IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LABOUR REVISION NO. 27 OF 2022

(C/F Labour Dispute No. CMA/KLM.MOS/ARB/72/2020 in the Commission for Mediation and Arbitration for Moshi)

AFISA MTENDAJI MKUU TPC LTD..... APPLICANT

VERSUS

WILLIAM K. MARISA
RAJABU SAIDI ZISSO **.....RESPONDENTS**

JUDGEMENT

Date of Last Order: 10.10.2023
Date of Judgment: 28.11.2023

MONGELLA, J.

The applicant has moved this court vide **section 91(1) (a), (2) (b) and (c) of the Employment and Labour Relations Act, 2004** as amended (ELRA) and **Rule 24(1); (2), (a), (b), (c), (d), (e), (f); 3 (a), (b), (c) (d) and; 28 (1), (c), (d) and (e) of the Labour Court Rules, 2007, GN No. 106 of 2007**. He is seeking for this court to examine and revise the award of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/KLM/MOS/ARB/72/2020, so as to satisfy itself on the correctness, legality or propriety of the orders made thereon and to quash and/or revise the same as it deems appropriate.

The application was accompanied by the sworn affidavit of Mr. David Shilatu, learned counsel for the applicant. The 1st respondent disputed this application vide his sworn affidavit in which he duly swore on the 2nd respondent's behalf, as well.

The brief facts of this case are to the effect that: both respondents were employees of the appellant whereby the 1st respondent was employed on 01.09.2008 and the 2nd respondent on 31.07.2018. The applicant terminated their employment on 13.09.2013 for serious breach of trust and causing loss to the factory. Aggrieved, they both filed a complaint to the CMA vide a case referenced as "CMA/KLM/MOS/ARB/155/2013" which was decided in their favour. The applicant challenged the CMA award in this court vide Labour Revision No. 19 of 2016. Due to an apparent illegality, the award was quashed and the matter remitted back to the CMA for retrial, which was conducted under a case referenced as "CMA/KLM/MOS/ARB/72/2020."

In an attempt to prove that the termination was both procedurally and substantively fair, the applicant called three witnesses: DW1, Daudi Swalehe Mwanazi, TPC's investigation officer who tendered 4 exhibits; a weighing ticket issued on 31.07.2013 admitted as exhibit D1; a sugar store loading tally sheet for 31.07.2013 admitted as exhibit D2; a weighing ticket issued on 05.08.2013 and a sugar store loading tally sheet for the same day admitted as exhibit D3; and a sugar store loading tally sheet for 06.08.2013 admitted as exhibit D4. DW2, the employer's Human Resource Officer who tendered four

exhibits being; suspension letters issued to respondents collectively admitted as exhibit D5; the respondents' reply letters to the charge admitted as exhibit D6; the respondents' hearing forms admitted as exhibit D7 and respondents' termination letters admitted as exhibit D8.

To prove their claim that the termination was unfair substantively and procedurally, the 1st respondent gave his evidence as PW1and tendered his termination letter which was admitted as exhibit A1. The 2nd respondent gave his testimony as PW2 and tendered his termination letter, admitted as exhibit A2.

Upon considering the evidence of both parties, the CMA found the termination was procedurally fair, but substantively unfair. It proceeded to order the applicant to reinstate the respondents without loss of remuneration. Aggrieved, the applicant filed Labour Revision 37 of 2021 which was struck out for want of prosecution. Still determined to pursue his claim, she filed the application at hand. The applicant, under paragraph 16 of the supporting affidavit, raised 4 legal issues to be determined by this court being;

i. *Whether the arbitrator failed to analyse evidence in the course of determining the matter.*

ii. *Whether the arbitrator determined the matter on a new issue that was never framed and heard by the parties.*

iii. Whether the Award was unlawful, hence problematic.

iv. *Whether it was proved on the balance of probability that the termination was valid in terms of reason and procedure*.

The application was argued by written submissions whereby the applicant was represented by Mr. David Shilatu, learned advocate, while the respondents were represented by Mr. Manase G. Mwanguru, their legal representative.

Mr. Shilatu commenced his submission in chief by adopting the contents of his supporting affidavit. On the 1st issue he averred that there were three issues raised before the CMA which were; whether reasons for termination were fair, whether procedures for termination were complied with and what reliefs the parties were entitled to. He contended that it was testified that the respondents were both on duty on 31.07.2013 and that on the very day the truck with Registration No. T998 BAV with Trailer No. T110 BAW was present. That, it was proved in evidence that on diverse dates, that is, on 05.08.2013 where the 1st respondent was the sugar store foreman, as per Exhibit D3, and on 06.08.2013 when the 1st respondent was the foreman of the sugar store, the same truck appeared for weighing whereby it weighed 18860 at first and when 14 people were told to get off the truck, the same weighed 18080 meaning that the truck had extra 780kg equivalent to 50 bags of sugar. He referred the court to exhibit D4 in proof of his argument. Mr. Shilatu added that people found hiding in the truck were at all

times loaded off at the sugar store which was under supervision of the respondents.

Mr. Shilatu further went on stating that the respondents were fairly terminated as they were suspended as exhibited in exhibit D5. That, they wrote their explanations as seen in exhibit D6, they were summoned for hearing as seen in exhibit D7 and were terminated by letters, as exhibited in exhibit D8. In the circumstances, he was of the view that the arbitrator failed to analyse the evidence before her and thus failed significantly to reach into a fair and just decision.

Addressing the 2nd issue, Mr. Shilatu was of the view that the CMA introduced a new issue in its award when it stated that the respondents were terminated for conspiracy to steal. He contended that the respondents were charged under clauses; 14. Which provides for the offence of dishonesty or any major breach of trust, 17. on causing serious loss of the employer's property and 18. on theft of employer's property. He contended that raising such a new issue amounted to condemning the parties unheard. Further, he challenged the arbitrator for holding that it did not find any negligent role played by the respondents while there was never a ground of negligence argued before her. In support of his argument, he referred the case of **Faidha Shabani Ally vs. Brac Tanzania Financ**e (Labor Revision 12 of 2021) [2022] TZHC 11991 (supra) and **National Oil (T) Limited vs. Farida Jumbe and 3 others** [2018] LCCD 10.

Concerning the 3rd issue he averred that the CMA award was unlawful, hence problematic. He had such stance on the grounds that, first, it was made without evidence being properly analysed; two, the arbitrator introduced a new issue in the award and three, that contrary to what the CMA held, the evidence on record proved the reasons for termination of the respondents which was involvement in stealing 780kgs of sugar from their employer, but the arbitrator stated it was 50 bags of sugar. He averred that the respondents had been in a cartel whereby they falsified the weight of the trucks and the same involved multiple employees who were also terminated from employment.

With regard to the 4th issue, Mr. Shilatu submitted that the applicant proved that the termination was procedurally fair, a fact that was also admitted by the arbitrator. As to whether the reason for termination was fair, he reiterated his stance that the arbitrator introduced a new issue in the course of determining the dispute. He maintained that the applicant terminated the respondent's employment for dishonesty or major breach of trust and or causing serious loss of the employer's property which were proved before the CMA. He insisted that by raising a new issue the arbitrator had denied the parties the right to be heard. He prayed for the award to be revised, quashed and all orders of the CMA set aside as the award was completely unlawful, problematic and irrational.

In reply, prior to arguing the issues advanced in the application, Mr. Mwanguru raised a legal issue to the effect that the revision was

filed out of time. He averred that the CMA award was delivered on 20.09.2021 and the applicant filed Revision No. 37 of 2021 within the 42 days prescribed under the law, which was struck out for want of prosecution. He contended that the application at hand was filed in more than 14 months later, that is, after 425 days and without any leave of this court. In the premises, he prayed for the application to be dismissed with costs.

Addressing the issues in the main application, Mr. Mwanguru had the view that the case against the respondents was not proved. He contended that while the employer charged them for theft or loss of bags of sugar which were loaded on truck No. T. 998 BEV with trailer No. T. 110 BEW, there was no evidence adduced as to what happened to the said truck after they learnt of the loss and the people involved with the truck were never called to the CMA to prove that they collaborated with the respondents. Further, he contended that there was no vehicle found with the alleged missing bags before 03.08.2013 or after such dates and that since it was a criminal offence the employer ought to have taken them to court which was not done.

Mr. Mwanguru neither denied that 14 people were found in the said truck nor that upon the truck being weighed on the second time after people got off, the weight of the truck was lower than at first instance it was weighed with people inside. However, he averred that it was strange that the employer took the variation between the initial weight and the second weight and alleged that the same

amounted to 780kgs which was equivalent to 50 bags while no such bags were ever caught. He insisted that there was no negligence employed by the respondents. That, the arbitrator rightfully analysed the evidence of both parties and found that the applicant failed to prove that the misconducts on which they were charged were correct and true.

As to the claim of new issues being raised in the award of the CMA, he was of the view that the same was not true. He argued that the arbitrator confined herself to the issues agreed between parties. He supported the CMA findings saying that it was right in not considering the company code of conduct and instead considered the law which provides that the duty to prove fairness of termination lies on the employer as provided under **section 39 (1) of the ELRA**. He had the stance that the employer failed to discharge his duty.

Reacting on the assertion that the award is unlawful, Mr. Mwanguru disputed the same averring that all necessary procedures were observed by the CMA. He said that the parties were given opportunity to file their opening statements, to bring witnesses and exhibits and finally to file their final submissions. He maintained his stance that the employer failed to prove his allegations against the respondents since she took the difference between the first weighing and the 2nd weighing as the value of excess weight and reasoned that the same amounted to 50 bags of sugar, which was an assumption on her part.

On whether the applicant had proved that the termination was both procedurally and substantively fair, he contended that the applicant failed to discharge such burden. As to procedural fairness, he averred that it was wrong for the employer to appoint DW3 as chairman of the disciplinary hearing while he was the 1st respondent's boss and the sugar allegedly stolen was under his supervision as he was the factory executive officer. In the premises, he contended that it was hard for DW3 to act justly and it was clear violation of the ELRA and the **Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007**.

While asking the court to take note that this matter has been in courts for 11 years, Mr. Mwanguru also asked the court to take note that no action was taken by the employer against the driver of Truck No. 998 BEV for the excess weight; and that the truck did not belong to either of the respondents but was from Marenga Investment Co. Ltd. That, on 05.08.2013, the 1st respondent had the duty to load 900 bags of sugar and he did so without exceeding the limit and on the said day, the 2nd respondent was absent as he was on leave. On 31.07.2013, the 2nd respondent also supervised the loading of 900 bags of sugar and there was no excess sugar loaded. Further, he argued that the loading of sugar into trucks is a work involving 16 people, hence it was questionable as to why the rest of individuals were left at work and no action was taken against them.

Mr. Mwanguru maintained that the respondents were unlawfully terminated and the applicant was intentionally employing delaying tactics. He thus asked the court to dismiss this application.

Rejoining, Mr. Shilatu challenged that Mr. Mwanguru wrongly raised his issue before this court as he did not inform this court on his intention to raise the objection. He also contended that the same is not a point of law. He further alleged that Mr. Mwanguru had misdirected this court as he averred that Labour Revision No. 37 of 2021 was dismissed while the same was struck out. He averred that the two terms vary. He cited the case of **Cyprian Mamboleo Hizza vs. Eva Kioso & Another** (Civil Application 3 of 2010) [2011] TZCA 40 TANZLII, whereby the Court of Appeal elaborated on the difference between the terms. He also cited the case of **Salma A. Walii (suing as Administrator of the estate of the late Gulbanu Abdul Rasul Walii vs. NHC** (Land Case 16 of 2020) [2022] TZHC 1116 TANZLII in which the case of Cyprian Mamboleo Hizza was applied.

With regard to the legal issues for determination of the application at hand, he averred that Mr. Mwanguru failed to address the court on the same. He maintained his prayers for this court to revise the award of the CMA and set aside the orders issued as the same was completely unlawful, problematic and irrational.

I have given the arguments by both parties, due consideration. As drawn from the brief history of this application, there was a case, "CMA/KLM/MOS/ARB/155/2013" filed by the respondents which

was determined in their favour. The applicant challenged the said dispute vide Labour Revision No. 19 of 2016 in which this court, having found the award coupled with irregularity, remitted the case back to the CMA for retrial which was done vide case no CMA/KLM/MOS/ARB/72/2020. The applicant challenged CMA/KLM/MOS/ARB/72/2020 by filing Labour Revision 37 of 2021 that was apparently struck out on 22.11.2022 for want of prosecution.

The respondent in a rather discouraged approach raised the issue that this application was brought out of time and without the consent of this court. While it is discouraged for parties to raise new issues in submissions, this issue concerns a matter of jurisdiction. It is settled law that issues of law, particularly on jurisdiction can be raised at any time and any stage of proceedings so long as the parties are accorded the opportunity to address the court on the same. In this case, the applicant had the opportunity to address the court on the issue and chose to address the court in the manner he did. See, **Isaya Linus Chengula vs. Frank Nyika** (Civil Application 487 of 2020) [2022] TZCA 167 TANZLII and; **Said Mohamed Said vs. Muhusin Amir & Another** (Civil Appeal 110 of 2020) [2022] TZCA 208 TANZLII.

The issue raised by the respondent stems from the fact that this application is a second application filed by the applicant to challenge CMA/KLM/MOS/ARB/72/2020, a fact depicted under paragraph 2 of Mr. Shilatu's supporting affidavit which states:

> *"2. That this Application for Revision has been filed afresh following the former one being struck out for want of prosecution on 22nd November 2022."*

The same fact was also stated under Paragraph 4 of the 1st respondent's counter affidavit which states:

> *"Aya ya 2 imeonwa na kujibiwa kwamba, tunakubaliana na baadhi kwamba ni kweli kulikuwa na Revision ya kwanza ambayo* ***No. 37 ya 2021*** *na shauri hilo liliondolewa* ***(struck out)*** *kwa sababu za Mwajiri* ***(mleta maombi)*** *kutojitokeza mbele ya Mahakama bila sababu wala taarifa yoyote…"*

Mr. Mwanguru's argument is two-fold, that the application is time barred and application has been brought without leave of this court. His averment was that the CMA award was delivered on 20.09.2021 and Labour Revision No. 37 of 2021 was filed on time, but the same was struck out for want of prosecution. That, the applicant filed this application more than 14 months (425 days) without leave of this court.

I, in fact, agree with Mr. Mwanguru that the application at hand, being a fresh application for review is indeed time barred. Since the applicant decided to file a fresh application, the time started to run the date the CMA award was delivered, which was 20.09.2021. In that regard the application at hand deserves to be dismissed for being time barred.

However, before I pen down, I wish to express my opinion that I wonder why the applicant resorted into filing a fresh application for revision, which was not only time barred, but contrary to the dictates of the law. Since the applicant's application, that is, Labour Revision No. 37 of 2021, was struck out for want of prosecution, she ought to have filed an application for restoration of Labour Revision No. 37 of 2021 instead of filing this application. While I note the difference between striking off and dismissing as elaborated in **Cyprian Mamboleo Hiza vs. Eva Kioso and Another** (supra), in circumstances where a labour dispute before this court is struck out for lack of prosecution, the remedy is for the applicant to file an application for restoration and the court will re-enrol the matter upon the party providing satisfactory explanation on his failure to attend the court. This is provided under **Rule 36 of the Labour Court Rules** which states:

> "**36-(1)** Where a matter is struck off the file due to the absence of a party who initiated the proceedings, the matter may be re-enrolled if that party provides the Court with a satisfactory explanation by an affidavit, for his failure to attend the Court.
>
> (2) The affidavit shall be filed in Court and the Registrar shall place it to be heard by a Judge in chambers to decide whether the matter may be re-enrolled or not.
>
> (3) The presiding Judge before whom the affidavit is placed may order that an

> application for re enrolment be made and, in that event, the application shall be in accordance with rule 24"

The applicant did not bother to file an application for restoration and instead filed a fresh application before this court which is contrary to the requirement of the law. Since no restoration order was bestowed and the matter at hand is time barred, this court lacks jurisdiction to entertain this application. In the premises, the application is hereby dismissed. Since this is a labour matter, I make no orders as to costs.

Dated at Moshi on this 28th day of November, 2023.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA