

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DISTRICT REGISTRY OF MBEYA

AT MBEYA

REVISION APPLICATION NO. 8 OF 2021

BETWEEN

PREMIUM ACTIVE TANZANIA LIMITED.....APPLICANT

VERSUS

GODFREY TIMOTHY MAKORWA..... RESPONDENT

JUDGMENT

Date of Last Order: 24/11/2021

Date of Judgment; 24/02/2022.

D. P. NGUNYALE, J.

This is a revision application against the Award of Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/MBY/mbby/43/2020/AR.19 which was delivered on 31/12/2020 by Hon. Ndonde, S. Arbitrator. **PREMIUM ACTIVE TANZANIA LIMITED**, the applicant herein, is applying to this Court for an order in the following terms: -

1. That, this honorable Court be pleased to call for record of proceedings and award dated 13th December, 2020 delivered by Hon. Ndonget, S (Arbitrator) of the Commission for Mediation and Arbitration of Mbeya Zone in the complaint No. CMA/MBY/Mby/43/2020/AR. 19 with a view to satisfy itself as to the legality, propriety and correctness thereof.

2. That the Honorable court be pleased to revise and set aside the whole award of the Commission for Mediation and Arbitration mentioned above.
3. Any other (s) relief the court will deem fit and just to grant.

The historical background of the dispute is that the respondent was employed by the applicant on 01/04/2013 as Warehouse Team Leader based at Mbeya. The applicant alleged that on 20th February 2020 the respondent appeared before him with a resignation letter seeking to resign from employment with the applicant. He informed the officer of the applicant that he wants to resign in order to have time to take care of his sick mother who was at Musoma by then. On 28th day of February 2020 they entered into a voluntary mutual agreement to terminate their employment relationship.

The respondent in his part denied having voluntarily entered into an agreement to terminate employment with the applicant. He said that he was forced to write resignation letter while under police custody suspected to have caused loss of properties of his employer. He wrote such letter in order to be released from police custody. On 28th February 2020 he was called by his boss at their office where he signed involuntary the agreement to terminate employment. The respondent was of the view that what transpired amounted to forced termination because he did not seek resignation voluntarily, and the alleged agreement was involuntary through it bears his signature. The termination was unlawful, he filed a complaint before the CMA.

The arbitrator was satisfied that the respondent termination was unlawful. The Commission ordered payment of 24,348,717 to the respondent, the payments comprised one month salary in lieu of notice,

compensation of unlawful termination, repatriation allowance to Morogoro a place of recruitment and subsistence allowance. The applicant being aggrieved preferred this application.

The application is accompanied with Chamber Summons and is supported by Affidavit sworn by Yassin Selemani Abood, Applicant's Principal Officer. The Applicant's Affidavit contains six proposed legal issues for determination. The legal issues are as follows; -

- i. Whether the in law and fact for failure to properly address issues framed on the trial instead she decided to deal with extraneous matter.
- ii. Whether the arbitrator erred in law and fact for arbitrary disregarding mutual agreement to terminate the employment which was tendered by the applicant before the Commission and hence reached erroneous decision and findings.
- iii. Whether the arbitrator erred in law and fact for disregarding the resignation letter of the respondent and instead her decision based on mutual agreement which she already had disregarded as unlawfully.
- iv. Whether in conducting arbitration the arbitrator failed to comprehend and properly interpreting Rule 4 and 6 of the ELRA (Code of Good Practice) G.N No. 42 of 2007 leading miscarriage of justice on the part of applicant.
- v. Whether the arbitrator was swayed by irrelevant consideration and did not stick to judicial approach of analyzing evidence.
- vi. Whether in the circumstances the arbitral award is arbitrary, irrational and unlawfully.

At the hearing of the application, the applicant was represented by Mr. Ibrahim Shineni, Advocate, whereas the Respondent was represented by Mr. Peter Kiranga, Advocate. Hearing of the application proceeded by way of written submissions.

Supporting the application Mr. Shineni submitted that the arbitrator did not adhere to judicial approach in recording evidence as indicated at page 5 of the CMA award, including the evidence of DW1 who testified before CMA that the respondent employment was permanent, but he opted to resign and the same was accepted with no condition. He stated that the respondent resignation was followed by mutual agreement between the parties.

Mr. Shineni argued that the arbitrator holding and findings that respondent was forced to resign as there was a case against him was illogical on the reason that the same was not supported by the evidence as to whether the same was criminal or civil case. On such basis he is of the view that respondent's resignation was not triggered by applicant as stated at page 6 and 7 of the CMA awards as the same was done by mutual agreement between the parties as supported by exhibit R-3 (voluntary agreement).

It was further submitted that the arbitrator erred in law by using the respondent's address of Morogoro as the place of employment (recruitment area) and this is justified when the same used to award the respondent repatriation allowance and subsistence allowance.

Lastly, Mr. Shineni submitted that the arbitrator's act of dealing with matters not supported by evidence at trial Court (CMA), he was of the view that the arbitrator opted to deal with extraneous matters.

They thus prayed for the award to be revised and set aside.

Opposing the application Mr. Kiranga submitted that the arbitrator was right in his findings by relying on exhibits tendered before CMA, he stated that the respondent at CMA testified that he wrote the said resignation letter so as to be bailable at police station and this is well stated at page 7 of the CMA award.

The respondent Counsel submitted that there was no witness testified at CMA that the purported agreement was entered voluntary to guarantee the consent of the parties and the same was witnessed by witnesses.

The Counsel submitted that it is not true that respondent is not entitled to awards of leave, severance pay, NSSF benefit and certificate of service, thus why the same was awarded by the arbitrator at page 10 of the CMA award.

It was further submitted that, since the law is very clear as per Section 15(1) of the ELRA, Cap 366 R.E 2019 that employer had a duty to keep her employee's record and owe duty to prove on the same as per Section 15(2) of the ELRA, Cap 366 R.E 2019. However, in this application the applicant failed to prove as to whether respondent was employed from Morogoro or from Mbeya. On that basis he was of the view that the arbitrator was right to award all terminal benefits including repatriation allowance and subsistence allowance.

Finally, the Counsel submitted that, the respondent was unfairly terminated in both aspects substantively and procedurally.

In rejoinder the applicant reiterated his submission in chief but argued that the respondent's Counsel failed to analyse that the respondent was the one who initiated resignation and then the same was

followed by voluntary agreement, on that reason he was of the opinion that nothing was violated.

Having carefully gone through submissions by parties and the Court records and the grounds for revision, the issue for determination is whether there was any intolerable condition(s) created by the applicant that resulted respondent to resign his employment contract; if the answer is positive and lastly what reliefs the parties are entitled to.

Starting with the first issue, regarding resignation the applicable provisions is Rule 7(1) of the ELRA (Code of Good Practice) G.N No. 42 of 2007 which provides that: -

"Rule 7(1) Where an employer makes an employment intolerable which may result to the resignation of the employee, that resignation amount to forced resignation or constructive termination.

In this application at hand the respondent alleged that he was forced to write a resignation letter so as to be bailable against the case facing him as per exhibit R-1(resignation letter) and the same was issued on 20/02/2020 in my view on that date it is when he supposed to institute a complaint of forced resignation. However, things differ in this application on 27/02/2020 the applicant opted to sign voluntary agreement of separation without consulting to any lawyer in such circumstance of having ample time of seven days from when he was released from police, I am of the view that his allegation of being forced to resign goes with smoke by signing a voluntary agreement of separation. In the case of **Benda Kasanda Ndassi Vs. Makafuli Motors Ltd**, Rev. No. 25/2011 HC Labour Division DSM (unreported), also in the case of **Hotel Sultan Palace Zanzibar vs. Daniel Laizer & Another**, Civil. Appl. No. 104 of 2004, where it was held that: -

"It is elementary that the employer and employee have to be guided by agreed term governing employment. Otherwise, it would be a chaotic state of affairs if employees or employers were left to freely do as they like regarding the employment in issue."

From the above authority since the respondent afforded with an opportunity to consult with lawyer after being bailed from police and failed to do so by signing a contract as per Section 10 of the Law of Contract Cap 345 Revised edition 2019 which provides that;-

All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void:

In such circumstance where by the respondent consented to terminate his employment contract even after being bailed as he decided to sign a separation agreement without consulting the lawyer for the intolerable conditions to be established, I am of the view that the respondent's allegation that he was forced to resign lacks legal stance.

Also, as parties did not dispute what they agreed in Mutual Separation Agreement was paid, I find nothing to award respondent. On such position as I find the first issue answered in affirmative/negative then I find no need to labor much on other issues.

From the above legal reasoning, I fault the Arbitrator's award as discussed herein. The application is allowed. I give no order as to the cost of the suit.


D. P Ngunyale
Judge
24/02/2022

Judgment delivered this 24th day of February 2022 in presence of Mr. Ibrahim Sheneeni Learned Advocate for the applicant.



D. P Ngunyale
Judge
24/02/2022