IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB -REGISTRY OF MWANZA

AT MWANZA

LABOUR REVISION NO. 34 OF 2023

BETWEEN

MWITA EVANCE MOKA.....APPLICANT

AND

CRDB BANK PLC .....RESPONDENT

RULING

16/04/2024 & 03/05/2024

CHUMA, J.

Aggrieved by the award of the Commission for Mediation and Arbitration for Mwanza (hereinafter referred to as the CMA) the applicant preferred the instant application for revision. It is made under sections 91 (1)(a)(b), (2)(a)(b) and 94 (1)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004 and rules 24 (1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and 28 (1) (c)(d)(e) of the Labour Court Rules GN. No. 106 of 2007. The applicant is seeking an order that:

(a) The Court is to call for the original CMA records with ref. CMA/MZA/NYAM/278/2021/118/2021 decided by Hon. E. L. Kimaro, Arbitrator dated 28th July, 2023, and inspect the records

therein and its proceedings to satisfy itself as to the correctness, rationality, legality, logic, and propriety of CMA findings and the entire Award and proceedings.

(b) The Court be pleased to revise, quash, and set aside the impugned Award and its proceedings and thereafter determine the dispute on its merits in the manner it considers appropriate.

(c) Any other reliefs that this Honorable Court may deem fit to grant.

The facts giving rise to this application are easily comprehended from the parties' affidavits. From June 2011, the applicant became a permanent and pensionable employee of the respondent stationed at the Bugando branch. The applicant served in different positions and was posted to various branches until 20th August 2021, when he was appointed as a team leader cash center.

Shortly after the promotion, the respondent transferred the applicant to Musoma Branch in Musoma. The applicant had no qualms with the transfer, for, he reported at his new working station on 6th September 2021. Two days later, to be precise, on 8th September 2021 the applicant informed his Branch Manager of his health condition and asked for permission that on 5th October 2021, he would travel to Bugando Hospital, Mwanza to attend his regular medical clinic and treatment. The

applicant's request was rightly rejected and from there, the employment relationship between them turned sour.

Flabbergasted by the notice of illness, the respondent ordered the applicant to be retransferred back to his previous work post at the Bugando Branch. She further directed the applicant to resume his prior role as Relationship Officer with its corresponding salary and his transfer payment of TZS. 8,398,110.50 to Musoma had to be refunded. Not only that, a few days after resumption, the respondent flagged the applicant's staff bank account effective from 20th September 2021 making him unable to access any money for personal, work-related expenses, and family use. Efforts to request the respondent to unflag the account ended to no avail. Finding such affairs unbearable, the applicant filed a tortious complaint before the CMA alleging that the respondent was treating and commanding him to work without following proper procedure. According to the applicant, such conduct subjected him to mental suffering and psychological torture hence, he prayed for the following reliefs:

(a) The declaration that the complainant is the employee of the respondent.

(b) The respondent did the torture to the complainant unlawfully.

(c) The applicant be paid TZS 500,000,000.00 as the general damages.

(d) The applicant be paid TZS 100,000,000.00 being specific damages.

The respondent on her part disputed the claims that she never committed any tortuous act against the applicant. She averred that the applicant used to receive all his salaries through his bank account. Regarding flagging of the account, the respondent stated that it was done following an investigation that was conducted against the applicant however, it was unflagged after the investigation.

After hearing the parties, the CMA had three issues for deliberation. One, whether the respondent committed the tortious act(s) against the applicant, two if the first issue had to be answered in the affirmative, whether the applicant suffered damages and to what extent, and three, what reliefs were the parties to the dispute entitled to. All issues were resolved in the negative. The CMA found that there was no substance in the applicant's evidence to prove that the respondent committed any tortuous act against the applicant.

The finding was based on the fact that the issue of illness which brought the whole fracas was not communicated to the respondent until

when the applicant was promoted to a team leader post and transferred to Musoma Branch. It held further that the applicant was not a trustworthy person to his employer accepting transfer entitlement knowingly that he had health problems. Consequently, the CMA disallowed the reliefs prayed.

Dissatisfied, the applicant filed the instant application alleging that in determining whether the respondent committed tortious acts against the applicant, the trial Arbitrator did not analyze all the documentary evidence tendered by the parties nor did discuss the issue of flagging the applicant's bank account.

Before me for hearing of the application on 19th February 2024, the applicant appeared in person, fending by himself while the respondent had the services of Ms. Marina Mashimba, learned advocate. Upon taking the floor, the applicant submitted that the Arbitrator never evaluated well the evidence presented before it. The applicant faulted the Arbitrator for not considering that his account was unreasonably flagged for 39 days from 20th September to 29th October 2021.

He further argued that the act was unjustifiable because there was no proof of investigation or order from competent executive authorities necessitating the freezing of the account. He also challenged the

Arbitrator for not contemplating the weight of exhibit P7 (transfer expenses) and the fact that PW1 admitted that the transfer benefits were perfectly paid and the respondent failed to cater for his treatment expenses contrary to the internal procedure. In view of his submission, the applicant implored the Court to revise and quash the CMA's decision and set aside the impugned Award. In lieu, therefore, order the respondent to pay compensation.

Contesting the application, Ms. Mashimba at first conceded the fact that the applicant's account was flagged and the CMA left the issue unattended. However, it was her stance that the whole evidence was considered and the respondent was justified to flag the account owing to the conversation the two parties had on 8th September 2021. In that talk, it was agreed the applicant should return to Mwanza and he would refund back transfer benefit paid to him. As a result, the applicant wrote a letter (exhibit D2) admitting repayment of the transfer benefit but requested to pay it via installments. The learned advocate argued further that even though there was no procedure to flag the account, such conduct was manifested by the applicant's refusal to remit back the paid transfer benefit. Ms. Mashimba was also of the opinion that flagging the account did not cause damage because the applicant received transfer benefits

TZS 8,398,110.50 but he did not return such amount despite being retransferred back in Bugando, Mwanza.

Regarding the grounds of illness, Ms. Mashimba being alive with the settled law that that parties are bound by their pleadings submitted that it is an afterthought argument since it was not pleaded in the CMA Form I. That notwithstanding, the learned counsel argued that the complaint had no merit since no evidence was rendered to prove that the applicant had health problems at the time of the interview.

Mr. Luhigo, a learned Advocate who was engaged belatedly rejoined for the applicant. Following Ms. Mashimba's concession that the trial Arbitrator did not discuss or consider the issue of flagging an account of the applicant in its decision, he submitted that the Court should revise, re-evaluate the evidence testified at CMA, and decide the matter accordingly.

Otherwise, Mr. Luhigo replied that the freezing of that account was not due to investigation as no evidence led to that effect. In his opinion, the evidence of DW1 and DW2 who were Human Resources and Retail Banking officers could not establish the link between flagging and investigation because the latter was conducted by a forensic department from whom no witness was summoned. Alternatively, the learned

advocate submitted that since the transfer expenses were lawfully paid to the applicant and the investigation was against the applicant himself, there was no rationale for flagging his account. His end remark on this point was that flagging of the account adversely affected the applicant in that he failed to bear medical expenses and daily upkeeping such as food and transport.

I have carefully followed the parties' competing submissions and considered the chamber summons along with affidavits for and against the application. The crucial part standing for determination is whether the trial Arbitrator abrogated her duty to properly evaluate the evidence in deciding the matter in favor of the respondent. Narrowing it down, the applicant's main complaint in his affidavit as well as submission is that the CMA grounded its decision without considering the issue of flagging his account.

As rightly conceded by the learned counsel from both sides, despite flagging of applicant's staff bank account being prime and central to the dispute, for unknown reasons, was left out in the Arbitrator's findings. Looking at pp. 4, 5, 10, and 11 of the Award, it is clear that the Arbitrator summarized the evidence on flagging the account but her reasoning was premised on other matters. In our adversarial system, the law is settled

that any adjudicator or Arbitrator has an unfettered duty to weigh up all of the evidence properly adduced and admitted as a whole and determine what version is more probable than the other. That involves findings of facts based on an assessment of the credibility of the probabilities, and the assessment of the applicable rules in the light of those findings to come to a conclusion. In a persuasive South African case of **Stellenbosch Farmers' Winery Group Ltd and Another v. Martel et Cie and Others** 2003 (1) SA 11 of (SCA), the Supreme Court of Appeal held the following on the duty of the court or tribunal when making findings:

> *"The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities… In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it".*

It is again the law that when a particular fact forms part of the pleadings and the evidence was led by the parties though it was not among the issues which were specifically framed by the trial court for determination, then the trial court is left with an obligation to decide. A

similar stance was stressed in the case of **Well worth Hotels & Lodges Limited & Another v. Enterprises (Tanzania) Limited** (Civil Appeal No.73 of 2020) [2023] TZCA 17497 (11 August 2023), where the Court of Appeal of Tanzania stated the following:

> *"As amply demonstrated through the relevant paragraphs of the record of appeal reproduced above, since the issue concerning the arbitration clause was brought in the trial court's record through pleadings and evidence, we agree with Mr. Kibatala that parties were sufficiently given the right to be heard on the same, and thus the trial judge was entitled to decide on that issue. As such, our thorough scrutiny of the record of appeal bears that according to the conduct of the suit during the trial, the matter was left to the court for decision".*

See also **James Funke Gwagilo v. The Attorney General** [2004] T.L.R. 116

Flowing from the foregoing decisions in the light of the prevailing circumstances, it is plain and clear that the Arbitrator abrogated her duty by failing to consider the question of flagging the account in her decision. Mr. Luhigo beseeched the Court to step into the shoes of the CMA to revise and re-evaluate the evidence. Before heeding such an invitation, it is apt to recall the parameters of revisional powers against decisions of

the CMA. In this, I am not sailing in a virgin territory as it has already been traversed before and received judicial interpretation, for instance in the case of **I-Tech Tanzania v. Monica Hosea Macha** (Civil Appeal 227 of 2020) [2023] TZCA 17274 (23 May 2023), our Apex Court of the land held the following:

> *"We are aware that, in terms of section 94 (1) (b) of the Employment and Labour Relations Act [CAP 366 R.E. 2019], the Labour Court is clothed with among others, jurisdiction to revise the decisions of the Arbitrator originating from the CMA. The purpose of revision which is done by a superior court, is to enable that court to examine the record of the lower court in order to ascertain the legality, propriety, and correctness of any finding, order, or any decision made thereon and as to the regularity of the proceedings of the lower court. In our jurisdiction, this is the gist of the statutory provisions that mandate courts to invoke revisional powers on the decisions of the lower courts…Moreover, in the exercise of revisional jurisdiction, the upper court may as well reverse the decision of the lower court or tribunal".*

Again, in **Patrick Magologozi Mongella vs The Board of Trustees of The Public Service Social Security Fund** (Civil Application 342 of 2019) [2022] TZCA 216 (22 April 2022), the Court had the following on

the scope of powers of court when exercising revisional jurisdiction: one, regarding the legality of a particular decision or order, the court is required to examine if that decision or order has the quality of being legal in the light of the applicable law or doctrine; two, correctness and propriety of any impugned decision or order involves an endeavor to determine if the order is legal and proper; three, the inquiry into the regularity of the impugned proceedings will involve examining whether the proceedings followed the applicable procedure and accorded with the principles of natural justice and fair play. It concluded that none of those endeavors will involve a re-appreciation or re-appraisal of the evidence on record, which, is what the Court does while exercising its appellate authority. See also **Olmeshuki Kisambu v. Christopher Nain'gola** [2002] T.L.R 280 at 283.

Guided by the decisions referred to, it is my reading and understanding that the scope and parameters of the Court's revisional jurisdiction do not involve the authority to re-assess or re-appreciate the evidence on record and come up with a new finding. The prayer sought by Mr. Luhigo that the Court should step into the shoes and consider the evidence that was ignored or rather left out by the CMA has no place to

lean on. It would be proper to exercise such powers if the matter before this court was an appeal.

In the event, and for the reasons stated above, the application is granted, and the CMA decision as well as the Award are hereby quashed and set aside. The matter is remitted to the same Arbitrator for the recomposition of the Award based on all important factual settings led by parties during the hearing. Since the matter arises from a labour dispute, I desist from making an order for costs.

Order accordingly.

DATED at **MWANZA** this 3rd day of May, 2024.

W.M. CHUMA

JUDGE

Ruling delivered before Mr. Mwita Evance Moka the applicant in person and Mr. Iche Mwakila advocate for the Respondent this 3rd day of May, 2024.

W.M. CHUMA

JUDGE