempted theft/removal of property other than that the employee's own; and collusion/dealing in or assisting others to unlawfully obtain company property.

The disciplinary committee's decision was unsuccessfully challenged by way of appeal to the applicant's managing director. Contending that the appeal is lacking in merit, the appellate authority dismissed it. As a result, the respondent's services were terminated with effect from 8th March, 2018, the date on which the appeal was dismissed. It is this decision that bemused the respondent, hence his decision to prefer a challenge to the Commission for Mediation and Arbitration (CMA). While dismissing the contention that the respondent's termination was marred by procedural impropriety, the CMA was convinced that the rules governing substantive fairness were infracted. In consequence, the CMA held that the termination was unfair and, accordingly, it awarded a compensation in the sum equivalent to 20 months's remuneration.

The CMA's decision has bemused the applicant, hence the decision to prefer the instant application which calls for partial revision of the CMA award

on the ground that the same is unlawful, illogical and/or irrational. The application is supported by an affidavit, sworn by Mr. Gregory Lugaila, the applicant's legal counsel, laying down grounds on which the application is based. The averment by the applicant is that the arbitrator failed to properly evaluate the evidence adduced by the applicant. The applicant further contends that the arbitrator failed to take into consideration facts on record, relying, instead, on facts which are not on record.

The application has been ferociously opposed by the respondent. Through a counter-affidavit sworn by the respondent himself, the contention by the applicant has been punctured. The respondent has held a contention that the arbitrator's award is without any blemishes as the evidence that led to the conclusion of unfairness of the termination was thoroughly evaluated.

When the matter came up for orders, the counsel for the parties unanimously requested the Court's indulgence for disposal of the application by way of written submissions. The request was acceded to by the Court, and, consequently, a schedule for filing of the submissions was drawn and complied with by the parties.

In the parties' last appearance, the Court ordered that the application be disposed of by way of written submissions, preferably consistent with the schedule drawn on the parties' consensual basis.

The applicant began its submission by giving a background to the matter which covered proceedings in the disciplinary committee and the CMA. With respect to the instant matter, the applicant's take is that the main issue for determination in this matter is whether the impugned termination was substantively unfair.

Submitting with respect to the first ground of the applicant's dissatisfaction, the counsel for the applicant argued that the arbitrator failed to consider and give due significance to the video and audio clip which established existence of collusion between the respondent and Eugene Madama. This was notwithstanding the testimony of DW1 who testified on the said clips which Eugene stated that he was directed by the respondent to deliver the items at the Hot seat area. The counsel argued that this narrative was changed, an act which raised doubts. It was the applicant's contention that this testimony uncovered a collusion between the two, and that the inconsistency in the testimony of the two, and Eugene's first reaction that purported to show that he did not know the respondent shows that there was an effort to conceal the truth, and that the respondent and Eugene had ill intention of taking the materials out of the mining area.

The applicant took the view that the respondent's failure to know the whereabouts of the truck driver was nothing but lack of concern. The

Counsel argued that the calmness and composure demonstrated nothing but an inference of guilt by the respondent and Eugene. The applicant's further contention is that, the fact that the respondent did not obtain any of his supervisors, as testified by DW1 and DW3 shows ill intention. The contention is that the department under which the respondent operated had three trucks all of which were at his disposal, and that the respondent's decision to prefer Eugene's truck without involving the latter's supervisor was another pointer to his ill intention. There is also a contention that the size of materials loaded in the lorry was so small as to require taking a big truck. The contention is that the option that would make sense is that of taking smaller vehicles which were available within the respondent's department.

The applicant maintained that the arbitrator's analysis of the evidence was not thorough and was not reflected in the award, an act which was alleged to contravene Rule 27 (3) (d) and (e) of the Labour Institutions (Mediation and Arbitration) Guidelines, GN. No. 67 of 2007 which requires that the award should contain a summary of the parties' evidence, arguments and reasons for the decision. On this, the applicant referred me to the decision in **Trevor Prince & Another v. Raymong Kelsall** [1957] E.A. 752, in which it was held that an appellate court has a duty to evaluate evidence where the trial court fails to evaluate it.

With respect to ground two, the applicant decries failure by the arbitrator to take into consideration the facts on record while relying on facts which were not part of the record. The argument by the applicant is that the contention by the arbitrator was misleading because the testimony of DW1 showed that removal of materials from one store to another was subject to some procedure and that, in this case, the same were not adhered to by the respondent, including getting a permission from DW3, the respondent's supervisor. The applicant held the view that the contention that another supervisor ought to have been interviewed lacked the spine that would make it stand, and that it rendered the award unlawful, illogical and irrational.

The applicant was emphatic that the award did not contain detailed closing arguments which would give a light on the significance of the audio and video clips whose contents weren't made known. On the termination, the applicant asserted that termination of the respondent's services conformed to Rule 12 (1) (a) (b), (2), (3) and (4) of the Employment and Labour Relation (Code of Good Practice) Rules, 2007, GN. No. 42 of 2007. The applicant further contended that the termination was in conformity with exhibits D8 and D3 both of which reveal that the respondent failed to dispense his duties diligently and to the applicant's detriment.

On the gravity of the offence with which the respondent was charged, the applicant contended that the offence of gross dishonesty which is essentially a deceit was grave enough to warrant a termination. The applicant buttressed its contention by citing the South African case of ***Metcash Training Ltd t/a Metro Cash and Carry v. Fobb & Another*** (1998) 19 ILJ (LC), in which it was held that trust is the core of the employment relationship, and that dishonest conduct is also a breach of that trust. The applicant maintained that Rule 12 (2) of GN. No. 42 of 2007 was duly complied with.

The respondent's rejoinder was fielded by Mr. Eric Lutehanga, learned counsel who began his address by insisting that Eugene Madama merely helped the respondent to transport materials from one store to another. The counsel further argued that in the course of moving the materials, the respondent was assigned another task and that this was attested to by DW3, the respondent's supervisor and corroborated by Eugene Madama during his cross-examination. The respondent's counsel contended that DW3 submitted that the respondent was under the supervision of a Mr. Avit Francis who was responsible for determining the respondent's daily schedules. The respondent further contended that the fact that the driver did not have a gate pass constituted sufficient evidence to prove that the said materials

would not be taken out of the gate, meaning that theft would not occur under such circumstances. He maintained that the equipment was intended to be taken to another store and not out of the gate. The counsel argued that the decision by the arbitrator included a summary of the parties' evidence between pages 2 and 8 of the award, while reasons were contained at pages 8 through to 14.

Submitting on the second ground of the applicant's consternation, the respondent's Counsel urged the Court to disregard it because the applicant's counsel has failed to point out which evidence was dropped out and which of the facts allegedly factored in were extraneous. Mr. Lutehanga argued further that DW1 admitted during cross-examination that he was not an expert in ware house issues, and that the much-talked ware house procedures and guidelines were not produced by the applicant in the entirety of the disciplinary process and even during the arbitral proceedings. The counsel further argued that the testimony of DW3 and the respondent was in sync on the need for having a waybill for goods to get past the gate. He argued that, in this case, the equipment was not meant to be taken to another store within the compound.

Mr. Lutehanga further submitted that DW3 who testified in the CMA was not preferred as a witness in the disciplinary committee while Mr.

Francis, the respondent's supervisor, was not called to testify for the applicant, and that exhibit D1 was not tendered. He argued that it is a rule of evidence that a party is bound by the testimony of his witness, adding that the applicant is estopped from disbelieving his witnesses and document tendered.

On the validity of the termination, the respondent's advocate argued that there was no valid reason for termination and, on this, the counsel referred the case of ***Bati Services Company Limited v. Shargia Feizi***, HC-Revision No. 106 of 2019 (unreported). He urged the Court to hold the termination was unfair and dismiss the application.

The applicant's rejoinder was a reiteration of what was stated in chief. The applicant's counsel argued that the cardinal principle in the law of evidence is that the court should construe the evidence which is before it and nothing else. The learned counsel held the view that besides the testimony of DW1 which is scathed by the respondent there is still evidence to prove the guilt of the respondent. The applicant's counsel took a firm view that being caught with goods outside the required area but without a waybill was enough to hold the respondent responsible. The applicant urged the Court to be persuaded by the testimony adduced, and hold that the reason for termination was valid. The counsel held that the termination was fair.

From these rival submissions, the narrow issue for determination is whether termination of the respondent was substantively fair. As I tackle this question, it is my bounden duty to lay down a foundation. This is to the effect that when fairness of reasons is at stake, the tribunal that handles the inquiry into the fairness of termination is charged with a responsibility of assessing the validity of the reasons for such termination. This entails proving or demonstrating that reason as well. Inevitably, the said process involves finding out why termination was effected, and whether the reason for such termination was adequate or justifiable. That process is also intended to establish if the reasons are ***sound, defensible, well founded, not capricious, fanciful, spiteful or prejudicial*** (see Grogan, J on ***Workplace Law***, 10th Edition, at pages 217-218). Conclusion on the validity and sufficiency of the reasons can only be drawn from the evidence on record (See: ***Jongo Mwikola v. Geita Gold Mine***, HC Revision Application No. 61 of 2017 (unreported); and ***Antony Masanga v. Mohamed Kayemba Hussein,*** HC Revision Application No. 15 of 2017 (unreported)). In the instant case, determination of the reasons entails reviewing evidence which was adduced in support of the charges levelled against the respondent. In this connection, the question to be resolved is whether such testimony was strong enough to constitute reasons for termination.

In the instant matter, the respondent faced several charges, but key among them was attempted theft. The question that should be addressed with respect to this offence is whether, in this case, the offence of attempted theft was proved. To be able to appreciate if this was done, need arises for defining theft and getting to see if what is alleged to have been committed is a failed attempt to steal. Black's Law Dictionary defines ***theft*** to mean:

> *"Felonious taking and removing of another's personal property with the intent of depriving the true owner of it."*

From this definition "removal of the property" and "the intent of depriving the true owner of it" constitute the key ingredients in a charge of theft. While there is no dispute that the equipment, the subject of the alleged attempted theft, was found at a place where it shouldn't be, there remains to be ascertained if such removal was felonious. It is also a matter of finding out if there was an intention to deprive the applicant of the use and possession thereof. It should be noted that an act becomes felonious when it is done with an evil heart or purpose; if it is malicious; wicked or if it is villainous (See. ***www.the free dicitionary.com***).

While the testimony adduced by the applicant's witnesses ably demonstrated that the equipment was taken from a store and was intercepted at the gate, what isn't clear and unproven is if such removal had

a felonious intention. It is also unclear if such removal was intended to deprive the applicant of the use of the said equipment. What isn't in dispute is the fact that such removal did not deprive the applicant, permanently or otherwise, of the use of the said equipment. Since the felonious intention and deprival of the use of the said equipment are not proved, it cannot be said that attempted theft was committed. The available evidence points to the fact that the equipment was impounded while it was within the premises and that the same would not get out of the premises without a waybill that Eugene was not possessed of. This means that, any attempt to steal it would not be successful where circumstances obtaining in the premises would not allow removal and deprival of the use of the said equipment against the applicant.

With respect to the allegation of unauthorized removal or taking of property, I take the view that the evidence adduced in respect thereof was deficient and unable to support this contention. This view stems from the fact that the warehouse procedures allegedly breached were not tendered to prove that such removal was contrary the procedure. The testimony adduced by DW3 was to the effect that she was not aware and did not authorize removal of the equipment from the ware house to any other place. She did not say, however, that such removal was not authorized by the Mr.

Francis, supervisor under whom the respondent works. There is no testimony that the other supervisor was kept oblivious to the removal of the said equipment from the warehouse to a place where it was found. Since the lingering question on whether the respondent was authorized by his immediate supervisor was not quelled at the CMA, it cannot be said with any semblance of precision that the removal was unauthorized. This is even where the respondent was unable to give satisfactory answers on what happened or where he allegedly exhibited a demeanor that was seemingly inconsistent with innocence. This is in view of the fact that the duty of proving that the removal was unauthorized rested on the shoulders of the applicant. My thinking is in line with a cardinal principle that governs conduct of civil cases, which places the burden of proof on the person who alleges existence of a certain fact. Such burden is, like in all civil cases, on the balance of probabilities, consistent with section 110 of the Evidence Act, Cap 6 R.E. 2019. Noteworthy, the substance of section 110 of Cap. 6 traces its roots from the Indian Evidence Act, 1872, whose applicability has been commented on by several authors of great repute, including the legendary commentaries made by Sarkar on Sarkar's Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by *Lexis Nexis*. The learned authors had the following comments at 1896:

> ***"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof.*** *It is ancient rule founded on consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."*** [Emphasis added].

On whether the testimony adduced by the applicant in the arbitral proceedings met the threshold of the burden of proof, my considered view is that, this question can be answered by understanding what that burden is, and how it is discharged. The answer can be found by glancing through the fabulous reasoning of Lord Denning in ***Miller v. Minister of Pensions*** [1937] 2 All. ER 372. The said decision was cited with approval by the Court of Appeal of Tanzania in ***Paulina Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (unreported), in which the following passage was quoted:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide*

accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches of the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say – We think is it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not ...."

In my view, the totality of the evidence adduced by the applicant in support of the offence of unauthorized removal of property, does not convey any sense that brings about the conviction that the burden of proof was discharged. This is even where the video and audio clips are included in the applicant's testimony as nothing can be said to reveal the alleged collusion where there is no evidence that the respondent's act constituted breach of any disciplinary rules, as alleged by the applicant. I take the view that this offence was not proved by the applicant. It brings me to conclusion that reasons cited for the respondent's termination were far from being sound, defensible and well founded as to constitute fair reasons for termination.

In the upshot, I find the Arbitrator's conclusion that the respondent's termination was substantively unfair is, on the basis of the available evidence, plausible and based on sound legal and factual foundation. Accordingly, I dismiss the application and uphold the Arbitrator's award.

Order accordingly.

DATED **at MWANZA** this 19th day of May, 2021.

M.K. ISMAIL

JUDGE