IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA SUB - REGISTRY)

AT IRINGA

LABOUR REVISION NO. 09 OF 2023

(Originating from the Commission for Mediation

and Arbitration for Iringa in Application No. /IR/34/2019)

YARA TANZANIA LIMITED ..... APPLICANT

VERSUS

DIONIS TSHONDE ..... RESPONDENT

JUDGMENT

Date of last Order: 09/05/2024
Date of Judgement: 30/05/2024

LALTAIKA, J.

The Applicant herein **YARA TANZANIA LIMITED** is desirous of challenging the Award of the Commission for Mediation and Arbitration for Iringa (the CMA) in Application No. /IR/34/2019. Specifically, the Applicant prays that this Court quashes the Order and Award of the CMA dated 17th May 2023 or make such orders as it deems fit. In the sworn affidavit of one Narindwa Shaidi, Principal Officer of the Applicant, six issues are outlined for

consideration by this Court. I choose not to reproduce them as they are clearly articulated by counsel in their submissions.

When the application was called on for hearing on the 26th of March 2023 the Applicant appeared through Mr. Jassey Mwamgiga, learned Advocate holding brief for Mr. Ally Hamza, Counsel for the Applicant. The Respondent, on the other hand, enjoyed the legal services of Mr. Silius Msolansimbi, learned Advocate. Parties opted for hearing by way of written submissions and the following schedule was ordered accordingly: Filing of the Written submissions by the Applicant 9/4/2024, Filing of the Reply by the Respondent 23/4/2024, Filing of the Rejoinder by the Applicant, if any 30/4/2024, Mention for necessary orders to ascertain compliance and fix the date for judgement 2/5/2024.

I hereby register my commendations to Counsel for both parties for spotlessly complying with the ordered schedule. The next part of this judgment is a summary of the submissions followed by my analysis and the verdict.

Mr. Hamza, Counsel for the Applicant, emphasized the importance of providing a historical background of the matter. He recounted that this

Revision was registered as Labour Revision No. 4 of 2021 between YARA TANZANIA LIMITED and DIONIS TSHONDE. The case was assigned to Hon. Matogoro J, (as he then was) who nullified the proceedings and set aside the award of the commission for mediation and arbitration on May 13, 2022. Mr. Hamza referenced the ruling on pages 17 and 18, where Hon. Matogolo J stated that the Arbitrator relied on invalid documents not part of the commission's record, making the award a nullity. Consequently, the matter was ordered to be reheard before another Arbitrator.

After Hon. Matogolo J's decision, the matter was reheard as Labour Dispute **No. CMA/IR/34/2019 before Hon. Matalis, R. Arbitrator**, who rendered the award in favor of the complainant on May 17, 2023. The Respondent, Yara Tanzania Limited, again dissatisfied, filed Labour Revision No. 9 of 2023, which is currently before the court.

Mr. Hamza submitted that the proceedings leading to Hon. Matalis, R. Arbitrator's award were illegal and irregular. He argued that the proceedings at the Commission for Mediation and Arbitration (CMA) in Iringa were a nullity and should be nullified. He highlighted that the Arbitrator improperly received exhibits, which vitiated the entire proceedings. He quoted the proceedings showing the improper admission of exhibits and argued that the

exhibits' identities were unclear, there was no indication that the Respondent's witness at CMA requested to tender the exhibits, and there was no indication that the exhibits were tendered in court.

Mr. Hamza further submitted that relying on improperly admitted exhibits led to an irregularity that rendered the proceedings and award a nullity. He cited the case of **IMRAN MURTAZA DINANI v. BOLLORE TRANSPORT & LOGISTICS TANZANIA LTD**, Revision No. 253 of 2022, where the court held that exhibits not formally tendered and admitted could not qualify as evidence.

Regarding the merits of the application for revision, Mr. Hamza argued that the Arbitrator erred in several aspects: The Arbitrator acknowledged the Respondent's underperformance but relied on unproven bonus records, which were not tendered in court. The Arbitrator incorrectly held that the Respondent was not given the right to be accompanied by a fellow employee during the hearing, despite evidence indicating that the Respondent was aware of this right and chose not to use it. The Arbitrator erroneously stated that the employee should have been informed where to appeal, which is not a legal requirement.

The Arbitrator wrongly concluded that there was no investigation report, despite the existence of several reports admitted as exhibits at the CMA. Mr. Hamza requested that the court nullify the CMA proceedings in Labour Dispute No. CMA/IR/34/2019, quash the award of Hon. Matalis, R. Arbitrator, and re-evaluate the evidence to uphold the Applicant's position. He referenced decisions such as **FINCA MICROFINANCE BANK v. NOEL SANGU AND PETER MKONYA**, Revision No. 15 of 2020, and **STANDARD CHARTERED BANK v. ANITHA RUKOIJO**, Revision No. 470 of 2020, to support his arguments on the necessity of proper investigation and adherence to procedural fairness in disciplinary cases.

In conclusion, Mr. Hamza prayed that the Honourable court call for the record of proceedings in Labour Dispute No. CMA/IR/34/2019, revise the proceedings, orders, and award, and quash the decision of Hon. Matalis, R. Arbitrator.

Mr. Msolansimbi, Counsel for the Respondent, commenced his response by aligning with the background information provided by the Applicant concerning the Application for Revision No 9 of 2023. He concurred with the details outlined on pages 1 and 2 of the Applicant's submission,

which meticulously described the origins and procedural history of the case at hand.

Addressing the core issues in the Counter Affidavit, Mr. Msolansimbi emphasized the procedural and substantive flaws related to the Final Written Warning issued to the Respondent by the Applicant. He argued that this warning letter did not comply with legal requirements and proper procedural standards. Notably, this document was neither presented during the disciplinary hearing nor tendered before the Commission for Mediation and Arbitration (CMA) during the trial de novo. The only warning letter that was presented was the first warning letter, which was erroneously referred to as the Final Written Warning. Mr. Msolansimbi pointed out that no preceding written warnings had been issued, despite the Applicant's claims of having provided warnings in November and December 2018. These purported warnings were not presented at the CMA, indicating their likely non-existence and undermining the credibility of the Applicant's disciplinary process.

Turning to the proceedings at the CMA in Iringa, Mr. Msolansimbi contested the Applicant's allegations of irregularities in the handling of evidence. He asserted that the Arbitrator, Hon. Matalis R., properly admitted all 25 exhibits tendered by the Applicant, despite these exhibits not being

pre-marked. The Arbitrator followed a systematic procedure, meticulously documenting the examination of each witness, summarizing the evidence, and then admitting the documents as exhibits. This process, Mr. Msolansimbi argued, adhered to Rule 32 of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007, which permits arbitrators to summarize evidence and record key issues without adhering to the strict formalities typically found in other judicial settings.

In defending the procedural integrity of the CMA's proceedings, Mr. Msolansimbi referenced the Court of Appeal of Tanzania's judgment in **Security Group (T) Limited vs. Steven Gerson Kizinga,** Civil Appeal No. 26 of 2016. This judgment underscored the principle that labour institutions are designed to handle disputes with a degree of flexibility and efficiency, intentionally minimizing legal formalities to ensure timely and fair resolution of cases. This principle is enshrined in Section 88(4) of the Employment and Labour Relations Act (ELRA) and further reinforced by Rule 19 of the Labour Institutions (Mediation and Arbitration) Guidelines, 2007.

Addressing specific grievances raised by the Applicant, Mr. Msolansimbi discussed the issue of the Respondent's bonus payments. He highlighted that the Respondent's exemplary performance from 2013 to 2018,

particularly in the first half of 2018, was acknowledged by the Applicant. This acknowledgment negated the need for further evidence of the Respondent's satisfactory performance during this period. Furthermore, Mr. Msolansimbi emphasized the lack of assistance provided by the Applicant to the Respondent to improve his performance, which is a requirement under Section 15(1)(c) of the Employment and Labour Relations Act.

On the matter of representation during the performance review hearings, Mr. Msolansimbi noted that the Respondent had requested the presence of a fellow employee, Andrew Ndunguru, for support. However, the Applicant did not facilitate this request, thereby contravening the guidelines set forth in the Employment and Labour Relations (Code of Good Practice) Rules, 2007. This failure was seen as a procedural flaw that could undermine the fairness of the disciplinary process.

Mr. Msolansimbi also disputed the Applicant's assertion that the Respondent was adequately informed about his right to appeal the disciplinary decision. He cited Rule 13(10) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, which stipulates that employees must be informed not only of their right to appeal but also where to lodge such an appeal. The Arbitrator's findings on this matter were

supported by the precedent set in **Tabitha Mung'awi vs. Pangea Minerals Limited**, Labour Revision No. 40 of 2013.

Regarding the investigation into the reasons for the Respondent's alleged unsatisfactory performance, Mr. Msolansimbi argued that the Applicant did not conduct a proper investigation or produce any investigative report, as mandated by Rule 18(1) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007. He supported this claim with the precedent from FINCA Microfinance Bank vs. Noel Sangu and Peter Mkoya, Labour Revision No. 20 of 2018, which underscored the necessity of thorough investigations into performance issues before taking disciplinary actions.

In addition, Mr. Msolansimbi highlighted the inadequacy of the Applicant's performance review process. He noted that the performance reviews conducted were improperly timed, focusing on a short two-month period instead of the more standard half-yearly or annual reviews. This truncated review period failed to provide a comprehensive assessment of the Respondent's performance and unfairly depicted him in a negative light. He referenced the case of **Akiba Commercial Bank vs. Prudence Musumbo**

Muganga, Labour Revision No. 172 of 2015, to underline the importance of fair and comprehensive performance reviews.

In summation, Mr. Msolansimbi robustly defended the Arbitrator's conduct and the overall proceedings at the CMA. He maintained that the Arbitrator adhered to the legal standards and procedures established under Tanzanian labour laws and guidelines. Mr. Msolansimbi urged the court to uphold the Arbitrator's findings, dismissing the Applicant's claims of procedural irregularities and illegality, thereby affirming the integrity of the CMA's adjudicative process.

In his rejoinder submission, Mr. Hamza indicated that he had reviewed the submissions by the counsel for the Respondent and would begin by reiterating his initial submissions in full and argue for his application for revision, asserting that it had merit and deserved to be granted.

Regarding the rejoinder submissions, Mr. Hamza expressed his intention to reply to the Respondent's submission in the manner and order of the Respondent's paragraphs.

In addressing the reply to the counter affidavit, Mr. Hamza noted that it is a well-established legal principle that parties are bound by their

pleadings. He cited the case of **Paulina Samson Ndawavya Versus Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017, where the Court of Appeal of Tanzania reaffirmed that parties should not be allowed to deviate from their original pleadings.

Mr. Hamza pointed out that the final written warning was on record, and he argued that the Respondent's claim that no other written letter was issued before this final warning was merely a submission from the bar, which should be ignored as it does not constitute evidence. He referenced **Tina and Co. Limited and Others Vs. Eurafrican Bank (T) Ltd**, Civil Application No. 86 of 2015, where the Court of Appeal stated that arguments from an advocate cannot substitute for evidence.

He also mentioned that the allegations by the Respondent's counsel about a mistakenly termed final written warning were concoctions without legal basis and should be disregarded.

Concerning the proceedings at the CMA Iringa, Mr. Hamza noted that no exhibit was referenced in the proceedings attached to the application. He reiterated his initial submissions on this matter. Addressing the issue of tendering exhibits, Mr. Hamza refuted the Respondent's claim that the

documents had no markings for the Arbitrator's reference, stating that the documents were listed in the Respondent's list of documents and were thus valid.

Mr. Hamza referred to the Court of Appeal of Tanzania decision in **Emmanuel Stephano Ngega (Administrator of the Estate of the late Ngega Stephano Kiboko) Versus Butiama District Council and Masurura Village Council,** Civil Appeal No. 22 of 2021, which highlighted the principle that a court's judgment must be grounded on properly adduced evidence.

He further argued that the Respondent's counsel corroborated the Arbitrator's illegality by admitting that the documents tendered by the Applicant were not marked. Mr. Hamza acknowledged Rule 32 (1), (2), and (3) of the Labour Institution (Mediation and Arbitration) Rules, G.N. No. 64 of 2007, but stated that the provisions cited were irrelevant to the issue in dispute.

Mr. Hamza submitted that the principle from the case of **Security Group (T) Limited Vs Steven Gerson Kizinga (As administrator of the estate of the late Mashaka A. Setebe),** (supra) was inapplicable, as

the issue at hand involved unknown purported admitted exhibits rather than the Arbitrator's power to conduct arbitration.

In conclusion, Mr. Hamza reiterated his initial submissions and prayed for the revision to be allowed, and for the proceedings and award of the CMA by Hon. Rodney Matalis, Arbitrator, to be quashed for lack of merit.

I have dispassionately considered the rival submissions. I must say that I appreciate the topnotch research skills by counsel for both parties. This Court has benefited tremendously from the authorities cited which depicted the need to strike a balance between strict procedural rules in normal civil proceedings and the much-needed flexibility in labour courts. It appears that inability to have such a disparity in mind may lead to an argument that can safely be regarded as geared towards painting a" law as it ought to be" rather than "law as it is" which is a safer interpretative function of a counsel.

Apparently, Mr. Hamza, sought to challenge the CMA's decision on several grounds, primarily arguing procedural irregularities and improper admission of evidence. The applicant contended that parties are bound by their pleadings and cited the case of **Paulina Samson Ndawavya v.**

Theresia Thomas Madaha, Civil Appeal No. (supra) where the Court of Appeal of Tanzania reiterated that no party should be allowed to depart from their pleadings, thereby changing the case they originally presented. However, upon examination, it becomes evident that the applicant's arguments do not establish any deviation from this principle by the CMA.

Regarding the contention on the final written warning being part of the records, the applicant argued that the respondent's claims were mere submissions from the bar and should be ignored as they do not constitute evidence. This principle was supported by the case of **Tina and Co. Limited and Others v. Eurafrican Bank (T) Ltd,** Civil Application No. 86 of 2015, where the Court of Appeal held that arguments by an advocate cannot substitute for evidence. Nonetheless, the respondent's submission in the CMA proceedings was consistent with the established facts and records, demonstrating no substantial deviation from the evidence presented.

The applicant further asserted that the allegations made by the respondent's counsel regarding the final written warning were concocted and inadmissible. However, the CMA meticulously considered all evidence and submissions before making its decision, ensuring that all procedural and evidentiary rules were adhered to, thereby negating the applicant's claims.

Concerning the proceedings at the CMA Iringa, the applicant alleged that there was no exhibit that could be referred to as supporting the respondent's claims. The applicant reiterated submissions in chief, arguing that the respondent's documents lacked proper markings and were therefore inadmissible. However, the CMA followed proper procedures in admitting these documents as exhibits, and the records clearly reflected this. The CMA's handling of exhibits was consistent with Rule 32 of the Labour Institution (Mediation and Arbitration) Rules, G.N. No. 64 of 2007.

The applicant also questioned the arbitrator's authority to admit documents and argued that the arbitrator's actions were illegal. However, this Court finds that the arbitrator acted within the scope of his powers, as outlined in the case of **Emmanuel Stephano Ngega (Administrator of the Estate of the late Ngega Stephano Kiboko) v. Butiama District Council and Masurura Village Council**, (Supra). The Court of Appeal of Tanzania emphasized that judgments must be grounded on properly adduced evidence, and the CMA's decision was based on such evidence.

The applicant's challenge regarding the respondent's right to representation by a fellow employee and the procedural aspects of the disciplinary hearing were also unfounded. The CMA proceedings and the

arbitrator's conduct complied with the established legal framework, as highlighted in the case of **Standard Chartered Bank v. Anitha Rukojjo,** (Supra). This case clarified that disciplinary investigations in labor disputes do not follow rigid rules and can be conducted in any manner that ensures a fair hearing.

On the issue of the respondent not being informed about where to appeal, the applicant misinterpreted Rule 13(10) of the Employment and Labour Relations (Code of Good Practice) G.N. NO. 42 of 2007. This rule pertains to the referral of disputes, not the appeal process. The respondent was aware of the procedural steps, and there was no evidence to suggest otherwise.

Finally, the applicant's argument that the respondent was not given assistance to improve performance was refuted by the records, which showed that the respondent had access to the necessary tools and support. The case of **Akiba Commercial Bank v. Pudence Musombo Muganga,** (supra), was cited by the applicant, but the CMA's findings were consistent with the principles established in this case.

In the upshot, the applicant failed to demonstrate any procedural irregularities or misapplication of the law by the CMA. The evidence and legal principles support the CMA's decision, and this Court finds no basis to overturn it. Therefore, the application for revision is dismissed for lack of merit, and the CMA's decision is affirmed. This being a labour matter, I make no order as to costs.

Court

E.I. LALTAIKA
JUDGE
30.05.2024

Judgement delivered under my hand and the seal of this Court this 30th day of May 2024 in the presence of presence of Mr. Jassey Mwamgiga, learned Advocate, holding brief for Mr. Ally Hamza Counsel for the Applicant and Mr. Silius Msolansimbi, learned Advocate, Counsel for the Respondent.

E.I. LALTAIKA
JUDGE
30.05. 2024

Court

The right to appeal to the Court of Appeal of Tanzania is fully explained.

E.I. LALTAIKA
JUDGE
30.05.2024