IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

[LABOUR DIVISION]
AT ARUSHA

REVISION APPLICATION NO. 03 OF 2020
(C/F Labour Dispute No. CMA/ARS/ARS/208/2018)

SHUHUDIA SAMWEL MBEBE ..... APPLICANT

Versus

MONSANTO TANZANIA LTD ..... RESPONDENT

JUDGMENT

20th April & 18th May, 2021

Masara, J.

In this Application, the Applicant, is challenging the decision of the Commission for Mediation and Arbitration for Arusha Region (hereinafter the "CMA") in Labour Dispute No. CMA/ARS/ARS/208/2018 which dismissed his claims for unfair termination on 06/12/2019. At the CMA there was no dispute that the Applicant was employed by the Respondent in the position of Field Operations Manager on 12/12/2016. According to the contract of employment, the Applicant was to serve a three months probationary period. His salary was set at TZS 60 million per year. His services were eventually terminated through a letter dated 28th May 2018 on allegations of poor performance. He was paid two months' salary in lieu of notice. Prior to the termination, the Applicant was subjected to a Performance Improvement Plan (P.I.P) signed on 6th March, 2018 and was to end by 30th March, 2018. The Applicant was not satisfied with the decision to terminate his services. He thus filed a claim at the CMA challenging his termination. He claimed compensation for unfair termination to the tune of 200 million shillings. The CMA dismissed his claim on the grounds that his termination was fair both procedurally and

substantively. That decision irked the Applicant, he has come to this Court praying that the CMA decision be revised for the purposes of setting it aside on the following grounds reproduced verbatim:

a) *That the Arbitrator erred in fact and in law by holding that the Applicant was fairly terminated while the Respondent failed to prove how the Applicant failed to meet the standards, how the Applicant was informed on the standards required to perform, and how the standards were reasonable and known to the Applicant;*
b) *That the Arbitrator failed to consider why the Applicant failed to meet the standards;*
c) *That the Arbitrator erred in fact and in law by not considered that the Applicant was not afforded a fair opportunity to meet the performance standards;*
d) *That the Arbitrator erred to fact and in law by failed to consider that the P.I.P was not for making the Applicant to improve his performance but to terminate the Applicant's employment;*
e) *That the Arbitrator erred in fact and in law by holding that the Applicant was given a chance to improve without challenge the length or the time given and the nature of the activities performed by the Applicant;*
f) *That the Arbitrator erred in fact and in law by not consider the evidence of the Applicant that he had given and signed the objectives/targets during the P.I.P and given a very short time to perform them which is unachievable due to the fact that the Applicant during the PIP was required to improve within a month from 9th March 2018 as shown in exhibit D1; and*
g) *That the Arbitrator erred in fact and in law by holding that the Applicant was aware with the standards required while the standards were set only during the P.I.P and was very clear that there was no targets or goals given to the Applicant before the date of PIP, furthermore there was no reason for P.I.P.*

The Application is supported by the Affidavit of Frank Lawrence Maganga, a personal representative of the Applicant. The Respondent opposed the Application and filed a counter affidavit Praygod Jimmy Uiso, learned advocate for the Respondent. The two deponents represented parties herein during the hearing which proceeded by way of written submissions.

Submitting on the first ground, Mr. Maganga faulted the CMA's decision for not holding that in line with Section 37(2) of the Labour Relations Act, Cap. 366 (hereinafter the Act) the termination of the Applicant was unlawful. Further, that the CMA ought to have held that the allegations of poor performance by the Respondent against the Applicant were not proved. That in order to terminate an employee for poor performance regard should be had on the provisions of Rule 16(1) and 17 of the Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007 (the Rules). Mr. Maganga argued the Applicant should not have been condemned of poorly performing his duties in the absence of pre agreed performance objectives and targets. That the contract of employment is silent on those yardsticks. He was therefore of the view that the Arbitrator abdicated his duty by not measuring the Respondent's claims against the legal requirements as per Rule 17(1)(b) and (c) of the Rules regarding awareness and reasonability of the alleged performance standards. Mr. Maganga attacked the lawfulness and purpose of the P.I.P conducted by the Respondent arguing that the same was not meant to increase the Applicant's performance but was meant to justify the intended termination.

On the second and third grounds, Mr. Maganga submitted that the yardsticks set in the P.I.P could not be achieved within the period specified and the Arbitrator failed to appreciate the reasons why the Applicant failed to meet the standard and whether he was afforded fair opportunity to meet the performance standards as per Rule 17(1)(d) and (e). That the Applicant was not given sufficient time to improve his performance as the set standards were not known to him until March 6, 2018 when they

signed the P.I.P. Mr. Maganga fortified further that the allegations of poor performance were not true as the Applicant had passed through the probationary period and had worked for close to two years without any warning.

Submitting on grounds four and five, Mr. Maganga was of the view that had the Arbitrator properly scrutinised the P.I.P, he would have discovered that the same did not contain agenda or topics to be taught in order to improve the Applicant's performance or aspect that the employee was underperforming. That the CMA ought to have found that the P.I.P was just a washing hand exercise and not a process aimed at improving the Applicant's performance. Mr. Maganga contended that the termination for poor performance should not be made unless the employer justifies the same by an investigation as to the reasons of poor performance in line with Rule 18(1) of the Rules. That having conducted the investigation, the employer was also supposed to call a meeting with the employee who is allowed to be accompanied by a fellow employee or trade union representative. He contended that the Arbitrator was wrong to condone the P.I.P exercise without taking into consideration that the length of time afforded to the Applicant was not sufficient to have crops cultivated and grow for the purposes of assessment.

Mr. Maganga abandoned ground six. On ground seven, it was his contention that the Arbitrator misdirected himself in the issues for determination, the main one being "whether the Applicant was having poor work performance contrary to the employment contract." That had he addressed himself on this issue he should have held that there was no

poor performance as the contract of employment did not provide for performance standards. That it was wrong for the arbitrator to hold that the Applicant was aware of the performance standards to be met.

Responding to the Mr. Maganga's submission on the first ground of revision, Mr. Uiso submitted that the termination was for fair reasons considering that the Applicant had been employed in a senior position and that he was expected to know the standards required for that position. That the Applicant's knowledge of the standards required were exhibited in Exhibit D1, the P.I.P and that having observed that his performance needed improvement he was availed all rights to improve and was closely monitored by two personnel.

Mr. Uiso responded to grounds two, three and five jointly. In his view the Applicant was the architect of his own termination as he failed to show cooperation with the Respondent. On another twist, the learned counsel submitted that the Applicant was still on probation at the time of termination as his employment was never confirmed. He was of the view that confirmation in employment is not automatic as was held in ***David Nzaligo Vs. National Microfinance Bank PLC,*** Civil Appeal No. 61 of 2016 (CAT – unreported). In the counsel's view the P.I.P was reasonable and attainable in the agricultural sector as issues raised therein were among the Applicant's daily duties.

Responding to the fourth ground, Mr. Uiso contended that the Arbitrator was correct when he ruled that the P.I.P was made in good faith in order to improve the Applicant's performance and that the intention behind

signing the P.I.P was not aimed at terminating the Applicant as alleged. Regarding the last ground of revision, it was Mr. Uiso's view that the Applicant cannot be heard to say that he did not know his duties as a manager having been in that position for close to two years, He summed up the submissions by asking the Court to dismiss the application and hold that the Applicant's termination was fair. Further, that as the Applicant was still on probation, he cannot enjoy the benefits of unfair termination.

In a rejoinder submission, Mr. Maganga opposed all the points raised by the counsel for the Respondent. He was of the view that Mr. Uiso had confused between performance of duties and meeting certain standards. That the Applicant was not terminated for failure to perform his duties but that he did not attain certain standards. That the Applicant was not availed with a job description as had been anticipated in the employment letter thus he only came to know of the required standards when they signed the P.I.P. That the P.I.P should not be used to set standards but training for purposes of improvement; plus, the time provided therein was insufficient. On whether the Applicant was on probation, Mr. Maganga was quick to point out that the issue of probation was not among issues canvassed at the CMA. Further, that in accordance with Rule 10(4) of the Rules, probation should always be for a reasonable period and not exceeding twelve months. Having served for over twelve months, Mr. Maganga stated, the Applicant was qualified to file a claim for unfair termination.

I have keenly considered the CMA records, the affidavits both in support and against the Application and the rival submissions by the parties'

representatives. The issue for determination is whether the CMA award was justified considering the evidence before it.

Before dealing with the issue on substance, I find it imperative to respond to an issue raised by the counsel for the Respondent; that is, whether at the time of termination the Applicant was still on probation. I do not understand the basis for which the learned counsel came up with that position. The contract of employment signed by the parties on 23rd November 2016 indicate in the preamble that the Applicant was to be on a probation period for three months. There was no evidence to show that this period was extended. Further, the testimony of three personnel from the Respondent never raised the issue of probation at all. In that regard, it is not open at this stage to raise the issue of probation. Further, even if it was to be assumed that the Applicant was never confirmed in his position, the period for which he served far exceeds the probation period provided by law.

Turning to the issue at hand, a careful scrutiny of the Award reveals that the learned Arbitrator based his decision on the P.I.P. In his view, the P.I.P was signed to give the Applicant the opportunity to improve in his performance. That the Applicant failed to improve and therefore the Respondent was justified to terminate him as the Applicant was aware of the performance standards. The Arbitrator also stated that through the P.I.P sessions, the Applicant was afforded the right to be heard which he deliberately opted not to take by defying attendance to some assessment meetings. I find it difficult to fathom the reasoning of the learned

Arbitrator and the grounds which made him to conclude that the termination of the Applicant was both procedurally and substantively fair.

As submitted by Mr. Maganga, there was no evidence that the standards of performance were communicated to the Applicant before they signed the P.I.P in March, 2018. The letter of appointment (Exhibit P5) states that the Applicant was to be given a detailed job description upon reporting on duty. Unfortunately, the said job description was not tendered as evidence and there was no evidence to prove that the Applicant was given the description from his "manager" considering that he was a "Manager" himself. Without such evidence, it cannot safely be stated that the Applicant was aware of the performance standards. Those standards appear in the P.I.P (Exhibit D1). At the time of signing the P.I.P the performance of the Applicant was found to be wanting, the P.I.P was therefore signed in order to help him improve. The areas of weakness as per the said document were stated as hereunder:

> *"Failure to clear seed from Toller warehouse leading to infestation, non-attendance of weekly SAP/CT meetings, SOP, Failure to file weekly processing and Field reports and weekly work schedules, concur on time, seed losses due to poor handling, AP/SNP failure, failure to make seed available on time without any set weekly targets and high customer complaints, failure to set and achieve production targets."*

After the P.I.P implementation started on 9th March, 2018, the Applicant was supposed to have *"achieved over 98% planting of 50 hectares of Seed in Tanzania according to crop plan; 95% to 110% seed availability of plan; seed packaging adherence to plan of 98%; minimise Customer Complaints and minimise rework to under 5%."*

By any stretch of imagination, the above were over ambitious expectations. I do agree with the submission of the Applicant and the evidence he adduced at the CMA that the P.I.P had an ulterior motive. Instead of being a process to improve the performance of the Applicant it turned to be a reason to terminate the Applicant. It is impossible to imagine that a worker's performance on a field such as agriculture would be measured weekly or for less than one month. The Arbitrator seems to have been influenced by the allegations that the Applicant did not attend some assessment meetings. While it is true that the Applicant did indicate the difficulties he encountered in meeting the objectives of the P.I.P, he did attend two of the three meetings scheduled. His reasons for not attending one of the meetings can be seen in an email communication which was tendered as Exhibit D2 where he said *inter alia*:

> *"I will not attend the PIP meeting as the point we have reached now requires a disciplinary hearing, I am tired with PIP meetings with SMART objectives which are not achievable, EMY you will soon fulfil your Plan to replace me with the Person you want, I saw this from the beginning..."*

Given the contents and the schedules provided in the P.I.P, I have no reasons to doubt the sincerity the Applicant portrayed in the above email. That email should not be a ground to hold that the Applicant forfeited his right to be heard. In the email, he even demanded for a disciplinary hearing. He was of the view, even if mistaken, that the said EMY had an ulterior motive against him. The Arbitrator was therefore wrong to be swayed by the email to condemn the Applicant.

On the premises, it is my holding that the Award of the Arbitrator was wrong. The Arbitrator should have found that the termination of the

Applicant was not in line with Rule 16(1) and 17 of the Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007. The termination was procedurally and substantively unfair. Consequently, the CMA Award is hereby quashed and orders thereof set aside. I direct that the Respondent pays the Applicant TZS 65,000,000/= compensation for unfair termination as follows:

a) 12 months salary compensation for unfair termination;
b) One month's salary in lieu of notice; and
c) Certificate of Service.

Considering that that the Applicant's address in the letter of appointment is in Arusha, he is not entitled to repatriation allowance to Mwanza as ~~indicated in his CMA F1.~~

Order accordingly.

Y. B. Masara,
JUDGE.
18th May, 2021.