IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT MOROGORO

LABOUR REVISION NO. 12 OF 2021

(Originating from CMA/MOR/119/2018, Commission for Mediation and Arbitration, at Morogoro)

FAIDHA SHABANI ALLY ..... APPLICANT

VERSUS

BRAC TANZANIA FINANCE ..... RESPONDENT

RULING

20th March & 1st June, 2022

M. J. CHABA, J.

Before me there is an application for revision filed by the applicant, **Ms. Faidha Shabani Ally** who seeks for revision of the Arbitral Award of the Commission for Mediation and Arbitration for Morogoro (the CMA) issued in Labour Dispute No. RF/CMA/MOR/119/2018 dated 22nd January, 2020. Basically, the applicant aims to challenge the decision of the CMA under the provisions of Sections 91 (1) (a), (2) (c) and section 94 (1) (b) (i) of the Employment and Labour Relations Act [Cap. 366 R. E. 2019] (the ELRA) and Rule 24 (1), (2) (a), (b), (c), (d) and (f); 3 (1) (a), (b), (c), (d) and Rule 28 (1) (a), (b), (c), (d), (e) of the Labour Court Rules, GN No. 106 of 2007.

The application has been preferred by way of Chamber Summons filed alongside with the notice of application and notice of representation. It is supported by an affidavit sworn by the applicant, Faidha Shabani Ally.

As hinted above, the applicant urges this court to revise and set aside the Arbitrator's Award on the grounds which will be apparent hereunder.

Briefly, the background of the matter is that on February, 2014 the applicant was employed by the respondent in a renewable fixed term contract in the capacity of a Loan Officer at Turiani Branch which she served until 13/01/2016. Thereafter, she was promoted to the post of a Branch Manager at Turiani, Mvomero, Morogoro. But it would appear that the new salary corresponding to the new post was not being paid. It is on record that the applicant referred the matter to the CMA for determination and it was resolved by way of mediation. Thereafter, another dispute arose between the two parties whereby the respondent orally terminated the applicant's contract on allegation of corrupt transactions and occasioning loss to the respondent. Again, the dispute was referred to the CMA and it was successfully mediated that the applicant should be reinstated to his rank of a Branch Manager, be paid salary arrears and a confirmation letter stating to that effect.

However, the applicant complained that some of the agreed terms were not being honoured by the respondent and therefore she was obliged to remind her employer through a written letter and asked her to do the needful on the unfulfilled part which includes arrears amongst others.

But in the midst, the respondent complained against the applicant on some disciplinary issues, which I will refer them shortly. It is on record that the applicant was summoned by the respondent to appear in the proceedings on a charge of misconduct. After the trial, the respondent terminated the applicant on 14th April, 2017. The applicant

contends that she was terminated from her employment without any justifiable cause immediately after the last dispute was determined at the CMA and also comprehends an undue retaliation. However, the respondent claims that the dispute referred by the applicant had nothing to do with the disciplinary procedure taken against her.

Irked by disciplinary proceedings and termination from her employment, the applicant filed Labour Dispute No. RF/CMA/MOR/119/2018 at the CMA complaining that she was terminated from her employment, and therefore she was claiming her terminal benefits and compensation. In essence, the applicant's claim is based on procedural issues to the effect that she was terminated without being duly and properly informed about the reasons for termination and that the termination procedure was unfair. Due to these anomalies, the applicant sought an award before the CMA to the tune of Tshs. 20,000,000/=.

When the parties were afforded with the rights to be heard, the CMA dismissed the dispute before it. Giving the reasons, the Arbitrator stated that the applicant wrongly filed a dispute over termination of employment instead of lodging a dispute in respect of breach of contract because the applicant was excluded under section 36 (a) (iii) of the Employment and Labour Relations Act [Cap. 366 R. E. 2019], for being under fixed term contract. The CMA further stated that even if the applicant would have instituted her claim under the auspice of breach of contract, but still the applicant would have not succeeded because she admitted the fact that she committed the disciplinary offence charged upon her which indeed it was the main cause for termination of her contract. As the respondent had the privilege of dispensing with the

hearing of the dispute under section 13 (11) of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007, to the arbitrator, the respondent was justified.

Being dissatisfied by the CMA findings, the applicant preferred the present Application for Revision which was made by notice of application, Chamber Summons, notice of representation and the supporting affidavit sworn by the applicant. The applicant prays this Court to fault the Arbitrator's Award on the following grounds, I quote: **One;** That, the Honourable Arbitrator grossly erred in law and fact by failure to decide on complaint filed through form No. CMAF1. **Two**; That, the Honourable Arbitrator grossly erred in law and fact by failure to make findings on each issue as framed before parties as well as assigning reasons for finding. **Three**; That, the Honourable Arbitrator grossly erred in law and fact by basing decision on sole ***suo moto*** raised issue without affording applicant an opportunity to be heard on the said issue. **Four;** That, the Honourable Arbitrator grossly erred in law and fact by basing decision / an award on extraneous matters out of proceedings. **Five**; That, the Honourable Arbitrator grossly erred in law and fact by making decision / issuing an award without reasoning.

At the hearing of this application, Mr. Baraka Lweeka, learned advocate entered appearance for the applicant, whereas Mr. Amedeus Michael, learned advocate represented the respondent. With the parties' consensus the application was disposed of by way of written submissions. Both parties adhered to the court's scheduling order.

In his written submission, Mr. Lweeka, learned counsel for the applicant opted to drop the first ground and proceeded to re-arrange the

second ground to fifth grounds as first to fourth as hereunder reproduced:

1) That, the Honourable Arbitrator grossly erred in law and fact by failure to make finding on each issue as framed before parties as well as assigning reasons for finding.
2) That, the Honourable Arbitrator grossly erred in law and fact by basing decision on sole ***suo moto*** raised issue without affording applicant an opportunity to be heard on the said issue.
3) That, the Honourable Arbitrator grossly erred in law and fact by basing decision/an award on extraneous matters out of proceedings.
4) That, the Honourable Arbitrator grossly erred in law and fact by making decision/issuing an award without reasoning.

As regards to the first ground, Mr. Lweeka argued that the CMA was required to answer all issues framed. Three issues were framed before the CMA, but did not determine all of them. To buttress his argument, the learned advocate referred the court to the case of **Sheikh Ahmed Said v. Registered Trustees of Manyema Masjid,** [2005] TLR. 61. In this case the Court insisted that a specific finding must be made by the court on each issue even where some of them covers the same aspect.

On the second ground, Mr. Lweeka accentuated that the CMA was duty bound to base its findings within the parameters of the framed three issues. If at all the Arbitrator decided to raise a new issue, then he could have accorded the parties with the chance or opportunity to

address the court accordingly. He highlighted that although the CMA raised a new issue ***suo moto***, but did not avail the parties with rights to be heard. He cited page 5 of the typed proceedings of the CMA and quoted the relevant paragraph in which the CMA *suo moto* raised an issue as to whether the employee under a fixed term contract can be able to file a dispute of unfair termination to the commission. To reinforce his argument the learned advocate cited the case of **Vicfish Limited v. Pius Francis Banjawala,** Land Case Appeal No. 24 of 2021, HCT Bukoba Registry (unreported). He said, though it is a land case, but the issue of right to be heard was fully discussed. He added that, since the CMA failed to determine the issues framed before it, and in lieu thereof introduced a new issue *suo moto* without affording the parties with their rights to be heard, then it contravened the requisite procedure. He prayed the court to nullify the whole proceedings of the CMA and the decision thereof.

Concerning the third ground, Mr. Lweeka underlined that there is no evidence to prove that the applicant admitted to commit the disciplinary offence. The CMA was wrong to have based its decision on that matter which was never proved before it and to the applicant. He argued that these facts are extraneous. He further contended that the decision or award by the CMA is not backed up by the evidence on record.

Arguing in respect of the fourth ground, the learned advocate sought inspiration from the decision of the Court of Appeal of Tanzania in the case of **Mkurugenzi Ras Nungwi Hotel v. Benjamin Mwakisyala,** Civil Application No. 100 of 2008 (Unreported). He went on stating that the decision of the CMA as shown at page 8 of the

Award, the Arbitrator cited Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007 and stated that the respondent had exceptional circumstance, therefore was not so compelled to comply with the requisite procedure covering termination of employment. However, the records are clear that no reasons were assigned to reach the findings of the CMA. He maintained that reasoning is a mandatory requirement in a decision and failure to give or assign genuine reasons for the decision / award, that is an error which the CMA found herself already caught by the web.

In response to the foregoing submissions, Mr. Amedeus Michael commenced by arguing that, regarding the first ground all three issues raised and agreed as controlling issues, were affirmatively answered and the reasons were given. To prove that the same were accordingly delt with by the CMA, the learned advocate demonstrated by referring this court at pages 8 and 9 of the typed copy of the award.

On the second issue, Mr. Amedeus conceded that the alleged new issue was actually raised. But he was quick to argue that such an issue was not the sole ground which determined the dispute. He however, applauses that the arbitrator went further by giving an alternative analysis of the evidence tendered before it. He emphasized that in his view the CMA made a thorough analysis of both two alternative issues regarding termination and breach of contract.

He continued that the arbitrator did analyse the evidence and came up with the conclusion that there was no possibility of success in any of the two causes of action; that is unfair termination and breach of contract. He maintained that at the CMA there were documentary evidence showing that the applicant would not succeed for breach of

contract. It was the learned advocate's view that, the award issued by the CMA was within the purview of the law. He fervently countered the findings reached by the Court in the case of **Vicfish Limited** (supra) by stating that the same is distinguishable and does not fit in the circumstance of this case

Coming to the third ground, Mr. Amedeus submitted that the applicant failed to point out what exactly were extraneous matters. He stressed that since the CMA throughout its award considered much the documentary exhibits tendered before it, this ground has no merit and the same is frivolous. He asked the court to disregard it.

Submitting on the fourth ground, Mr. Amedeus began by adopting his arguments and submissions advanced in respect of the 1st and 2nd grounds by stating that the Arbitrator gave the reasons for the decision and each issue was properly discussed and determined as well. He argued that as correctly analysed by the CMA and exhibited the reasons for such decision, admission of the offence by the applicant amounted to sufficient cause and indeed was enough to terminate contract for employment and the respondent was not bound to follow procedures under Rule 13 (11) of GN 42 of 2007 (Supra). He maintained that this was taken as the basis for exceptional circumstance as exhibited at paragraph 3 of page 8 of the typed award. He contends that the award was properly reasoned.

Basing on the above discussion, the learned advocate submitted and prayed this court to dismiss the application on the ground that the same is frivolous, vexatious and it lacks merit.

To re-join, Mr. Lweeka reiterated what he submitted in chief and further prayed the court to ignore the error featured in his written submissions in chief. He requested the court to allow the applicant's application as the same has merits.

Having heard the rival submissions from both sides, and upon carefully considering the records at trial and the legal authorities advanced during hearing of the application, it is now my turn to deal with the application objectively.

In determining this application, I will commence with the 3rd ground and then I will deal with the 4th ground. The 1st and 2nd grounds which are more or less correlated will be determined together. The following questions will also be considered to arrive to a just and fair decision. These questions are: **First;** Whether the arbitrator failed to make finding on each issue as framed before parties and instead based his decision on sole *suo moto* raised issue without affording the parties an opportunity to be heard on the said issue. **Second;** Whether the arbitrator did assign no reasons for his decision / award, and **Third;** What are the proper remedies depending on the issues.

Commencing with the third ground, the applicant complained that the Arbitrator grossly erred in law and fact when he made his decision and/or issued the award based on extraneous matters out of proceedings. On this issue Mr. Lweeka highlighted that there is no evidence which establishes that the applicant admitted to have committed the alleged disciplinary offence. He maintained that the CMA was wrong to rely on extraneous matters never pleaded or proved by the CMA and the applicant. On the other hand, the learned advocate for the respondent submitted that though the applicant failed to point out

what exactly were extraneous matters, but the CMA exhibited through the award that it dealt with all documentary exhibits tendered before it. He was of the opinion that this ground has no merit.

From the foregoing and upon going through the records, I have noted that the finding made by the CMA that the applicant committed disciplinary misconduct is what exactly the learned advocate for the applicant denoted. At any rate, that cannot be extraneous matter. To the contrary, it was pertinent to the dispute before the CMA as the applicant was seeking to challenge its procedure and the decision reached by the respondent. Extraneous matters are those that were not pleaded by the parties and not found in the record of proceedings, but this was not the case before the CMA. The third ground is therefore dismissed.

On the fourth ground, the applicant complained that the Arbitrator grossly erred in law and fact by making decision or issuing an award without reasoning. The proceedings and award of the CMA gives a very clear nexus of the award and reason for the award. In short, I have grasped the award in this way: The applicant's dispute was dismissed on the following reasons: **first;** the applicant was under fixed term contract and thus was improper for her to have filed an unfair termination of employment dispute in lieu thereof she ought to have filed a breach of contract dispute. **Second;** even if she would have filed a dispute in respect of breach of contract, she would have not succeeded because there was enough evidence that she admitted to have committed gross misconduct against the respondent, which culminated to termination of contract. The arbitrator reasoned further that for a contract terminated under those circumstances, the respondent was not bound to follow the

procedures as per Rule 13 (11) of GN 42 of 2007. Whether the reasons were amusing to the applicant or not, that is another issue. But what I have studied and gathered from the trial proceedings; the Arbitrator assigned reasons to his decision. On the basis of the above points, the fourth ground is hereby dismissed.

Coming to 1st and 2nd grounds, the applicant is lamenting that the CMA failed to determine each of the issues raised before the parties and failed to give reasons thereof and in lieu therefore he introduced new issue *suo moto* without affording the applicant her right to be heard.

To answer the applicant's grievance, I had an ample time to review and/or visited the proceedings and I observed that three issues were raised. At page 18 of the word-processed proceedings, which was recorded on the 19/10/2019, it is apparent that before commencing hearing, issues were framed. For ease of reference, I quote the relevant part:

"Viini vya Mgogoro:

1. *Kama mlalamikiwa alikuwa na sababu ya msingi kusitisha ajira ya mlalamikaji.*
2. *Kama mlalamikiwa alifuata taratibu halali kusitisha ajira ya mlalamikaji.*
3. *Nafuu kwa pande zote"*

The above three issues in the language of this court would be translated as: **first;** whether the respondent had a valid reason to terminate the applicant's employment; **Second;** whether the respondent had followed legal procedures in terminating the applicant's employment; and **Third;** reliefs which the parties are entitled to.

On reviewing the award issued by the CMA, I have noted that the CMA did not address each of the issues above. As it will be apparent soon, the Arbitrator opted to depart from the controlling issues agreed by the parties and came up with a different approach in a bid to attempt to determine the matter before him. In my considered opinion, the applicant's grievance on this facet is genuine and it bears merits. The Arbitrator was enjoined to determine each of the issues raised accordingly. The law is clear under Rule 27 (3) of The Labour Institutions Mediation and Arbitration Guidelines Rules, GN. No. 67 of 2007 which requires the decision or award to address the issues among other requirements. In addition to the above observation, I would like to comment that by avoiding to address the issues raised by the parties and the same reflected in the relevant proceedings, the Arbitrator contravened the basic principles of trial as prescribed by the Rules shown above. In my considered view, this trend cannot fetch any blessing from this court. Instead, thereof I fault the arbitrator for defying the dictates of the rules.

Apart from the above, I have considered the parties concession that the CMA actually raised a new issue *suo motu* and that the said new issue was substantially involved in the CMA's finding when giving an award. I am enjoined to accept the assertion raised by Mr. Lweeka that by so doing, the CMA prejudiced the applicant. I will also add that the CMA did not only prejudice the applicant, but also denied both parties the basic right to be heard.

As regards to the procedures for arbitration, Rule 19 to 22 of the Labour Institutions Mediation and Arbitration Guidelines Rules, GN. No. 67 of 2007 are relevant and the arbitrator ought to follow. It is apparent

that when the honourable arbitrator introduced a new issue, he failed to observe and comply with the legal requirements as stipulated under Rule 27 (3) of GN 67 (supra) which provides for a decision to include issues raised and recorded under rule 22 (2) (b) of the Rules and decision thereof, among others.

Coming to the argument advanced by Mr. Amedeus that there were other points considered by the CMA, or such an argument was an alternative reasoning, with due respect to the learned counsel, this contention is unconvincing. As correctly highlighted by Mr. Lweeka at page 5 of the award, the new issue framed *suo moto* was the main ground of the award. The arbitrator, among others observed:

> *"From the foregoing observation, a crucial question to be determined by this commission is whether the employee under fixed term contract can successfully file a dispute of unfair termination to this commission".*

From the above passage, there is no hypothetical point of thinking that the above question raised by the trial Arbitrator did not influence the whole award or that it did not affect the parties. It is evident that the arbitrator derived this issue to the end and dismissed the complaint as previously alluded. In **National Oil (T) Ltd v. Farida Jumbe and 3 others [2018] LCCD 10,** the arbitrator disregarded the issues raised in the proceedings and introduced a new one in the award. This court held inter-alia that:

> *"I am of the view that the arbitrator violated the rules of natural justice as he denied parties their right to be heard on the new issue raised suo moto in the award. He denied*

each party the right to be informed of any point adverse to him that is going to be relied upon by the Arbitrator, and to be given the opportunity of stating what his answer to it is".

From the above, the court nullified the trial proceedings and the award. Since the surrounding circumstance of this case falls within the findings in **National Oil (T) Ltd** (Supra), I am afraid to rule that there is no avenue for CMA proceedings and the award issued to survive for one reason that fundamental principle of natural justice was violated. Parties not afforded with the right to be heard. In that view, I will allow the 1st and 2nd grounds.

As to what reliefs fits in our case, I have the following observations: where a decision or award is given based on the proceedings that are defiant to any rule of procedure, usually the remedy will depend on the circumstance surrounding the case. In some specific cases, the test has been whether the impropriety of procedure did prejudice the parties. In this case there is no doubt that the basic right and relevant procedures were contravened by the CMA. As rightly submitted by the counsel for the applicant, I tend to agree with him that the irregularity actually prejudiced the applicant, and I so rule.

As hinted above, in **National Oil (T) Ltd** (supra), whose facts are much similar to the present application, all the proceedings and the award were nullified and a retrial was ordered. In another case of **Safi Medics v. Rose Peter and two others, Labour Revision No. 82 of 2010** (Unreported) the CMA failed to frame issues in arbitration and when making an award it included matters not claimed and that parties were not heard on. This court held that a successful arbitration requires that both the arbitrator and the parties in the dispute must have a

common understanding of the issues in controversy. It then nullified the whole proceedings.

Having considered the arguments advanced by the parties and fully paid attention on the circumstance of this case, I have formed an opinion that the proper cause is to undo the injustice occasioned by the CMA. It follows therefore that, all the trial proceedings at the CMA and the award made therefrom by the CMA for Morogoro, at Morogoro in Dispute CMA/MOR/119/2018 are null and void.

In the final event, I order and direct that the case file be remitted back to the CMA to start afresh, if at all the applicant wishes to pursue for her right. To ensure that justice is seen to be done, Arbitration shall be conducted by another qualified and competent arbitrator.

It is so ordered.

DATED at **MOROGORO** this 1st day of June, 2022.

M. J. Chaba

Judge

1/6/2022