IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION APPLICATION NO. 73 OF 2020

(Originating from the Commission for Mediation and Arbitration Application No. CMA/ARS/ARS/74/20/49/2020)

SAINT GOBAN LODHIA GYPSUM INDUSTRIES .....APPLICANT

VERSUS

ANDREW JOHNSON SINGANO ..... RESPONDENT

JUDGMENT

17/02/2020 & 31/03/2020

KAMUZORA, J.

Before the Commission for Mediation and Arbitration of Arusha (the CMA) **Andrew Johnson Singano** (the respondent herein) lodged a claim for unfair termination of his employment vide CMA/ARS/ARS/74/20/49/2020 against his employer **SAINT GOBAN LODHIA GYPSUM INDUSTRIES** (the applicant herein). The CMA made an award in favour of the respondent hence the applicant preferred the present revision application under the provision of section 91(l)(a) 91 (2)(a)(b) 94(1), (b) (i) of the Employment and Labour Relations Act No. 6 of 2004, and Rules 28(1) (c), (d), (e) and 24 (1), (2)(a)(b)(c)(d) and (f), of the Labour Court Rules, GN No. 106 of 2007.

The application is supported by an affidavit sworn by Asha Mafita the Principal Officer of the applicant and opposed by the respondent through a counter affidavit sworn by Sylvester Samwel Kahunduka an advocate for the respondent. Hearing of the present application was by way of written submission whereas both parties filed their submissions as scheduled save for the rejoinder submission by the applicant.

Before delving into what was argued by the parties in respect of the revision application, it is paramount in brief to give the background of the matter leading to this application.

The respondent was employed by the applicant on 1st September 2015 as a Maintenance Coordinator as per annexure P1 which is a contract for employment. In the course of performing his contractual duties the respondent was accused by the applicant of poor performance and failure to reach the target as set by the applicant.

Following the said poor performance the applicant conducted performance review as per monthly performance monitoring discussion exhibit D1 and the respondent was issued with a notice to show course (Exhibit D2) why punitive action should not be taken against him. The respondent later issued with a notice to attend the disciplinary hearing (Exhibit D3). A disciplinary hearing was conducted, and the disciplinary

committee proposed termination of the respondents' employment. On 22/01/2020 the respondent's employment was terminated by the applicant as per exhibit D 4 (a termination letter) and payments due was paid to the respondent as per Exhibit D5.

The respondent being aggrieved by both the reason and procedure for termination, referred the matter to the CMA. The CMA after considering the evidence and exhibits tendered before it, issued an award to the effect that, the termination was both substantively and procedurally unfair. It was the holding of the CMA that since some of the terminal benefits was paid to the respondent as stipulated under exhibits D4 and D5 then, the respondent by virtue of sections 40(1) (c) and 42 of the Employment and labour Relations Act No. 6/2004 was entitled to be awarded a compensation of 12 months salary equivalent to 14,400,000/= and severance pay for 5 years which is equivalent to Tshs 1,400,000/= which makes a total of Tshs 15,800,000/=.

The applicant being dissatisfied with the CMA award made an application before this court for the following reasons: -

i) *That, the Honourable Arbitrator erred in law and fact by failing to acknowledge that the respondent failed to meet the performance standard required by the applicant.*

ii) *That, the Honourable Arbitrator erred in law and fact by failing to acknowledge that the respondent was afforded a fair opportunity to meet the reasonable performance standard.*

iii) *That, the Honourable Arbitrator erred in law and fact by not considering the fact that the applicant had reasons to terminate the respondent and the termination of employment was fair.*

iv) *That, the Honourable Arbitrator erred in law by basing his award on technicalities notwithstanding the fact that there was a valid reason for termination.*

The major issue calling for the determination of this court is whether the arbitrator was correct to having treated the respondent as being unfairly terminated.

Arguing in support of the application Mr. Hamisi the advocate for the applicant submitted that, at the CMA two issues were formulated that is whether the termination was substantively and procedurally fair and to what reliefs are the parties entitled to.

As for the first issue the counsel for the applicant submitted that, the applicant did prove at the CMA that there was a valid reason to terminate the respondent for his failure to meet the target. Regarding the procedure for termination, the counsel submitted that, for several

months the applicant conducted monthly performance monitoring discussion giving the respondent various directions, guidelines and working tools in order for him to meet his working standard. That the respondent was given a reasonable time to improve including oral and written warnings.

Mr. Hamisi was of the view that the arbitrator erred by ruling in favour of the respondent as the applicant proved to adhere the substantive and procedural part of the fairness of respondent termination. Mr. Hamisi also stated that, the award was made basing on technicalities that is requiring the applicant to comply with section 37 and 38 and rule 12 to 24 of GN No. 42 of 2007 which the applicant had adhered to. He thus prayed for this court to revise and set aside the CMA award and nullify the benefits granted to the respondent as the same has been paid.

In contesting the application, Mr. Kahunduka claimed that the respondent was accused of poor performance and failure to meet target as per Exhibit D2 and exhibit D1 which are different performance Appraisal reports resulting from monthly reviews that led to the termination of the respondent's employment. He submitted that it is a

laid principle that an employee should be appraised on pre-set standards which should be known to him before the said appraisal.

Mr. Kahunduka claimed that from the applicant's evidence there was job description setting the standards to be met by the employee but the same were not communicated to the respondent and not even tendered before the CMA during hearing. That, as the said standards were never known by the respondent it is contrary to Rule 16(1) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 GN No. 42 of 2007.

Mr. Kahunduka submitted further that, it was not shown anywhere as how the management responded to issue raised by the respondent from time to time and the action taken by the management to curb the shortfalls raised by the respondent thus no proof that poor performance if any was caused by the respondent. He added that as per Rule 18(1) GN No. 42/2007(Supra), it is a mandatory requirement for an employer to investigate the reasons for unsatisfactory performance. That, the Reason for the investigation is to revel the extent of the poor performance caused by the employee. He claimed that, as per the evidence of the applicant, no investigation report was tendered at the disciplinary hearing or at the CMA hence no proof that the investigation

was done. For this he claimed that there was no fair reason for termination of employment. To support his argument on investigation report he cited the case of **Tanzania Revenue Authority Vs. Andrew Mapunda, Revision No. 104/2014 HC at Dar es Salaam.** (Unreported, a copy to which was not attached)

Mr. Kahunduka went on and submitted that initially the respondent was alleged and charged of theft of company machines, he was terminated but he appealed to the higher authority and on 20/12/2019 he was allowed to go back to work. That, when he reported back to work, he was given 11 days leave up to 2/01/2020. That, on 2/01/2020 upon his arrival to work a performance appraisal which culminated to his termination was done the same day after being out of work for almost 35 days. That, four days later, on 06/01/2020 he was served with a notice to show cause why he should not be terminated for poor performance and on 09/01/2020 he was served with a notice of disciplinary hearing. The counsel termed the whole series of events as malpractice in the whole process aiming at ensuring the termination of the respondents' employment.

Mr. Kahunduka also submitted that during disciplinary hearing, the respondent was denied to testify on the past events thus denied his

right to defend his case. He insisted on the fundamental right to be heard as entangled under Article 13 (6) of the Constitution of the United Republic of Tanzania and the case of **Joseph K. Magombi V. Tanzania National Parks**, Revision No. 2/2013 HC at Arusha and the case of **Hamisi Jonathan John V Board of External Trade**, Civil Appeal No. 37/2009 CAT (Unreported).

Concerning the procedure for termination based on poor performance, Mr. Kahunduka submitted that page 6 of the CMA award the Arbitrator explained the procedure for termination based on poor work performance which is guided by Rule 17 of The Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007. He explained that the procedure followed by the applicant was not in tandem with what is provided for by the Rules. That, at the disciplinary hearing what was required is for employer to summon the employee and outline the reasons for termination and giving a chance to the employee to make any representation before making a final decision. A procedure which he stated that was not done. Mr. Kahunduka thus prayed for this court to uphold the award by the CMA.

From the analysis of the submissions and the records in this matter, there is no dispute that the respondent was an employee of the

applicant, and his employment was terminated on the allegation of poor performance and failure to meet the target/standards set by the applicant.

What is disputed is the fairness of the reasons for termination and fairness of the procedures for termination. In determining the fairness of employment termination, it is important to consider the provision of section 37(2) (a) (b) and (c) of the Employment and Labour Relations Act, 2004 which requires employer to prove that the reason for termination is valid and fair and the termination is in accordance with a fair procedure.

Starting with the validity and fairness of the reasons, Rule 17 of the Employment and Labour Relations Act (Code of Good Practise) GN No. 42 of 2007 provides that,

17.-(1) Any employer, arbitrator or judge who determines whether a termination for poor work performance is fair shall consider-

(a) whether or not the employee failed to meet a performance standard;

(b) whether the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;

(c) the reasons why the employee failed to meet the standard; and

(d) whether the employee was afforded a fair opportunity to meet the performance standard.

It was contended by the applicant as deponed under paragraph 10 of the affidavit in support if this application that, according to the standard procedures made available to the respondent prior to commencement of his employment, the respondent was required to prepare a detailed maintenance plan and submit the same to the applicant prior to the occurrence of any problem/breakdown which in all occasion he failed to do. Unfortunate, the record on this case shows that, at the CMA there was no any document tendered by the applicant showing that there are standards set by the applicant and communicated to the respondent. The sole witness of the applicant that is Asha Mafita tendered various monthly performance monitoring discussions (Exhibit D1) for the months of February 2019, July 2019, September 2019 and January 2020. However, there is no standards that were made known to the respondent before commencement of employment which could be the basis of the assessment was not part of the evidence tendered. In fact, no evidence showing that there were standards set by the applicant and no proof that the respondent was aware or was made aware of the said standards before he was being assessed.

It must be noted that, the proof of poor work performance is a question of fact to be determined on balance of probabilities. For this see Rule 17(3) of The Employment and Labour Relations (Code of Good Practice) Rules G.N No. 42/2007. It is thus the duty of the applicant to adduce facts strong enough to hold that the respondent had poor work performance based on the standards set by the employer and known to the employee. Since there were no standards set by the employer then it is evident that there was no reason fair enough for termination of the respondent's employment.

It was also contended by the respondent's counsel that the allegation was not investigated to warrant a proof of the reason of unsatisfactory performance. In referring Exhibit D1 the counsel for the applicant considered it as a proof that the investigation was conducted.

The law under Rule 18(1) of GN No 42 provides that, *"The employer shall investigate the reasons for unsatisfactory performance. This shall reveal the extent to which is caused by the employee."*

The above cited provision makes it a mandatory requirement for an investigation to be conducted by the applicant. To prove that an investigation is conducted then it was necessary to know the guiding performance standards and a report showing how those standards were

met or not met. As there is no report tendered before CMA showing how the investigation was conducted to balance the standards set and the work performed, it cannot be concluded that investigation was conducted as required by the law. What the applicant referred to as investigation, monthly performance discussions (exhibit D1) in my view does not prove the investigation in meaning of the provision of Rule 18(1) of GN No 42. I say so because the same were based on the standards not proved to have been made known to the respondent. I therefore agree with the respondent's counsel that the investigation was not conducted. In considering the unreported decisions of this court in the case of **Tanzania International Container Terminal services (TICTS) Vs Fulgence Steven Klikumtima and others,** Revision No 471 of 2016 and the case of **Fredrick Mzimbwa Vs Tanzania Ports Authority,** Revision No. 220 of 2013, it is my considered view that in the absence of investigation report, there is no justification that the investigation was conducted.

Regarding the fairness of the procedure the records shows that, the required procedures as stated above was not followed that is, despite notice being issued and a disciplinary hearing being conducted by virtue of Exhibit D3 the procedures were not complied. Apart from

failure to conduct investigation prior to the conduct of a disciplinary hearing the hearing itself contained weaknesses.

The law under Rule 18(6) and (7) of GN No. 42/2007(supra) requires that, prior to finalising a decision to terminate the employment of the employee for poor work performance, the employer shall call a meeting with the employee. At the said meeting the employer shall outline the reasons for action to be taken and allow the employee or his representative to make representation before finalising the decision.

The record at the CMA indicates that, pursuant to Exhibit D3 which is the hearing form, the respondent signed to attend the disciplinary hearing. However, there is no indication of the respondent's response/representation to the allegation. Item 8 of the hearing form as per GN No. 42 of 2007 requires a brief summary of the employee's response to the allegation. It is expected that the employee response is to be recorded in his own wording. However, under item 8 of exhibit D3 which is referred as hearing form, what was recorded is the employer's report on the employee's response to allegation. For easy reference the same is reproduced here under: -

"8. Maelezo ya mwajiri kwa ufupi juu ya tuhuma iliyoandikwa hapo juu.

Mwajiriwa amesema tuhuma sio sawa lakini amekiri kusign onyo la maandishi kuhusina na tuhuma hapo juu."

The above response cannot be termed as the employee response within the meaning of the law. As required by the law, prior to the issuance of termination letter that is exhibit D4, the respondent was to be informed on the allegations and consequence thereof and be allowed to make representation before the final decision was issued. As the same was not done, in my view, the procedures for termination contravened the law.

In the final analysis, it my conclusion that there was no valid reason for termination and the procedure for termination was not followed. Just as how the night follows the day, I find it that the arbitrator was correct to hold that there was unfair termination. The terminal benefits awarded by the arbitrator to me are correct and I do not see any reason to interfere with the CMA award. This application is therefore devoid of merit and is hereby dismissed with no order for costs considering the nature of dispute being a labour dispute.

DATED at **ARUSHA** this 31st day of March 2022.

HIGH COURT OF TANZANIA

D.C. KAMUZORA

JUDGE