IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)
AT ARUSHA

REVISION APPLICATION NO. 7 OF 2022
(Originating from the Commission for Mediation and Arbitration of Arusha, in dispute No. CMA/ARS/ARS/215/21/133/21)

LEILA CHILEBO ..... APPLICANT

Versus

SBC TANZANIA LIMITED ..... RESPONDENT

JUDGMENT

29th August & 21st October 2022

Masara, J.

Leila Chilebo, the Applicant herein, is challenging the Award by the Commission for Mediation and Arbitration of Arusha ("the CMA"), which rejected her claims of reinstatement after she was allegedly unlawfully terminated by the Respondent. This Application is supported by the affidavit deponed by Mr Emmanuel Sood, learned advocate. The Respondent opposed the Application by filing a counter affidavit deponed by Mr Edwin Arbogast, the Human Resources Manager of the Respondent.

At the hearing, Mr Emmanuel Sood, learned advocate appeared for the Applicant, while the Respondent was represented by Ms Neema Oscar, learned advocate. The application was heard by way of written submissions.

The genesis of this Application is as follows: the Applicant was employed by the Respondent as a store clerk on 05/07/2019 at the salary of TZS 566,421/= per month. Her salary was incrementally increased to TZS 642,350/= by the time of termination. The dispute arose on 20/04/2021, when the Applicant was involved in serious allegations of misappropriating fuel which allegedly caused loss to the Respondent. On that day, she was issued with a letter containing allegations of fuel loss accompanied with suspension pending investigation. On 23/04/2021, she wrote a letter denying the allegations. On 11/05/2021, the Applicant was issued with another letter to show cause. In this latter letter, it was indicated that, according to the investigation and auditing conducted on 23/04/2021, there was extra fuel loss, which made a total of 8487 litres loss valued at TZS 18,858,144/=. The letter showed further that the Applicant had caused serious loss to the employer, the Respondent.

The Applicant was also summoned for disciplinary hearing to be held on 21/05/2021. On 19/05/2019, the Applicant wrote another letter denying the allegations. On 21/05/2021, the disciplinary hearing was conducted and on 29/05/2021, the Applicant was served with the outcome of the hearing which terminated her from employment.

Upon termination, the Applicant was paid repatriation costs to the tune of TZS 1,230,000/= only. The other entitlements were withheld so as to cover the loss she had caused to the Respondent. On 18/06/2021, the Applicant lodged her dispute at the CMA. On the basis of the evidence adduced, the CMA, in its Award dated 26/11/2021, found the Applicant's termination substantively fair but procedurally unfair. It ordered the Respondent to pay the Applicant compensation of four months' salary which amounted to TZS 2,501,192/=, leave to the tune of TZS 625,298/= and a certificate of service. That decision did not please the Applicant culminating to this revision application.

In his submission, Mr Sood initiated the same by challenging the counter affidavit of the Respondent because it was not accompanied with a notice of opposition. Mr Sood submitted that the omission infringed the provisions of Rule 29(4) of the Labour Court Rules, G.N No. 106 of 2007 (G.N No. 106). Amplifying its seriousness, Mr. Sood relied on section 53 of the Interpretation of Laws Act, Cap. 1 [R. E 2019], contending that Rule 29(4) is couched in mandatory terms by the use of the word "shall".

On her part, counsel for the Respondent refuted the assertion by Mr Sood stating that the word "shall" does not always mean compulsory. She relied on the Court of Appeal decisions in **Goodluck Kyando vs Republic**

[2006] TLR 364 and **Baghati Makeja vs Republic, Criminal Appeal No. 118 of 2006** (unreported). She stressed that in so far as the counter affidavit was filed to controvert the application, omission to file a notice of opposition is not fatal because there is no prejudice on the part of the Respondent.

Before dealing with the merits of the application, I will first determine the objection raised by the Applicant's counsel. First of all, it laboured me to find relevancy between the cited Rule 29 of the G.N No. 106 and what was said by the Applicant's counsel. Unfortunately, the cited Rule does not have subsections. For the purpose of clarity, it says:

> *"Any appeal to the Court under the Acts, shall be instituted by filing a notice of appeal with the responsible person or body whose decision is under appeal and a copy thereof shall be filed with the Registrar."*

From its wordings of Rule 29, it is patently clear that the same does not support the Applicant's objection. However, in the course of researching on the matter, I realised that the proper provision that ought to have been relied on by the Applicant's counsel is Rule 24(4) of G.N. No. 106. The said Rule 24(4) provides:

> *"(4) A notice of opposition, a counter affidavit* ***or both*** *shall:*
> *(a) be filed within fifteen days from the day on which the application is served on the party concerned; and*

(b) substantially be in conformity with the necessary changes required by the context of subrules (1) and (2)." (Emphasis added)

The provision above cited is self-explanatory. A party is at liberty to choose either to file the notice of opposition or counter affidavit or both. According to the provision, it is not mandatory that both the notice of opposition and a counter affidavit be filed together. Thus, the contention by Mr Sood that the omission to file a notice of opposition together with the counter affidavit renders the application unopposed, is a misconstruction of the law. That said, the objection is hereby overruled.

I now revert to the substantive part of the application. In his affidavit, Mr Sood raised four grounds upon which the application is based. Submitting in respect of the first ground, the learned advocate submitted that the arbitrator erred in concluding that the Applicant omitted to sign exhibit D1 collectively without tangible proof. He argued that even in her job description that was tendered as exhibit D4, there is no clause that the Applicant ought to have signed exhibit D1 collectively. He maintained that there was no work regulation or guidance that was tendered in evidence by the Respondent to support the allegations that the Applicant was obliged to sign exhibit D1 collectively. Mr Sood relied on sections 110 and 111 of the Evidence Act, Cap. 6 [R.E 2019], stating that the Respondent

failed to prove whether the Applicant had obligation to sign exhibit D1 collectively.

The second and third grounds were combined and argued jointly. According to counsel for the Applicant, there was no valid reason for terminating the Applicant as there was no evidence that involved the Applicant in the loss of TZS 18,341,144/=. That, first, there was no evidence that the documents relied on to prove the charges were tendered before the disciplinary committee as there was no witness wo admitted to have attended the said hearing. He fortified that exhibit D8 was fabricated or prepared with an ill motive in order to defeat rights of the employer against the Respondent. According to Mr Sood, some of the slips used in calculating the loss were not tendered in evidence at the CMA. He also faulted the investigation report, stating that the loss was not certain to both the Applicant and Stella Msumali. Further, that there is no evidence showing how the extra fuel was used by the Applicant to enrich herself.

Regarding the fourth ground, it was counsel's argument that the Arbitrator failed to distinguish between exhibit D1 collectively and exhibit D5. He asserted that exhibit D5 had four signatures, including that of the Applicant. He stated that exhibit D5 entailed vehicles that went outside

Arusha, which makes it distinct from exhibit D1 collectively. He concluded that there were no valid reasons to terminate the Applicant's employment; thus, she ought to be reinstated. As to why reinstatement should be ordered, Mr Sood relied on the case of **Magnus K. Lauren vs Tanzania Breweries Limited, Civil Appeal No. 25 of 2018** (unreported), which held that where it is proved that the termination was both substantively and procedurally unfair, reinstatement without loss of renumeration is ordered.

On her part, Ms Neema contended that since the Applicant was working as a store clerk, she was duty bound to ensure that before motor vehicles were refuelled, she had to sign slips to show the number of the vehicles refuelled. It was her further contention that the Applicant filled extra cars apart from those which PW1 had requested, that is why she wilfully decided to leave the slips unsigned.

Responding to the second and third grounds, Ms Neema contended that the receipts which were tendered in evidence were relied on in the investigation report as stated by DW3 during re-examination. She maintained that the investigation report is clear that the loss was occasioned by both Leila Chilebo and Stella Msumali and that it was not apportioned to each of them individually. She argued that the issue is not

on the specific loss occasioned by each individual but the fact that the Respondent suffered loss occasioned by the Applicant and her colleague, because both were terminated for the loss caused. As to why some of the slips where not produced in evidence, it was counsel's submission that it was due to bulkiness. Relying on the case of **Vedastus S. Ntulanyenka and 60 Others vs Mohamed Trans Ltd, Revision Application No. 4 of 2014,** the learned advocate stated that the Applicant does not deserve reinstatement.

Regarding the fourth ground, Ms Neema fortified that the Applicant purposely omitted to sign exhibit D1 collectively but signed exhibit D5, while both slips had places for a store keeper to sign. She contended that the main reason exhibit D5 were tendered was for the Respondent to prove to the CMA that the Applicant for sometimes was not diligent in performing her duties. Basing on her submission, Ms Neema urged the Court to find the application devoid of merits and dismiss it.

I have thoroughly considered the affidavits, the record of the CMA as well as submissions by Counsel for the parties. The issues for determination is whether the Applicant's termination was based on valid reasons and whether reinstatement should be ordered.

I have taken note that the CMA confirmed that the Applicant's termination was procedurally unfair because procedures were not adhered to during disciplinary hearing. It is further noted that all the four grounds raised by the Applicant's counsel fault the CMA award for holding that the termination was based on valid reasons. In the first place, Mr Sood stated that the Applicant was not obliged to sign exhibits D1 collectively. He was of the view that her job description and the evidence adduced do not lead to the conclusion that the Applicant had to sign exhibit D1 collectively.

From the evidence on record, exhibit D3 collectively, which is the Applicant's contract of employment, specifically states that the Applicant is liable to be assigned any other functions in addition to those pertaining to her position at the discretion of the management. That is provided under paragraph 12, titled place of work. In addition to that, the questionnaire which was filled in by the Applicant as reflected in exhibit D2, clearly stated that she was the one responsible for receiving fuel orders.

Since the Applicant admitted in her evidence that she was the one responsible for receiving and issuing fuel orders and that she signed exhibits D5 collectively, one fathoms no good ground that would exempt her or her colleague from signing exhibit D1. I hold this view because

exhibit D1 collectively was the document that detailed her daily responsibilities. In the normal course of business, it was not possible for the fleet manager who was responsible to request fuel and the vehicle drivers of the refuelled vehicles to sign without being confirmed by the Applicant. The slips were conclusive proof that the vehicles were refuelled but that cannot be made without a signature by the Applicant, the refuelling officer.

In her own evidence, the Applicant stated that exhibits D1 collectively ought to be signed by the fleet manager. What she was signing was store requisition form which was not tendered in the CMA. If that was the case, she had all the reasons to inquire and demand that such documents be tendered as she would be vindicated. However, during cross examination she admitted that she did not ask that such evidence be tendered. She also did not explain why exhibit D1 collectively ought to be signed by the fleet manager on the part which ought to be signed by the store clerk. Her evidence therefore was weak to contradict the evidence adduced by DW1, the fleet manager, and DW3, the Human Resources Manager Therefore, the allegation that there was no proof that the Applicant was supposed to sign exhibit D1 collectively has no weight.

Mr Sood also faulted the CMA award stating that there was no proof that the documents used in deciding the charges against the Applicant were tendered in the disciplinary committee. Without mincing words, the record is clear that exhibit D8 which is the disciplinary hearing form under item 9 shows that among the evidence relied upon were the fuel requisition slips from the management side and fuel investigation report, exhibit D2. Admittedly, none of the Respondent's witnesses at the CMA admitted to have attended the disciplinary hearing. However, that does not mean that there were no witnesses and that the documents were not tendered. As the record depicts, the Applicant knew the charges that were facing her on 20/04/2021. She was issued with a letter to show cause and she responded thereto. Allegation that some of the slips used in calculating the loss were not tendered, cannot exonerate her from the liability since even those which were tendered in the CMA formed the basis of the investigation in calculating the loss.

Another complaint is that there was no specific proof of the loss caused by the Applicant. It is noteworthy that from the very beginning, it was an undisputed fact that the Applicant was serving in one office with Stella Msumali. The record is straight forward from the evidence adduced and the report, the loss originated from the store, where the Applicant was an

attendant. As submitted by Respondent's counsel, it was not possible to ascertain the specific loss occasioned by each individual, since the office was served by both of them.

The Applicant's counsel lastly contended that there was no proof that the Applicant transformed the fuel to enrich herself. I agree with the Respondent's counsel that whether the misappropriated fuel was used for personal gain or was transformed into cash for personal gain by the Applicant and her colleague, none of those issues was an issue at the CMA. The issue before the CMA was whether the Applicant's termination was based on valid reasons. Since it was proved that the Respondent suffered loss partly occasioned by the Applicant, other factors such as the whereabouts of the proceeds of the crime, remain to be irrelevant.

On the distinction between exhibit D1 collectively and exhibit D5, that was best resolved by the Applicant when cross examined by the Respondent's counsel. Exhibits D5 related to transactions that took place prior to the dispute. The fact that exhibit D5 had features unique to those in exhibit D1 collectively is attributable to the purpose for which each was made; but both were used for fuel requests. One cannot justify her innocence merely because exhibit D1 collectively was not signed by the Applicant. She did not offer tangible reasons as to why the same office signed exhibit

D5 on the part of the store clerk while exhibit D1, which she also admitted was a fuel requisition form, was left unsigned.

Notably, DW1 who was responsible for fuel requisition for the drivers, testified that it was the Applicant and her colleague who ought to have signed exhibit D1 collectively, but that they did not do so in order to achieve their clandestine mission. I have no doubts that DW1 stated the truth.

Basing on the evidence adduced at the CMA, I, as the CMA Arbitrator, harbour no doubts that the Respondent suffered loss due to misappropriation of fuel by the Applicant and one Stella Msumali. The fact that the procedure was not strictly adhered to does not mean that there was no misappropriation of the fuel leading to loss on the part of the Respondent. From the above observations, I also hold that the Applicant's termination was based on a valid reason.

I now turn to the issue of reinstatement the Applicant craves for before this Court and did so also at the CMA. Since the termination was based on valid reasons, the prayer for reinstatement cannot be maintained. The case of **Magnus K. Laurean vs Tanzania Breweries Limited** (supra), is instructive on the remedy available. It was held thus:

"Generally, where the termination is adjudged unfair on procedural grounds only, an arbitrator or the High Court, Labour Division will award compensation under section 40 (1) (c) of the ELRA as opposed reinstatement or re-engagement under section 40 (1) (a) and (b) respectively of the ELRA. But if the termination is held to be both substantively and procedurally unfair, it will be fitting to order reinstatement without loss of remuneration unless there are justifiable grounds for not doing so in terms of Rule 32 (2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007, G.N. 67 of 2007 ("the Guidelines Rules")."

Circumstances obtaining in the above cited decision, apply in the application at hand. Reinstatement cannot be ordered as the CMA only faulted the procedural aspects of the termination.

Last, it is noted that the CMA Arbitrator awarded compensation of four months only. He did not allude to the grounds that necessitated him to award less compensation than the one that the law prescribes. That was not appropriate. Section 40(1)(c) of the ELRA specifically provides that once termination is found to be unfair on procedural grounds, the Applicant is entitled to compensation of not less than twelve months renumeration. It provides thus:

"40.- (1) If an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer:
(a) ... N/A... or

(b) ..... N/A ... or

(c) ***to pay compensation to the employee of not less than twelve months remuneration."*** (Emphasis added)

Guided by the above position of the law, compensation of four months ordered by the CMA is hereby vacated. The Applicant shall be paid compensation of twelve months renumeration, plus other entitlements awarded by the CMA.

Consequently, the application partly succeeds. It is allowed to the extent above explained. The CMA award is altered on the compensation to be awarded to the Applicant from 4 months' remuneration compensation to 12 months' remuneration compensation. The rest of the Award remains unaltered. This being a labour dispute, each party shall bear their own costs.

Y. B. Masara

JUDGE

21st October 2022.