IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISION NO. 39 OF 2021

BETWEEN

GEITA GOLD MINING LTD..... APPLICANT

AND

EUNICE MGORE..... RESPONDENT

JUDGMENT

Date of last order: 28/03/2023
Date of Judgement: 24/04/2023

M. MNYUKWA, J.

Aggrieved by the Award of the Commission for Mediation and Arbitration (CMA) delivered on 03rd September 2021, the applicant filed the present application seeking revision of the Award of the CMA. The application is made under the enabling provisions of sections 91(1)(a)(b), 91(2)(a)(b)(c), 94(1)(1)(b)(i) of the Employment and Labour Relations Act [Cap 366 RE 2019] (herein to be referred as the Act) and Rule 24(1), 24 (2)(a)(b)(c)(d)(e) and (f), 24(3)(a)(b)(c)(d) and 28(1)(c)(d) of the Labour Court Rules, GN No.106 of 2007 (herein to be

referred as the GN No. 106 of 2007). The applicant prayed before this Court for the following Orders:

i. *That the Court be pleased to revise and set aside the Arbitration Award issued by the Commission for Mediation and Arbitration at Geita (Hon. Salehe, B. Arbitrator) in Dispute No. CMA/GTA/57/2019 dated 03rd September 2019.*
ii. *Any other order that the court may deem just to grant under the circumstances of this application.*

In his affidavit which is sworn by Gregory Lugaila who is the legal counsel of the applicant, the applicant advanced the following legal issues for consideration and determination which are;

i. *Whether the termination of the respondent's employment was procedurally unfair.*
ii. *Whether the Arbitrator was right to fault the termination on procedural unfairness after holding that the respondent admitted having committed the misconduct.*
iii. *Whether the arbitrator was right to order payment of twelve months' salaries to the respondent based only on procedural unfairness of the termination.*

The respondent opposed the application through the counter affidavit of Eunice Mgore, the respondent.

When the Revision Application came for hearing, the applicant was represented by Ms. Marina Mashimba, the learned counsel and the respondent enjoyed the legal services of Mr. Erick Lutehanga, the learned counsel too. The Revision Application was argued orally.

To appreciate the context in which the labour dispute arose and later this Revision, I find it apposite to briefly explain the material facts of the matter as gleaned from the available court record. It goes thus: the respondent was employed by the applicant as a human resource officer in October 2011 and later on, she was promoted to senior human resource officer and in performing her daily work, she was reported to the human resource manager. The respondent being a senior human resource officer, was taking an active part in the recruiting processes of the applicant's employees of different cadres.

It was alleged that, in one of the interviews that was supervised by the respondent, she negligently recommended a candidate who did not get the highest score in the interview of socio-economic development post conducted on behalf of the applicant. The above allegation resulted the respondent to be suspended and later on, sometime in September 2019 to be terminated after she was found guilty of misconduct.

It is also on record that, before she was terminated, the investigation was conducted which triggered to be summoned in the disciplinary hearing. It is further on record that, before the conduct of the disciplinary hearing the respondent was served with a complaint form which list out the rules of the applicant's disciplinary code of conduct alleged to be breached by her including dishonesty, gross incompetence or inefficiency in the performance of work and misuse of position for personal interest.

The record further reveals that, the main allegation by the applicant which found her guilty in the disciplinary hearing was gross negligence on the scores and subsequent ratings for recommending a candidate who did not get the highest score as a suitable candidate for the post, hence employed while the ratings of the candidate who got the highest score were manipulated by incorrect data input of scoring.

It is the findings and the outcome of the disciplinary committee prompted the respondent to file a labour dispute before the CMA. After hearing both parties, the CMA found the respondent was fairly terminated in terms of reason but faulted the procedures for termination to be unfair since the respondent was not served with an investigation report. The arbitrator ruled out that, the affidavit of DW2 which by itself, does not qualify to be an affidavit cannot be equated to an investigation

report. For that procedural unfairness, the Arbitrator awarded the respondent compensation of 12 months' salary for unfair termination.

Dissatisfied with the Award of the CMA, the applicant lodged the present Revision and advanced three legal issues as reproduced above.

In arguing the Revision, the applicant's counsel kicked the ball rolling. She quickly prayed to adopt the affidavit sworn in by Gregory Lugaila to form part of her submissions. She started arguing the 1st legal issue whether the termination of the respondent was procedurally unfair. On this ground, the counsel mainly discussed the legal requirement to conduct an investigation. She refers to the evidence of DW2 who investigated the matter before the respondent was summoned and charged in the disciplinary hearing. She avers that, DW2 prepared the investigation summary that was handed over to the human resource department. The counsel went on, DW2 was called as a witness in a disciplinary hearing and he presented a document titled 'affidavit' which was admitted as Exhibit D6. He also prepared and presented a video presentation on the findings of the investigation and tendered the investigation presentation which was admitted as Exhibit D 15.

Ms. Marina was of the view that, the investigation was conducted and the document titled 'affidavit' was tabled in the disciplinary hearing, that the respondent got an opportunity to go through it and cross-

examined it. She refers to Rule 13(5) of the Employment and Labour Relation (Code of Good Practice) GN. No. 42 of 2007 to say that, it does not require the employer to serve the employee with the investigation report before the hearing. She argued that, the Rule requires only the information to be tabled during the hearing.

Admittedly, the counsel for the applicant submitted that, what was tendered was not an "affidavit" in the eyes of the law. However, she had a strong view that, still, that does not give room for the arbitrator to disregard it since it is not the requirement of the law for the investigation report to be tendered in the disciplinary hearing and therefore, failure to tender it is not fatal.

To support her argument the counsel referred to the case of **Geita Gold Mining Limited vs Tenga B Tenga,** Labour Revision No. 14 of 2021, HCT Labour Division at Mwanza which held that the law does not require the investigation report to be supplied to the employee and that not every noncompliance of the procedural law renders the collapse of the case unless it is only those which prejudices the party. She retires in this issue by stating that, it is neither the respondent nor the arbitrator who is prejudiced for being served with the document titled "affidavit" instead of being titled investigation report. She thus prays this Court to find that the respondent was fairly terminated in terms of procedures.

On the 2nd legal issue, the counsel faults the CMA Award that it was wrong for the Arbitrator to hold the view that there was unfair termination in terms of procedures while he ruled out that, the respondent admitted the commission of the misconduct. She further argued that, if the reason for termination was due to admission, it is not mandatory for the procedures to be followed. She refers to the case of **Patricia Minja vs Bank of Africa (T) Ltd,** Revision No. 316 of 2021 HCT at Dar es Salaam to support her argument that there is no need to conduct the disciplinary hearing if there is admission. She also refers to the case of **NMB PLC vs Andrew Aloyce** LCCD 2013. She retires by insisting that, if there is admission, the procedural irregularity cannot be used to fault the decision to terminate or to hold that termination was procedurally unfair.

The learned counsel finalized his submissions in chief arguing the 3rd legal issue as advanced in the applicant's affidavit. She attacked the order of compensation of 12 months' salaries awarded to the respondent. She strongly argued that, since the termination was only faulted on procedures, it was wrong for the arbitrator to award the respondent an excessive amount of compensation considering the fact that, the respondent admitted the misconduct for breaching the applicant's rules. She refers to the case of **Felician Rutazwa vs World**

Vision Tanzania, Civil Appeal No. 213 of 2019 whereby the Court upheld lesser compensation since the termination was procedurally unfair but substantively fair as there was a valid reason for termination.

She, therefore, prays the Revision Application to be allowed and this Court to set aside the CMA Award.

In rebuttal, the counsel for the respondent prays to adopt the notice of opposition and the counter affidavit of the respondent, Eunice Mgore to form part of his submissions. The lerned counsel was very brief and went straight to tackle the legal issues argued by the applicant's counsel.

In his submission, he argued jointly the 1st and 2nd legal issues as they are intertwined. He started his submissions by referring to page 30 and 31 of the CMA typed Proceedings, and remarked that, in his evidence, DW2 admitted during cross-examination that there was a presentation on his affidavit. He therefore argued that, the Hon. Arbitrator was right to hold the view that, there was no investigation report and he was also right to hold the view that, the investigation report was not served to the respondent. To support his argument, he invites this Court to the decision of the Court of Appeal in the case of **Kibobery Limited vs John Van Der Voort,** Civil Appeal No 248 of 2021 where it was observed that, failure to involve the employee in the

investigation and coupled with omission to share the report thereof is a serious irregularity.

He went on that, DW2 admitted that he conducted an investigation and that he did not serve the respondent prior to the hearing and the same was not tendered during the CMA or disciplinary hearing. He contended that, what was brought before the CMA and the disciplinary hearing was the affidavit which does not possess the quality of the affidavit as it was stated in the case of **DDP vs Dodoli Kapofi and Another,** Criminal Application No. 11 of 2008.

He retires by stating that the document presented by DW2 was a mere paper which cannot be considered. He, therefore, insisted that there was no investigation report and this suggests that, there was procedural irregularity.

Further to that, the counsel for the respondent rebut the applicant's assertion that the respondent admitted the misconduct that's why the applicant conducted an investigation in order to establish the respondent misconduct.

On the issue of compensation of 12 months' salaries, the respondent's counsel refers to section 40 (1) (c) of the Act which gives power to the Arbitrator to award not less than 12 months' salaries when there is unfair termination. He holds the view that, it is the discretionary

power of the CMA or Labour Court to award the above compensation as stated in the case of **Magnus K Laurean vs Tanzania Breweries Ltd,** Civil Appeal No 25 of 2018. He finally prays the Revision Application to be dismissed as there is no justifiable reason to set aside the CMA Award.

In a rejoinder, the counsel for the applicant mainly reiterates what she had submitted in chief and she distinguished the case of **Kibobery Limited** (supra) because in that case the investigation report was not tendered in the disciplinary hearing or in the CMA which is different with our case at hand in which the report was shared to the respondent in the disciplinary hearing as well as the CMA. She, therefore, prays the Application to be granted as prayed in the Chamber Summons.

After considering the rival submissions from both counsels, I noted that, it is not in dispute that the employment of the respondent was terminated on account of misconduct after the CMA satisfied that there was dishonesty, gross negligence and misuse of power by the respondent. However, parties locked horns on whether the applicant adhered to the procedures when terminating the respondent's employment.

The procedure which is alleged to be contravened is whether the investigation was conducted and whether the investigation report if any, was mandatorily required to be served to the respondent. In other words, this Court is called to determine whether the procedures were followed before terminating the respondent's employment.

In determining the present Revision Application, I will determine the 1st and 2nd legal issues jointly because they are intertwined and I will argue separately the 3rd legal issue.

To begin with, the law under Rule 8(1)(c) and (d) of the Employment and Labour Relation (Code of Good Practice) GN No. 42 of 2007 provides that:

> *"An employer may terminate the employment of the employee if he-*
>
> *(c) follow a fair procedure before terminating the contract and*
>
> *(d) has a fair reason to do so as defined under section 37(2) of the Act."*

It is settled that, termination of the employment contract is considered to be unfair if the employer fails to prove that: **one,** the validity of reasons for termination, **two,** the reason for termination is

fair and **three,** that the termination was conducted in accordance with a fair procedure. (See the case of **Severo Mutegeki and Another v Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma** (DUWASA), Civil Appeal No 343 of 2019.

For ease of reference, I find it worth reproducing section 37 (2) of the Act which provides that: -

> *"37(2) A termination of employment by an employer is unfair if the employer fails to prove*
> *(a) that the reason for the termination is valid*
> *(b) that the reason is a fair reason*
> *(i) related to the employee's conduct, capacity or compatibility or*
> *(ii) based on operational requirement of the employer*
> *(c) that the employment was terminated in accordance with a fair procedure.*

As indicated, what is disputed in this Revision Application is whether there was non-compliance with the procedures when terminating the respondent's contract of employment. It has to be understood that, what amount to a fair procedure in terminating an employment contract is governed by Rule 13 of the Employment and Labour Relation (Code of Good Practice) GN No. 42 of 2007 provides that:

"13(1) The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.

(2) Where a hearing is to be held; the employer shall notify the employee of the allegations using a form and language that the employees can reasonably understand

(3) The employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted at the hearing by a trade union representative or fellow employee, what constitute a reasonable time shall depend on the circumstances and complexity of the case. But it shall not be less than 48 hours

(4) The hearing shall be held and finalized within a reasonable time and chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case

(5) Evidence in support of the allegation against the employee shall be presented at the hearing, the employee shall be given a proper opportunity at the hearing to respond to the allegations, question any witness called by the employer and to call witness if necessary"

In the above-cited Rule, the foremost procedure is to conduct investigation to ascertain whether there was a ground for a hearing to

be held. In my view, after the investigation was conducted, a report must be prepared and so far, there is no prescribed format on what should be included in the investigation report. What is important for my understanding is all the relevant information has to be included to demonstrate that a credible instigative process has been carried out to enable the employer to make a prudent and reasonable decision before inviting the employee to the disciplinary hearing.

Indeed, it is the investigation report which triggered the disciplinary action against the employee because his allegations is derived from the investigation report. The Court of Appeal in **Paschal Bandiho vs Arusha Urban Water Supply & Sewerage Authority (AUWASA),** Civil Appeal No. 4 of 2020 quoted with approval the case from the Republic of South Africa of **Avril Elizabeth Home for the Mentally Handicapped vs CCMA** [2006] ZALC 44 when deliberating on the procedure for fair termination according to their laws which is almost similar to Rule 13 of our Code of Good Practice, GN. No. 42 of 2007 on the requirement of an employee to be afforded a fair chance of hearing it pointed out that:

> *"This conception of the right to a hearing prior to dismissal... is reflected in the Code. When the Code refers to an opportunity that must be given by the employer to*

the employee to state a case in response to any allegations made against that employee, which need to be a formal inquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss, In the absence of exceptional circumstances, the substantive content of the process as defined by item 4 of the Code requires the conducting of an investigation, notification of the employee of any allegations that may flow from that investigation and an opportunity, within a reasonable time, to prepare a response to the employer's allegations with the assistance of a trade union representative of fellow employee. The employer should then communicate the decision taken and preferably communicate this in writing."

Given the foregoing, the respondent's counsel contends that, the affidavit tendered by the applicant before the CMA is not an investigation report and the same was not shared with the respondent which is fatal and it was a procedural irregularity. This view was also taken on board by the CMA which ruled out that the alleged "affidavit" which was tendered before the CMA is not an affidavit in the eyes of law and does not qualify to be an investigation report.

On her part, the counsel for the applicant admitted that the affidavit so tendered does not qualify as an "affidavit" in the eyes of law. However, she quickly prayed the Court not to consider the name of the

document rather than the contents of the document itself in which to her view, it was the investigation report. She strongly disputed the assertion that, the investigation report has to be shared to the respondent because the law does not provide for that requirement. She further added that, taking into consideration that in our case at hand the respondent admitted the misconduct, the irregularity on the procedure cannot results the respondent's termination to be adjudged unfair.

Having carefully examined the exhibits referred by the applicant's counsel specifically Exhibit D6 and Exhibit D15, I agree with the applicant's counsel that investigation was conducted, the report after investigation was prepared and its findings were presented in the disciplinary hearing. What seems to be contested is the title of the investigation report which was titled as 'affidavit' instead of investigation report which is popularly referred as *Ripoti ya Uchunguzi* in Swahili language.

It's true that in its strict sense, the "affidavit" presented by DW2 is not an affidavit in the eyes of the law as it does not have legal qualification as rightly decided by the CMA. However, upon analyzing with eyes of caution the evidence of DW2, it is clear that what is intended to be done by the applicant and what was actually done, was

the conduct of investigation on the allegation against the respondent. In the said investigation, the evidence was gathered, interviews were conducted with different personnel to whom the investigator thinks they are necessary to be interviewed, the respondent was also interviewed and involved where necessary to gather the correct information, and ultimately the detailed report which bears the title of the "affidavit" was prepared and forwarded to the responsible office. It was the said affidavit which triggered the disciplinary hearing.

As I have earlier stated, I have carefully scrutinised Exhibit D15, and I find a document with a detailed information on the offence alleged to have been committed by the respondent and finally the document gave out the findings. Therefore, it is my considered view that naming the document as an 'affidavit' and not an investigation report is not fatal and does not vitiate the contents of the report. I hold that view because not only the parties in this case understood the contents and the purpose of the said affidavit but also this being a labour Court, which is a court of law and equity is not bound with technicalities to ensure that justice is done timely without being tied up with technicalities and more important, to maintain the employer-employee relationship friendly.

The records of the CMA also bear testimony that, DW2 made a video presentation of the investigation findings presented in the disciplinary hearing, Exhibit D15 and the respondent got an opportunity to ask questions on the report presented by DW2. All this supports the applicant's assertion that the investigation was conducted.

Furthermore, on the issue of procedural fairness, the battle also rests on whether the investigation report was required to be served to the respondent. The counsel for the applicant strongly disputed that assertion as she avers that, Rule 13 of the Employment and Labour Relation (Code of Good Practice) GN No. 42 of 2007 does not require to serve the investigation report to the respondent. She went further to say that, since the respondent admitted the alleged misconduct charged upon her, procedural irregularity if any, has to be ignored while the respondent's counsel insisted that the investigation report has to be shared to the respondent and denied the fact that the respondent admitted the offence charged.

First of all, it should be noted that, each case is determined by its own facts. In resolving the disputant issue between the parties as to whether the investigation report is required to be served to the

respondent or not, I find it worthy to refer the case of **Kibobery Limited** (supra), where the Court of Appeal observed that:

> *"We also find it significant that although, according to the appellant's Huma Resource Manager, Magdalena Sabaya (RW1), the appellant, through its director, Erick Costa, conducted a full-fledged investigation into the allegations against the respondent after he was suspended from duty, the said report was never availed to the respondent, nor was it produced at the hearing before the CMA. The report according to RW1, was the basis of the disciplinary proceedings against the respondent. As we held in Severo Mutegeki (supra), the failure to involve the appellant in the investigation that led to the formulation of the report coupled with the omission to share a copy thereof with the respondent was a serious irregularity..."*

In our case at hand, the evidence on record shows that, the report conducted by DW2 linked the respondent who was interviewed by an investigator concerning with the interview of the social economic development post and the report was shared during the disciplinary hearing in which the respondent got an opportunity to know its contents and got an opportunity to cross-examine it. However, the records are silent if the said report is shared to the respondent prior to the disciplinary hearing.

It is manifest from the foregoing discussion that it is the investigation report which is the basis of the foundation of the charge levelled against the respondent who was then subjected to the disciplinary hearing without getting an ample opportunity to go through the report and to prepare her defence during the disciplinary hearing. Guided by the decision of **Kibobery Limited** (supra), I find that, it was prudent for the applicant considering the nature of the case to have shared the report to the respondent in order to get an opportunity to analyze the evidence which prima facie finds her that he had the charge to answer. Therefore, it is my considered view that, failure to share the report to the respondent is a serious irregularity which makes the procedure for termination to be unfair.

Before I conclude on the issue of procedural fairness, I now address the issue of the respondent's admission to misconduct. From the very beginning, I don't agree that the respondent unequivocally admitted the offence charge. I say so because, if the respondent could have been really admitted the offence charged, she could have done so consistently in all stages involved in determination of his case apart from when she was interviewed by the investigator. That is to say, the respondent could have also admitted when she appears in the

disciplinary hearing as well as in a full trial before the CMA. Since the clear admission is missing in all processes of determining her guilty of misconduct, the same cannot be considered by this court for it to rule out that there is no need for the procedures to be followed based on the respondent's admission. By the way, the plea entered by the respondent that it was human error is ambiguous plea as it does not admit the full particulars of the offence charged.

The next issue for consideration is the third legal issue which is all about the compensation entitled to the respondent after I have ruled out that the procedure for termination was contravened. Essentially, I don't think this issue needs to detain me much. The applicant's counsel submitted that, it was wrong for the Hon. Arbitrator to use its discretionary power to award twelve (12) months' salaries as compensation for unfair termination which based on procedures only, while the defence counsel submitted that, it was correct for the Hon. Arbitrator to award twelve (12) months' compensation.

In determining this legal issue, I am guided by the decision of the Court of Appeal in **Felician Rutwaza** (supra) and exercise my discretion to reduce the amount of compensation to be paid to the respondent based on the fact that, the CMA satisfied that, the

termination of the respondent contract of employment was fair in terms of reason and unfair in terms of procedure. Since the above findings were not challenged by either of the parties, I fully subscribe to the decision of this Court in **Sodetra (SPRL) Ltd v Mezza and Another**, Labour Revision No 207 of 2008, which also subscribed by the Court of Appeal in **Felician Rutazwa** (supra) that:

> *"We respectfully subscribe to the above interpretation, for we think it is founded on logic and common sense; it reflects a correct interpretation of the law. Under the circumstances, since the learned Judge found the reasons for appellant's termination were valid and fair, she was right in exercising her discretion ordering lesser compensation than what awarded by the CMA. We sustain that award."*

All said and considered, I hereby ordered the respondent to be paid three (3) months' salary as compensation for unfair termination of the employment contract in terms of procedure. I have reached the above decision after considering that, there was a valid reason for termination of the employment contract of the respondent. The act done by the respondent not only tarnish the applicant's image but also undermines the profession of human resource as a whole which deals with recruitment of competent employee without any favouritism. Again,

the profession requires a person of high integrity and of the highest ethical standard because he is entrusted with the welfare of the staff.

In the final analysis, I hereby allow the Revision Application and revise it to the extent explained therein. Since this is a labour matter, I make no order as to costs. It is so ordered.

Right of appeal explained.

M. MNYUKWA

JUDGE

24/04/2023

Court: Judgement delivered in the presence of the applicant's counsel and in the absence of the respondent.

M. MNYUKWA

JUDGE

24/04/2023