IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI SUB REGISTRY

(LABOUR DIVISION)

AT MOSHI

LABOUR REVISION APPLICATION NO. 18 OF 2023

(Arising from Labour Dispute No. CMA/KLM/MOS/ARB/104/2020)

TPC LTD ..... APPLICANT

VERSUS

VEDASTUS WANJARA ..... RESPONDENT

JUDGMENT

13/05/2024 & 22/05/2024

SIMFUKWE, J.

The applicant, TPC LTD, filed the instant application after being aggrieved with the ruling of the Commission for Mediation and Arbitration (CMA), in Labour Dispute No. CMA/KLM/MOS/ARB/104/2020 of Moshi dated 4th August, 2023. The application was filed under **section 91 (1)(a)(2) (b), section 91 (4) (a)(b) and section 94(1) (b) of the Employment and Labour Relation Act,** Cap 366 R.E 2022 read together with **Rules**

24 (1), (2), (a), (b), (c), (d), (e) (f), 3(a) (b) (c) and (d), 28 (1) (c) (d) and (e) of the Labour Court Rules, 2007, G.N No. 106 of 2007 and any other enabling provisions of the law.

The applicant prayed for the following orders:

a) *That, this honourable court be pleased to call for the record, revise and set aside the whole Award of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/KLM/MOS/ARB/104/2020 and examine the legality, propriety and correctness of the Award and orders made thereon and quash and or revise the same as it deems appropriate so to do.*
b) *That, this honourable court be pleased to determine the matter in the manner it considers appropriate and give any other relief it considers just to grant.*

The application was supported by an affidavit sworn by Mr. David Shilatu, learned counsel for the applicant.

The history of the dispute is that the Applicant and the Respondent had employer - employee relationship since 23rd May, 2013 when the respondent was employed as a store keeper. On 24th September, 2020

the respondent was terminated from employment on the reason of gross incompetence and being under influence of alcohol during working hours. Dissatisfied with termination procedures, the respondent filed the dispute before the CMA challenging his termination. Upon determination of the dispute between the applicant and the respondent, the CMA ordered the applicant to pay the respondent compensation of 12 months' salary, severance and one month salary in lieu of notice.

Upon being dissatisfied with the CMA Award, the applicant filed this application for revision and raised the following legal issues for determination:

i. *Whether the Arbitrator failed to analyze the evidence while determining the matter.*
ii. *Whether the Arbitrator considered the fact that the respondent was furnished with an opportunity to appeal internally.*
iii. *Whether the Award was unlawful and hence the same is problematic having violated the principle of stare decis/precedent.*

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

When the matter was called for hearing, the applicant was represented by Mr. David Shilatu, learned counsel whereas the respondent enjoyed the service of Mr. Leonard Mashabala, learned counsel. The hearing was by way of oral submissions.

In his submission in chief, Mr. Shilatu prayed to adopt his affidavit to form part of his submission. Arguing the first issue whether the Arbitrator failed to analyse evidence while determining the matter; Mr. Shilatu submitted that it is obvious that the arbitrator failed to make thorough evaluation of evidence presented before her. That, evidence of all witnesses who were called by the employer stated how the respondent failed to fulfill his duties as a store keeper. They informed the Commission that the respondent exhibited gross negligence, incompetency and he was under influence of alcohol on the material date. Exhibits were tendered to substantiate the allegations levelled against the respondent. Mr. Shilatu averred that the respondent did not tender any exhibit to refute the fact that he was under influence of alcohol, the fact which was not considered by the Arbitrator

in his decision. Mr. Shilatu urged this court to consider that there was no proper analysis of evidence.

Submitting on the second issue whether the Arbitrator considered the fact that the respondent in his termination letter was furnished with an opportunity to appeal internally; Mr. Shilatu explained that it is the rule of law currently in the **Employment and Labour Relations Act** (supra) together with its Rules, that prior to filing his labour dispute before the CMA an employee must appeal internally. That, the same is provided under **rule 4 (12)** of GN No. 42 of 2007 (Guidelines for Disciplinary, Incapacity and incompatibility Policy and Procedures). The learned counsel explained further that the guideline requires the employee aggrieved with the decision of his employer, to appeal internally. That, the internal appeal is filed in a prescribed form. It was contended that, in the instant matter, the respondent did not produce before the CMA the appeal form.

Also, Mr. Shilatu asserted that, **Rule 4(15) of GN No. 42 of 2007** (supra) directs the employee to exhaust internal remedies but the respondent did not do so. Mr. Shilatu cemented his submission by referring to the case of **Delight Aminiel Mushi v. Equity Tanzania**

LTD, Labour Revision No. 01/2022, at page 15-17 where **Hon. Mwenempazi J,** observed that:

> *"In light of the above finding of this court, the CMA determined the matter prematurely, and therefore the same was incompetent for contravening the law as explained above….*
>
> *From the foregoing reasons, I find that this application for revision lacking merit and proceed to dismiss it. The CMA decision and order are hereby quashed and set aside. The applicant if so wishes, may challenge the decision by following a proper channel. It is so ordered."*

Centred on the above authority, Mr. Shilatu advised the respondent to follow the proper channel by exhausting internal remedies by challenging the decision of the employer internally.

On the third issue whether the award is unlawful; Mr. Shilatu submitted that, the award was unlawful because; ***first***, the award did not comply with **rule 4 (12) and 4(15)** of G.N. No. 42/2007. **Second**, the award contravened the case law cited hereinabove. The learned counsel urged

this court to find that the CMA award contravened the law and hence, a nullity in the eyes of the law.

Supporting the fourth issue whether it was proved on balance of probabilities that the termination was valid in terms of reasons and procedure; Mr. Shilatu averred that, first, before the CMA the respondent did not call any witness apart from himself despite the fact that he had a representative. He averred further that, the respondent was issued with a letter explaining the charges against him and he replied it in writing. Second, the respondent appeared before the disciplinary hearing. He was accorded an opportunity to cross examine all witnesses who testified against him. Moreover, the respondent was terminated through a letter which explained his right to appeal within five working days. The learned counsel believed that the employer complied to all procedures and had a very good reason to terminate the respondent.

In his conclusion, Mr. Shilatu urged this court to revise the CMA award accordingly and all orders issued by CMA be quashed and set aside. That, the respondent be advised to comply with the law in pursuit of his rights.

Replying the first issue which concerns failure to analyse evidence properly, Mr. Mashabala submitted that the Arbitrator analysed evidence properly and reached at a correct decision after hearing all witnesses.

On the issue of exhibit T5, Mr. Mashabala opined that its authenticity is questionable as the level of alcohol which the respondent was alleged to have been found with, contradicts with the level of alcohol indicated in the charge (exhibit T6). That, in exhibit T5 it is indicated that alcohol was 2 while in exhibit T6 it is indicated that the alcohol was 0.2. Moreover, exhibit T5 did not indicate the author of the document and it has no signature. That, most of the documents of the applicant have a logo of TPC while exhibit T5 has no logo. Mr. Mashabala insisted that the Arbitrator analysed evidence properly, that's why she reached at such decision.

Opposing the second issue on whether the respondent was accorded with an opportunity to appeal internally; the learned counsel contended that, the respondent was not accorded with that opportunity due to the following reasons:

First, hearing form is prescribed by the law. In **the Employment and Labour Relations (Code of Good Practice) Rules,** G.N No. 42 of 2007

at page 75 it is shown that the hearing form has three parts. The first part is supposed to be filled by the chairperson of the disciplinary hearing, the second part is filled by the employee, while the third part is filled by the senior Manager who heard the appeal. Mr. Mashabala expounded that, exhibit T4 which was tendered by the applicant was Part I of the hearing form. That, the employer was supposed to give the employee Part II but the respondent was never given that part of the hearing form. The respondent was given Part I of the hearing form. He argued further that, exhibit T4 is contrary to the form prescribed by the law under **Rule 4(9) of the Guidelines for Disciplinary Incapacity Policy and Incompatibility Procedure Rules, G.N. No 42 of 2007,** which directs that after a disciplinary hearing, the chairperson must supply to the employee a copy of disciplinary hearing form and right to appeal must be explained. That, right to appeal is at Part II of the hearing form.

Moreover, Mr. Mashabala said that before the CMA, the applicant tendered exhibit T4 which was part of the disciplinary hearing form and it did not explain right to appeal. That, the respondent being a layman did not know that he was supposed to appeal. He cemented his argument by referring **Rule 4(12) of the Guidelines for Disciplinary, Incapacity and Incompatibility Procedures** (supra) which prescribes how an

employee may appeal. That, exhibit T4 had no appropriate part for filling for the purpose of an appeal. That being the case, the learned counsel averred that the respondent was denied his right to appeal internally.

Regarding the third issue whether the award was lawful; Mr. Mashabala believed that the award was lawful due to the fact that evidence was contradictory. That, exhibit T5 and T6 are relevant. Also, exhibit T4 at part four, among the witnesses there was Eliamini Manase who was not supposed to be among the witnesses but he testified before the CMA.

On the fourth issue, Mr. Mashabala opined that, the employer had no reason to terminate the respondent. Moreover, the employer did not adhere to the prescribed procedures explained in their reply to the 2nd and 3rd issues. Negligence which occasioned loss to the employer, was among the charges leveled against the respondent. The respondent prayed that an audit be conducted at the store but they refused, as a result he was terminated. In that regard Mr. Mashabala implored this court to confirm the decision of the CMA and if possible, to consider that this matter arose in 2020, therefore, the respondent should be awarded more payment.

In his rejoinder, Mr. Shilatu contended that the respondent was terminated through a letter as indicated in CMA Form No.1. That, exhibit

T4 is part of a hearing process. He contended further that the said form was signed by the respondent at the end of hearing. Exhibit T4 is part of CMA and High Court records. That, the allegation that the said form had no Part II was not part of the record and it was not cross examined. Thus, the hearing form was complete as all rights were accorded to an employee, including right to appeal, which he did not see the reason to exercise.

Concerning rule 4(12) which prescribes how an employee may appeal; Mr. Shilatu conceded that, an employee must fill a prescribed form. The learned counsel insisted that, that was an issue of evidence that's why they are here for revision. The learned counsel insisted further that; it is obvious that the respondent signed a complete hearing form. Meaning that the assertion that the respondent was not furnished with Part II of the hearing form was completely an afterthought.

Regarding the allegation that evidence was contradictory, Mr. Shilatu submitted that the respondent could have presented it as his ground of appeal in his internal appeal. All that was not done, hence, raising it before this court amounts to afterthought.

Mr. Shilatu reiterated his prayer that the CMA award be quashed, set aside and revised.

I have keenly considered the rival submissions of the learned counsels of both parties, the raised legal issues and the CMA records. I think the best way to approach the matter is to start with the issue on point of law, that is the second legal issue herein above.

On the second legal issue, the learned counsel for the applicant moved this court to determine whether the respondent prior to filing his dispute before the CMA exhausted the available internal remedies. Arguing this issue, Mr. Shilatu referred this court to **rule 4(12) of GN No. 42 of 2007** (Guidelines for Disciplinary, Incapacity and incompatibility Policy and Procedures) Rules which requires an employee prior to filing his Labour dispute before the CMA, to appeal internally. Also, he referred to Rule 4(15) which directs an employee to utilise dispute mechanisms contained in the **Employment and Labour Relations Act** to challenge the outcome of his appeal.

The assertion was contested vehemently by Mr. Mashabala who was of the opinion that the respondent was denied her right to appeal internally as he was not supplied with Part II of the hearing form. He relied on **Rule**

4(9) of the Guidelines for Disciplinary, Incapacity Policy and Incompatibility Procedures Rules.

According to the arguments of both parties, the issue is whether the matter before the CMA was filed prematurely.

On the outset, I subscribe to the position of the law forwarded by Mr. Shilatu that before filing a dispute before the CMA, the applicant must exhaust internal available remedies, in our case, that is right to appeal internally. This is according to **rule 4(12) of GN No. 42 of 2007** which reads:

> *"An employee may appeal against the outcome of a hearing* ***by completing the appropriate part of the copy of the disciplinary form*** *and give it to the chairperson within five working days of being disciplined together with any written representations the employee may wish to make..."* Emphasis added

In addition to that, **rule 4(15) of G.N No. 42/2007** provides that:

> *"An employee wishing to challenge the outcome of the appeal may utilise dispute mechanisms contained in the Employment and Labour Relations Act..."*

The above quoted rules provide for the procedures to be followed by an employee whereby an employee if he is aggrieved by the outcome of the disciplinary hearing, is supposed to appeal internally. According to rule 4(15) an employee who is aggrieved by the decision of internal appeal he should file a labour dispute before the CMA. It is my considered opinion that the said rules provide for systematic procedures to be followed before filing a labour dispute.

In the instant case, instead of appealing against the decision of the disciplinary hearing, the respondent decided to file his complaint before the CMA contrary to the law. In the case of **Parin A.A. Jaffer and Others V. Abdalla Ahmed Jaffer and Two Others [1996] TLR 110** it was held that:

> *"Where the law provides extra-judicial machinery alongside a judicial one for resolving a certain dispute,* ***the extra-judicial machinery should in general be exhausted*** *before recourse is had to the judicial process."* Emphasis mine

Mr. Mashabala tried to convince this court that the applicant was not supplied with Part II of the hearing form for the purpose of appealing.

With due respect to the learned advocate, **rule 4(9) of GN No. 42/2007** provides that:

> *"The chairperson should inform the employee of the outcome of the hearing as soon as possible, but not later than five working days after the hearing, giving brief reasons for a decision. The chairperson should sign the disciplinary form and give a copy to the employee."*

The wording of the above quoted rule is to the effect that the employee should be informed of the outcome of the hearing and reasons for the decision. Looking at Part II and III of the prescribed hearing Form, Part II of the Form was to be filled by the employee if he intended to appeal internally. The law does not provide that it should be supplied to the employee. What is to be supplied to the employee is Part I of the hearing Form. The respondent acknowledged to have been supplied with Part I of the disciplinary hearing form. During the disciplinary hearing, the respondent had a representative from the Trade Union. Thus, his representative should have extracted Part II of the Form from the rules and filled it for him. Part III of the hearing Form is filled by the Senior

Manager after hearing the internal appeal. Respectfully to Mr. Mashabala, he misconstrued rule 4(9) (supra).

I am of considered opinion that even if the employer had a duty to supply the employee with the said form, that cannot exonerate the employee to skip the procedure prescribed by the law. That is due to the reason that, the respondent was dully informed of his right to appeal. This is reflected at the end of exhibit T8 where it was stated that:

> *"Haki ya kukata rufaa ya ndani dhidi ya maamuzi haya (ndani ya siku tano za kazi) imeelezwa."*

Also, at page 41 of the typed proceedings of the CMA, the Human Resource Officer confirmed that the respondent was informed about his right to appeal internally. She testified that:

> *"Mlalamikaji hakuwa na madai yoyote dhidi ya Mlalamikiwa wakati anaachishwa kazi. Alilipwa haki zake ambazo ni likizo na nauli ya kumrejesha alipoajiriwa. Pia alipewa cheti cha utumishi. Mlalamikaji hakukata Rufaa kupinga Uamuzi wa kuachishwa kazi, alielekezwa haki yake ya Rufaa na kama angetaka appeal forms."*

Moreover, at page 50 of the typed proceedings of the CMA, during cross examination, the respondent admitted that he was accorded with the right to appeal within five days, as he replied as follows:

> *"Swali: Angalia Kielelezo T-8 aya ya mwisho inaeleza nini?*
>
> *Jibu: Haki ya kukata Rufaa ya ndani dhidi ya maamuzi haya ndani ya siku tano imeelezwa.*
>
> *Swali: Kwa hiyo ulipewa siku ngapi za Rufaa?*
>
> *Jibu: Tano.*
>
> *Swali: Ulitimiza haki yako ya Rufaa.*
>
> *Jibu: Sikutimiza."*

Based on the above extracts, and the fact that the respondent admitted that he was aware of his right to appeal, the argument by Mr. Mashabala that the respondent was not supplied with Part II of the hearing form has no basis.

Regarding the complaint that, the respondent was a layman and did not know how to appeal; it goes without saying that the assertion is an afterthought and unfounded as it is settled principle that ignorance of the law is not an excuse. Apart from that, the respondent had a representative from the Trade Union who could assist him to appeal internally.

According to the findings in respect of the second legal issue herein above; automatically the first and third legal issues are resolved in the affirmative. Had the Hon. Arbitrator analysed evidence properly, he could have found out that the respondent had not exhausted internal remedies. Consequently, the CMA Award was unlawful.

Having found that the dispute was preferred before the CMA prematurely, there is no need of determining the fourth legal issue whether it was proved on balance of probability that the termination of the respondent was valid in terms of reasons and procedure.

In the event, I hereby quash, set aside and revise the CMA award and orders, forthwith. The respondent may pursue his rights by adhering to the laid down procedures. Application granted. No order as to costs.

It is so ordered.

Dated and delivered at Moshi this 22nd day of May 2024.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI SUB REGISTRY

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

22/05/2024