IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LABOUR DIVISION]

AT ARUSHA

REVISION APPLICATION NO. 21 OF 2023

(Originating from the Commission for Mediation and Arbitration at Arusha, Labour Dispute No. CMA/ARS/ARS/518/20/25/21)

TANZANIA BREWERIES LIMITED ..... APPLICANT

VERSUS

ANDREW LUCAS SHAYO ..... 1ST RESPONDENT

LIVING ABDON KINABO ..... 2ND RESPONDENT

ROGERS NGAI MSANGI ..... 3RD RESPONDENT

JUDGMENT

29th November, 2023 & 21st February, 2024

MWASEBA, J.

The Applicant herein has preferred this revision application under the provisions of **Sections 91(1)(a) & (b), 91(2)(b) & (c) and 94(1)(b)(i) of the Labour and Employment Relations Act,** Cap. 366 [R.E 2019] (hereinafter "ELRA") and **Rules 24(1)(2)(a-f), (3)(a-d) and 28(1)(a-e) of the Labour Court Rules,** 2007 and any other enabling provision of the law, moving the court to call for the record of the Commission for Mediation and Arbitration for Arusha (hereinafter " the CMA") in Labour Dispute No. CMA/ARS/ARS/518/20/25/21 in order to satisfy itself as to correctness, legality or propriety of the findings,

orders or decisions made thereon. The applicant is also moving the court to quash and set aside the award of the CMA dated 31st March 2023. The court is also called upon to grant any other relief that it considers just and convenient to grant. The application is supported by notice of application and affidavit deponed by Mr. Daniel Dannland Lyimo, learned advocate for the applicant. The respondents on the other hand contested the application in a counter affidavit deponed by Ms. Federika Sikale, their representative coupled with a notice of opposition to that effect.

Briefly, the respondents were employees of the applicant in the logistics department as drivers. They were employed on diverse dates, that is 01/01/1985, 11/05/2007 and 05/05/2010 respectively. On 18/08/2020, the respondents were issued with warning letters on the allegations of misconduct. It was alleged that they exceeded the crates of beer which they dispatched in their motor vehicles. The warning letters were admitted as exhibits D1 collectively. They were required to respond to the allegations against them. Their responses did not please the applicant's management; hence they were notified to attend disciplinary hearing on 31st August 2020. The notifications of a disciplinary hearing were admitted as exhibit D2 collectively. On 2nd

September 2020 disciplinary hearing was scheduled when parties and their witnesses/representatives signed meeting attendance registers, which were admitted as exhibits D3 collectively.

After hearing, the disciplinary committee proposed termination of the respondents. The meeting minutes and hearing outcomes were admitted as exhibits D4 collectively. The respondents were informed of their right to appeal against the decision of the committee. They appealed to the Plant manager on 7th September 2020, but the appeal was dismissed on 11th September 2020, confirming the decision of the Committee. The appeal forms were admitted as exhibits D5 collectively. The respondents were ultimately issued with termination letters dated 11th September 2020, which were admitted as exhibits D6 collectively. The ground of their termination according to exhibit D6 was dishonest which was considered a serious offence. The documents purported to prove the alleged dishonest included the picking reports, picking receipts and transfer slips dated 13th August 2020, which were admitted as exhibits D7 collectively. The incident report forms along the stock taking variance which were also the basis of establishing the dishonest, were admitted as exhibits D8 collectively.

The respondents were aggrieved on the ground that their termination was both substantively and procedurally unfair. They referred the dispute of unfair termination in the CMA as aforesaid. In the CMA F1, the respondents claimed to be reinstated in their place of work.

After thorough hearing of both parties, the CMA declared the respondents' termination unfair both substantively and procedurally. There was neither valid reason for their termination nor was the fair procedure adhered to, for their termination. The applicant on the other hand stringently insisted that there was valid reason and fair procedure as per the disciplinary hearing and the documentary exhibits tendered. In its award dated 31st March 2023, the CMA arbitrator ordered the applicant to pay the respondents a total of 41 months renumeration as compensation and severance pay. The applicant was ordered to pay a total of TZS 170,830,289/= which would be sub-divided to the respondents as TZS 75,699,472.60 for the 1st respondent, TZS 47,565,407.90 for the 2nd and the 3rd respondents equally. The applicant was also ordered to furnish the respondents with certificates of service.

The applicant was aggrieved by the CMA award, it has preferred this revision challenging the same on six grounds as canvassed in the affidavit in support of the application.

At the hearing of the application, the applicant was represented by Mr. Mwanili H. Mahimbali, learned advocate while the respondents were represented by Ms. Federica Sikale, Personal Representative. It was resolved that hearing of the revision proceed through filing of written submissions.

Submitting in support of the 1st ground for the revision, Mr. Mahimbali contended that the holding by the arbitrator that there was no investigation conducted, was erroneous referring the invoices and the reports which were tendered as exhibits D7 and D8 collectively, which he equated as the investigation report. He insinuated that the said exhibits sufficiently proved the alleged dishonest which was committed by the respondents, insisting that the same were admitted as exhibits. It was his further submission that the respondents neither in their testimony nor in their opening statement complained that they were not served with the investigation report, maintaining that it was the arbitrator's own invention.

Submitting on the second ground, Mr. Mahimbali intimated that despite the fact that the CMA found similarities in the nature of dispute, cause of action and reliefs claimed, ordering consolidation of the disputes, that in itself did not authorise the 1st respondent to testify on

behalf of the rest of the respondents. He added that since it is undisputed that the 1st respondent testified in the CMA, there is no proof that he also testified on behalf of the rest of the respondents. He maintained that the 1st respondent was not mandated to testify or represent others, without leave of the CMA, neither was there written consent from the other respondents authorising him to testify on their behalf. It was his firm view that all the respondents were bound to testify before the Commission. To bolster his account, he referred the Court of Appeal decision in **Peter Jacob Weroma and 11 Others v. Ako Group Limited**, Civil Appeal No. 172 of 2021 (unreported). In his view, since the award covered all the respondents, it ought to be nullified since it was made in abeyance of the right to be heard.

In respect of the 3rd ground, it was applicant's counsel submission that the arbitrator did not consider the evidence adduced and the exhibits tendered, because the investigation report was detailed and exhaustive as it contained the CCTV footage and statements from the security guards. He also accounted that all those who were involved in the shady deal were terminated as well. He casted blames on the arbitrator for defying the investigation report, stating that, had he taken

into account the report, he would have not opined that the security guards ought to have testified.

Submitting on the 4th ground, Mr. Mahimbali accounted that the arbitrator did not take into account any of the exhibits tendered, hence he issued unjust award.

Regarding the 5th ground, the applicant's counsel faulted the arbitrator for awarding 41 months compensation arguing that it was not the applicant's fault for the case to remain pending in the Commission for 30 months. He insinuated that the arbitrator punished the applicant even for the period he delayed issuing the award. He insisted that had the arbitrator taken into account the 1st respondent's age, he would have not made the conclusion which he made. The quantum of compensation awarded by the arbitrator was excessive considering the fact that the 1st respondent had already attained the retirement age, the counsel contended.

Elaborating the last ground, the applicant's counsel submitted that while composing the award, the arbitrator mixed up facts with another case which might have been perpetrated by copy and paste from his former awards. He concluded by praying that the court allows the application by quashing and setting aside the CMA award.

On her part, Ms. Sikale in respect of the 1st ground argued that the applicant did not marshal any evidence before the CMA showing that investigation was conducted so as to prove that the respondents were responsible for the misconducts. She intimated that the investigation that was required was not stock taking, rather the investigation that would link the respondents with the alleged dishonest. She stressed that even assuming that the investigation was conducted, still the respondents were not availed with copy of the investigation report before entering the disciplinary hearing, referring **Rule 13 of the Code of Good Practice**. Ms. Sikale also referred the court to the decision in 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 (unreported), to underscore her submission that failure to avail the respondents with the copy of the investigation report, denied them right to make an informed defence at the disciplinary hearing.

Responding to the 2nd ground, Ms. Sikale submitted that at page 5 of the award, it is indicative that the respondents opted that only one of them to testify on behalf of the others, since they had similar facts. She also accounted that while testifying, the 1st respondent indicated that he was testifying on behalf of other respondents.

In response to the 3rd ground, Ms. Sikale pondered that it is not true that the arbitrator did not consider the evidence adduced by the applicant as well as the exhibits tendered. It was her stance that the applicant did not explain any of the documentary exhibits tendered, and above all, there was no security guard who turned up to testify in the CMA regarding the CCTV footages.

Arguing the 4th ground, the respondents' representative submitted that the applicant's witness tendered documents without explaining them. She added that the witness was not involved in the termination process, he performed the duties of the Human Resource Officer whom the respondents had nothing to do with.

Regarding the 5th ground, it was respondents' representative submission that the award took into account that it was 30 months since the respondents were terminated and there was likelihood that the employer employed some other persons to take over their roles. Further the fact that the respondents were already paid their terminal benefits, and conforming to decisions of this court and Court of Appeal, the arbitrator was convinced to order the compensation he made. She maintained that the respondents deserved the 12 months compensation

and the additional 29 months renumeration from the date of unfair termination to the date of the award.

Expounding the last ground, it was Ms. Sikale's argument that the award was well understood amplifying that there is no miscarriage of justice occasioned. She concluded by praying for dismissal of the application for being devoid of merits.

In his rejoinder submission, the applicant's counsel reiterated what he submitted in the submission in chief, which I find no justification to reproduce.

Having revisited the CMA record, the affidavits for and against the revision and the annexes thereto, I will determine the application beginning with the second ground, for reasons to be unveiled in the due cause.

In the second ground, the applicant's counsel faulted the arbitrator for relying on the evidence which was adduced by the 1st respondent alone to find the termination unfair to all the respondents. On her part, the respondent's representative made reference to page 5 of the award stating that the respondents opted that the 1st respondent testify on their behalf. She further accounted that the first respondent indicated that he was testifying on behalf of the other respondents.

I have scanned the CMA record, at the outset I entirely agree with the applicant's counsel that neither in the opening statement nor in his evidence, the 1st respondent indicated that he was testifying on behalf of the other respondents. According to the record, the opening statement of the 1st respondent which was filed on 30th June 2021, he categorically indicated that he would testify on himself. Similarly, the 2nd and 3rd respondents in their opening statements of 22nd February 2021 and 12th February 2021 respectively, there is neither express nor implied terms suggesting that someone else would testify on their behalf. I am alive that the disputes were consolidated after the opening statements were filed, however, that did not in itself confer powers upon the 1st respondent to testify on behalf of the other respondents, in the absence of express terms so conferring.

Upon perusal of the entire record of the CMA, at page 23 of the typed proceedings, it reflects that before testifying, Mr. Joseph Patrick who represented the respondents informed the commission that he had two witnesses. Surprisingly, after the testimony of the 1st respondent, Ms. Federica informed the commission that other witnesses were not in attendance. Not only that, but also the record does not support the respondents' representative argument that the 1st respondent indicated

that he was testifying on behalf of the rest of the respondents. That argument does not feature in the CMA record. The only record where the 1st respondent mentioned the rest of the respondents, is found at page 26 of the typed proceedings. When cross examined by Mr. Mahimbali, he responded that: *"I was accused with Mr. Living and Rogers."*

I have also revisited page 5 of the typed award; it is true that the arbitrator stated that the complainants (respondents herein) opted that only one of them should testify on their behalf because they had similar facts. I hasten to remark that the words were the arbitrator's own creation as they are not supported by the record.

There was neither written consent nor an oral agreement that the 1st respondent would testify on behalf of the rest of the respondents. The mere fact that the respondents had the same cause of action against the applicant and that the reliefs claimed were the same, in my considered view, does not give an automatic authorisation to the 1st respondent to testify on behalf of the others. Undoubtedly, the testimony of the 1st respondent was his own evidence, it does not extend to cover the evidence of the other respondents. It is my firm view that the 2nd and 3rd respondents were deprived their right to give

their evidence, which is tantamount to denying them the right to be heard. My stance finds support in the authority referred to me by counsel for the applicant in the case of **Peter Jacob Weroma and 11 Others** (supra), where the Court of Appeal when faced with a scenario akin to the one at hand made the following observation:

> *"Next for our consideration is the validity of the award from the evidence of two witnesses in a dispute involving 12 complainants. It is common cause that, the CMA heard two of the complainants; Peter Weroma (PW1) and Peter Mwita Waitara (PW2).* ***However, neither PW1 nor PW2 indicated to be testifying for himself and on behalf of other complainants. Yet, the Arbitrator glossed over and closed the complainants case upon a prayer to do so by the counsel who represented the complainants. We cannot, but agree that this was a serious irregularity which vitiated the proceedings that followed and the ultimate award. The overall effect was that the other complainants were not heard in a dispute that involved them considering that the resultant award was against them. That was in clear violation of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 and thus, any decision reached in such violation was, but a nullity.*** (Emphasis added)

The above authoritative decision is binding upon this court and it is considered the position of the law. Since the CMA heard the evidence of the 1st respondent only, it is the finding of this court that the 2nd and 3rd respondents were not heard in a dispute that involved them. It clearly denied them the right to be heard as per the authority above. This is an infraction which violated the rules of natural justice requiring the CMA to adjudicate over a matter by according the parties full hearing before deciding the dispute. Indeed, observance of the right to be heard for parties in a trial or any proceedings cannot be overemphasized. The Court of Appeal had occasions to address this in cases where such right was not observed. In the landmark case of **Abbas Sherally and Another v. Abdul S. H. M. Fazalboy**, Civil Application No. 33 of 2002 (unreported) it was held that:

> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

Since the CMA denied the 2nd and 3rd respondents' right to be heard, its award cannot be left to stand since it emanated from a nullity. I find merits in the 2nd ground for revision, which sufficiently disposes of

the application. That being the case, I find no justification delving on to determine the rest of the grounds.

Consequently, the application is merited. Exercising revisional powers conferred on this court, I hereby nullify the proceedings of the CMA which followed on 29th October 2022, after the first respondent testified, and set aside the CMA award dated 31st March 2023. I remit the record to the CMA for an expedited hearing of the evidence of the 2nd and 3rd respondents. After hearing, the CMA shall compose another award in accordance with the law. This being a labour matter, I desist from making any order as to costs.

DATED at **ARUSHA** this 21st February, 2024.

N. R MWASEBA

JUDGE