IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

LABOUR REVISION NO 78 OF 2021

(Originating from Labour Dispute No. CMA/ARS/ARS/616/19/275/19)

SHINE YUDATHEY LEON ..... APPLICANT

VERSUS

JUBAILI AGROTEC LTD..... RESPONDENT

JUDGMENT

08/09/2022 & 17/11/2022

KAMUZORA, J.

The Applicant Shine Yuda Leon, being aggrieved by the decision of the Commission for Mediation and Arbitration (CMA) preferred this revision under sections 91(1), (a) and (b), 91(4) (a) and (b) and section 94(1) (b)(i) of the Employment and Labour Relations Act Cap 366, Rules 24(1) 24(2) (a) (b) (c) (d) (e) (f) and 24(3) (a) (b) (c)(d) and 28(1) (a)(c) (d) & (e) of the Labour Court Rules G.N No. 106/2007 and any other enabling provisions of the law. The Applicant moves this Court to be pleased to call for the record of the CMA in Employment Dispute No. CMA/ARS/ARB/275/2019 and revise the proceedings, award and orders passed by the CMA.

The facts of the dispute between the parties as indicated in the CMA record as well as this application are such that, the Respondent is a company whose main business is support activities for crop production. The Respondent employed the Applicant as a Technical Sales in a renewable contract for contractual period starting from 16th January 2017. However, that contract was terminated on 17th October 2019 three months before it could lapse. The reasons for termination was the Applicant's misconduct based on gross dishonest, abuse of office and employment trust for personal gains and unjust enrichment and sabotage of company's business through manipulation of the company invoices.

Being aggrieved by the said termination the Applicant lodged a complaint at the CMA challenging the termination and raised a claim that there was breach of employment contract. The Applicant's prayer before the CMA was payment in lieu of notice, severance allowance for 2 years, 24 months salaries as compensation for wrongful termination, salaries from the date of termination to the date of satisfaction making a total claim of Tshs 99,769,230/=.

The CMA in considering the evidence and exhibits tendered before it, dismissed the claims for reasons that the termination was lawful in

compliance of the procedure and with valid reasons. However, the CMA ordered the Applicant to be issued with a certificate of service. Being aggrieved by the CMA decision, the Applicant preferred this current revision application on the following grounds: -

a) *That, the arbitrator erred in law and in fact by holding that the Applicant was fairly terminated by Respondent.*
b) *That, the arbitrator erred in law and in fact by holding that the Respondent proved the reasons for termination.*
c) *That, the arbitrator erred in law and in fact for holding that the Respondent followed fair procedure in terminating the Applicant.*
d) *That, the arbitrator erred in law and in fact by failure to properly assess and evaluate the evidence tendered before it leading to wrong findings.*
e) *That, the arbitrator erred in law and in fact by failure to establish the relationship between Jabail Agrotec Ltd and Barefoot Ltd in abusing the Respondent's office for personal gain.*
f) *That, the arbitrator's award has occasioned miscarriage of justice to the Applicant.*

When the application came for hearing, the Applicant was represented by Mr. George Njooka learned counsel while the Respondent enjoyed the service of Mr. Kapimpiti Mgalula, learned advocate. In his submission in support of application Mr. Njooka adopted

the affidavit filed in support of the application and opted to consolidate and argued jointly grounds **a** and **b**, ground **c** was argued separately and grounds **d, e** and **f** were consolidated.

Submitting on grounds **a** and **b,** the Applicant's counsel argued that the reasons for termination were not proved against the Applicant because the only reason advanced by the employer for termination of the contract is the fact that there was dishonest by the Applicant by failure to disclose conflict of interest as the Applicant was the shareholder and director of the company known as BAREFOOTPACE Ltd Limited which was running similar business with that of the Respondent.

The Applicant is faulting the arbitrators finding which was to the effect that, since there was proof from BRELA that the Applicant was the director and shareholder of BAREFOOTPACE Ltd and since the Respondent was doing the same business as that of BAREFOOTPACE Ltd, there was conflict of interest and therefore the Applicant benefited by doing business with the Respondent through his company.

It was the claim by the Applicant that there was no evidence on record proving that there was ongoing business between the Respondent and BAREFOOTPACE Ltd. The counsel for the Applicant referred the evidence by DW2 and submitted that, during cross

examination DW2 stated that there was no any problem for the Applicant to be the director of any company. That, she also admitted that there was no any document showing that BAREFOOTPACE Ltd was doing business with the Respondent as no document tendered showing any goods delivered to BAREFOOTPACE Ltd or invoices between BAREFOOTPACE Ltd and the Respondent.

The Applicant's counsel further submitted that, under page 6 of the typed CMA award the arbitrator stated that the Applicant did not declare that he had the company doing the same business as that of the Respondent. The Applicant's counsel submitted that such fact is not correct and referred this court to page 4 of the typed proceedings of the CMA where the Applicant made it clear that he informed the employer who is the Respondent and that is the main reason he was employed.

Submitting on ground **c** on the procedure for termination, the Applicants counsel argued that one of the requirements under Rule 13 (5) of the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007 is for the employee to be given the right to ask questions. That, DW1 who was the secretary of the disciplinary committee admitted under page 7 to 8 of the typed proceedings that the employee was not afforded the right to ask questions. He added that the

Applicant was not afforded the right to mitigate after he was found guilty and this is contrary to Rule 13 (7) of GN No. 42 of 2007.

Pointing at other irregularities in the procedures it was the submission by the counsel for Applicant that the complainant was also the secretary of the committee as admitted by DW1. That, there was also impartiality of the chairman an act which he stated to be contrary to Guideline 4(2) of GN No. 42 of 2007 under the heading "Guidelines for Disciplinary, Incapacity Incompatibility Policy and Procedure" as exhibit D3 was tendered by the chairperson which is an act of impartiality.

Regarding the right to appeal he submitted that, the law requires the employee to be given 5 working days but, in this case the termination was done before the appeal time lapsed. That, the outcome of the disciplinary hearing was on 11/10/2019, the employee was served with a copy on 12/10/2019 and given 5 days to appeal and the time to appeal was to lapse on 18/10/2019. That, the Applicant submitted his appeal on 17/10/2019 and was issued with a termination letter on the same day he submitted the appeal contrary to guideline 4 (12) of the guidelines under GN No. 42 of 2007. That, the chairman was required by the above provision to write the report after receiving the appeal, give a

copy to the employee and forward the appeal to the senior management but that was not done.

Arguing grounds **d, e** and **f,** the Applicant's counsel adopted the submission in grounds **a** and **b** and added that, it is the requirement of the law that, where there is misconduct the employer must conduct investigation as per Rule 13 (5) of GN No. 42. That, there was no report for investigation showing misconduct and that fact was admitted by DW1. That, DW1 also said that the person who conducted the investigation was the company secretary Tanisa Towo but, Tanisa Towo was not called as a witness to the disciplinary hearing and her report on the outcome of the investigation was not produced to the disciplinary committee during hearing.

It was the prayer by the Applicant's counsel that this court should re-evaluate the evidence and come up with its own findings and award the Applicant the remained part of the contract as he had a fixed term contract which was three months pending from October 2019 to January 2020. He prayed this court to consider that the Applicant was receiving 3,750,000/= as salary per month as per Exhibit D1.

Contesting the application Mr. Mgalula adopted the counter affidavit and submitted for grounds **a** and **b** that it is not in dispute that

the Applicant was the director and the shareholder of BAREFOOTPACE Ltd as per Exhibit D3. That, on the first complaint of gross dishonest for not declaring conflict of interest the Applicant admitted that he only has shares and serves as the director in the said company which actually was registered before he joined the Respondent. That, during cross-examination the Applicant admitted that he did not declare the interest.

It was the Respondent's counsel submission that the Applicant was indeed compromising the activities of his own company and the Respondent's company who was his employer at the time. That, his failure to declare interest that he was doing the same business like the employer was a gross dishonest of the agreed terms of employment contract. That, it was right for the arbitrator to rule out that there was indeed a conflict of interest which was never declared by the Applicant.

Responding to ground **c**, on non-adherence to the procedures for termination of employment, it was the Respondent's counsel submission that all the procedures were adhered to by the Respondent. He pointed out that, the Applicant was served with the summons to appear before the disciplinary committee, exhibit D2 and the Applicant confirmed that he went there with his personal representative one Ahmed and was given right to be heard during disciplinary hearing.

Responding on the right to appeal before the disciplinary committee the Respondent's counsel referred exhibit D4 and submitted that an appeal was written by the Applicant himself who acknowledged that on 12/10/2019 he received the decision made by the disciplinary hearing conducted on 08/10/2019. That, the requirement of the law is that within 5 working days after the disciplinary hearing, the decision has to be made. That, the decision was rightly made within 5 working days as acknowledged by the Applicant in exhibit D4. That, from the date the Applicant acknowledged the decision, he had 5 working days to file his appeal and he filed his appeal on 17/10/2019 as per exhibit D4. That, no procedure was violated on the appeal process and the appeal was fairly determined and the result issued to him on 24/10/2019.

On the argument that there was no impartiality, it was the Respondent's counsel submission that there was indeed a fair adherence to the procedures and the rights of the Applicant. That, the issue of impartiality at this juncture is an afterthought because the Applicant together with his personal representative Mr. Ahmed never questioned the issue of impartiality during disciplinary hearing. That, under exhibit D3 Mr. Mohamed Kdouh introduced himself by one title, the chairman

and he did not tender the document but the Applicant was only shown the document by Mr. Mohamed Kdouh.

Regarding the allegation that there was no mitigation, the Respondent's counsel submitted that exhibit D3 shows that the outcome of the hearing could have been given within 5 working days. That, at this juncture it cannot be said that he was found guilty for him to mitigate. That, Mitigation could have arisen if the Applicant was availed with the outcome before the recommendation was made.

Responding to the claim that the company secretary was not called to tender the report, it was the submission by the Respondent that the document in support of the allegation which was the report from BRELA, exhibit D8 was duly tendered and justify the owner of BAREFOOTPACE Ltd and its registration.

On the claim that the secretary of the disciplinary hearing was also the complainant, the Respondent submitted that, exhibit D3 shows that the secretary only read the allegations and nowhere is shown that the secretary was also the complainant. Citing section 110 (1) of the Tanzania Evidence Act Cap 6 [RE 2019], the Respondent stated that a party who wishes the decision to be made in his favour has duty to prove that these facts exist.

On the consolidated grounds **d, e** and **f,** the Respondent's counsel submitted that the arbitrator properly assessed and evaluated the evidence tendered before the CMA. That, failure by the Applicant to tender any document before the CMA justify that he had no claim.

On the prayer for the award of three months' salary the Respondent's counsel submitted that even if three months were left in that contract, basing on the fact that the misconduct was proved and the whole disciplinary procedures were followed, the Applicant cannot benefit from his own wrong as he was properly found guilty. That, as per exhibit D6 the Applicant was paid his entitlements including the terminal benefit of Tshs. 4,464,720/=. It was the Respondent's prayer that the revision application be dismissed.

In a rejoinder submission the Applicant's counsel added that no evidence that the Applicant's company had business with the Respondent. That, the fact that the Applicant admitted to have interest during cross-examination was cured during re-examination at page 24 of the proceedings line 11 to 15.

On the appeal days, the Applicant's counsel added that, he was terminated on 17/10/2019 the appeal was received on the same date but the outcome of the appeal came out on 24/10/2019 after he was

terminated. About the impartiality of the chairperson the counsel submitted that page 3 of D3 last paragraph shows that the documents were tendered by the chairman.

As regard to the company secretary and investigation report, it was the Appellant's counsel submission that what he was referring here is the full report on the allegation and the finding and not a piece of report from BRELA. He added that, DW1 confirmed at page 9 of the typed proceedings that she was the complainant and the secretary.

On the duty to prove, the counsel for the Applicant submitted further that as opposed to normal civil litigation, the principle of who alleges must prove does not apply in labour matters. Actually, it was the employer who has the burden to prove. He reiterated that the Respondent failed to prove that the reasons and procedures for termination were fair.

I have considered the record of the CMA, the application and submissions by the counsel for the parties. In determining whether the CMA was right to hold that the Applicant was fairly terminated in compliance with valid reasons fair procedures, this court will be guided by the record and the submissions made by the counsel for the parties in this matter.

From the analysis of the record and the submissions there is no dispute that the Applicant was an employee of the Respondent in a position of a technical sale as evidenced by exhibit D1. Also reading from the records and submissions by the counsel for the parties as well as the CMA award there is no dispute that the Applicant's employment contract with the Respondent was a fixed term contract of three years which was terminated before it ended. What is disputed here is whether there was proof of misconduct that could result to the conclusion by the CMA that there were fair reasons for the Applicant's termination and the Respondent complied with termination procedures. This will be discussed in course of determining the grounds raised by the Applicant in this application.

Starting with grounds **a** and **b** on the reasons for termination, it is in record as per exhibit D2 and D3 that summons to appear before the management for disciplinary hearing and the proceedings of the disciplinary hearing that the Applicant was charged with 4 allegations that is:

1) Gross *dishonest by not declaring conflict of interest and directly benefiting the business opportunities of the company.*
2) abuse of office and Employers trust,

3) sabotage of company's business through forgery of the company's invoice and

4) gross misconduct by occasioning to the company loss to the tune of USD 150,000.

However, the 4th allegation was not proved or explained thus it was dropped by the disciplinary committee but the disciplinary committee concluded that the other three allegations were proved. The basis of the above allegations is that the Applicant while working for Respondent, was also running a business similar to that of the Respondent but did not declare any interest to the Respondent. That, the Applicant being the shareholder and director of the company known as BAREFOOTPACE Ltd was benefitting from that business to the disadvantage of the Respondent.

I understand that among the reasons that may lead to the termination of employment is an act of gross dishonest, abuse of employer's trust and gross misconduct. Now the question here is whether the Applicant committed any of those allegations to amount to good reasons for termination.

As prior pointed out, the evidence is clear that the Applicant is among the shareholders and director of the company known as BAREFOOTPACE Ltd. It is the Respondent's claim that the said company

was a major customer of the Respondent and owing to the Applicant's position at JUBAILI AGROTEC Ltd (Respondent herein) and the transactions Between JUBAILI AGROTEC Ltd and BAREFOOTPACE Ltd, the Applicant has direct conflict of interest with his employer which he neither declared nor disclosed. The Applicant however claimed that he was part of BAREFOOTPACE Ltd even before he was employed by the Respondent and that fact was well disclosed and actually, it was the reason he was employed by the Respondent.

As per exhibits 7 and 8 which are registration status from BRELA, there is no dispute that both BAREFOOTPACE Ltd and JUBAILI AGROTEC Ltd are doing the same business of support activities for crop production. Although the Applicant claimed in his evidence that he disclosed the matter to the employer, there is no evidence justifying the same. In my view, since the employer was doing similar business tothat of the Applicant's company, there was need for a clear declaration for both parties to understand their position in the business. The employment contract, exhibit D1 contain also a clause requiring the Applicant to disclose conflict of interest if any. Thus, it was expected for him to present evidence of disclosure. Although the Applicant claim that he was not dealing with operations of the company, that fact is

unacceptable because, being the company director, the Applicant has direct involvement with the company operations thus, operations which touches the employer's activities become part and parcel of the conflict which he was responsible to disclose to the employer.

It was contended by the counsel for the Applicant that, no proof that the Applicant's company had business relationship with the Respondent. In my view, the interest arose by the fact that the two companies were doing similar business thus, the Applicant the who was employed as Technical Sales Officer by the Respondent could not honestly look for customers for his employer while his company needed the similar customers.

In my conclusion, there was a clear conflict of interest which needed to be disclosed to the Respondent by the Applicant. Failure by the Applicant to disclose during or prior to the signing of the employment contract the fact that he was a shareholder and director of BAREFOOTPACE Ltd while knowing that both his company and the Respondent trade in similar items/commodities, amounts to an act of gross dishonest which could result to the termination of employment contract between the parties. I therefore find that there were good reasons for termination of the Applicant's employment contract.

Reverting to ground **c** which is related to the procedures for termination, the Applicant pointed out three irregularities committed in the procedures for termination; denial of right to ask questions and mitigation upon conviction, impartiality of the secretary and the chairman of the disciplinary committee and denial of the right to appeal.

On the right to ask question, the counsel for the Applicant claimed that the Applicant was not given right to ask questions and to mitigate after he was found guilty. I find the claim that the Applicant was not given right to ask questions unsubstantiated because, at page 21 of the typed proceeding, when the Applicant was cross examined, he admitted that he understood the proceedings of the disciplinary hearing as he asked questions and Responded to the questions. Thus, the claim that he was not availed an opportunity to ask questions is unsupported.

On the allegation that the Applicant was not given a right to mitigate after he was found guilty of the offence, the Respondent's counsel made no response to this issue. However, upon visiting the records, Exhibit D3 which is the disciplinary hearing form indicate that, in the course of hearing the allegations, the Applicant was given opportunity to Respond on each allegation before the disciplinary committee recommended for the termination of the Applicant's

employment. By recommending so, it means that they found him guilty of the allegations. It is true that, Rule 13 (7) of GN No. 42 of 2007 requires that after being found guilty, the employee is to be given opportunity to put forward any mitigating factor before a decision is made on the sanction to be imposed. From the record, there is nothing evidencing that the Applicant was given opportunity to mitigate.

The record shows that after the disciplinary hearing, the disciplinary committee recommended the Applicant's termination. Its decision was issued on 11/10/2019 and supplied to the Applicant on 12/10/2019. The Applicant lodged an appeal on 17/10/2019 and on the same date he was served with a termination letter dated 17/10/2019. However, on 24/10/2019 the appeal was responded to by the management which upheld the outcome of the disciplinary hearing. This was done after the Applicant was terminated meaning he was terminated before his appeal could be considered. That was a clear violation of right to fair hearing as the Applicant was terminated before his appeal could be heard.

Regarding impartiality of the chairman, it was alleged that exhibit D3 was tendered by the chairman during disciplinary hearing hence he was impartial. Reading page 3 of the disciplinary hearing exhibit D3, it is

indicated that official search from BRELA were tendered by Mr. Kdouh proving that Mr. Shine was not only a shareholder of BAREFOOTPACE Ltd but also a director of the company. Mr. Mohamed Kdouh is indicated in the disciplinary proceedings as the chairman of the disciplinary committee. Thus, it becomes obvious that he could not be a witness to the matter he was presiding.

On the argument that the chairman was responsible to prepare a report after receiving the appeal, that is the requirement of the law under guideline 4 (12) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures under GN No. 42 of 2007. The said provision requires the chairman after receiving the appeal to refer the matter to the senior level management within 5 working days together with a written report summarising the reasons for the disciplinary action imposed. The provision also requires the appealing employee to be given a copy of the said report. That was not complied with in this matter.

On the argument that the secretary of the committee was also a complainant, the disciplinary hearing proceedings show that the secretary was Abdallah Nyaki. I agree that the disciplinary hearing does not indicate the complainant but Abdallah Nyaki was a witness before

the CMA and he admitted on cross examination that he was the one who reported the complaint and he was the one who sat as secretary of the disciplinary committee. However, the Applicant did not point out the provision that was contravened by that conduct.

On argument that investigation was not conducted as required under Rule 13 of GN No. 42, prior to the conduct of the disciplinary hearing, I find this baseless. There is evidence that before the Applicant was called for hearing the Respondent made follow up for the determination of the Respondent's business status BRELA report exhibit D8 is part of the evidence. There is nowhere it is indicated that there must be an investigation report to prove that there was investigation that was conducted. The evidence can also reveal if there was effort made to assess the validity of the allegations

For the reasons above, I agree with the findings of the CMA that there were good reasons for termination. However, I do not support the CMA conclusion that the procedures were followed. There is clear breach of the necessary procedures of employment termination. The record shows that the chairman acted as witness by submitting to the disciplinary hearing evidence against the Applicant. After the committee decision, the Applicant appealed but he was terminated before the

appeal could be determined. Thus, these are clear breach of the procedures for termination and it entitles the Applicant an award.

Reverting to grounds **d, e** and **f**, it is my view that, although the Respondent had good reasons to terminate the Applicant, failure to adhere to the procedures for termination resulted into miscarriage of justice. As the Applicant was working under a fixed term contract, he is entitled to payment of the remained period which is three months. The contract of employment, exhibit D1 indicates that the Applicant was receiving Tshs. 3,750,000/= as monthly salary. Thus, he is entitled to Tshs. 11,250,000/= as salary for the remained contractual period and one month salary in lieu of notice Tshs. 3,750,000/=. Other claims are not justifiable.

In the final result, I find this application to have merit and it is hereby allowed to the extent above explained. The CMA award and orders arising therefrom are quashed and set aside. I therefore award the total amount of 15,000,000/= to the Applicant. In considering that this is a labour dispute, no order as top costs is made.

DATED at **ARUSHA,** this 17th day of November, 2022

D.C. KAMUZORA

JUDGE