

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION NO. 108 OF 2020

BETWEEN

MANTRAC CAT..... APPLICANT

VERSUS

TUSAJIGWE MWAKYUSA.....1ST RESPONDENT

COMFORT MAUGO.....2ND RESPONDENT

JUDGMENT

Date of Last Order: 01/09/2020

Date of Judgment: 18/09/2020

MWIPOPO, J.

MANTRAC CAT, the applicants in this Revision Application has preferred the application against the Commission for Mediation and Arbitration (CMA) Award in Complaint No. CMA/DSM/TEM/245/2015. The applicant is praying for the Court to revise and set aside the arbitral award dated 10th September, 2018, between the parties with reference no. CMA/DSM/TEM/245/2015 delivered by Hon. H.I. Lukeha, Arbitrator. The applicant also is praying for other reliefs this Court may deem fit and just to grant.

The brief background of the dispute is that: the respondents namely Tusajigwe Mwakyusa and Comfort Maugo were employed by the applicant MANTRAC CAT on divers date. Tusajigwe Mwakyusa was employed as Personal Assistant to the Managing Director on October, 2007, whereas Comfort Maugo was employed as Personal Assistant to the Service Operations Manager East Africa November, 2008. The respondents were terminated from employment for misconduct on 16th July, 2015. Aggrieved by the employer's decision they referred the matter to the CMA where the Commission decided the dispute in their favour. The applicant was not satisfied with the Commission decision and filed the present application for revision. The application is supported by the affidavit of Clara Rusibamayila, Principal Officer of the Applicant.

The applicant relied on 9 grounds for revision as contained in the affidavit. The grounds for revision are as follows:-

1. That the Commission for Mediation and Arbitration lacked jurisdiction to entertain the matter and deliver the award.
2. That the CMA Award was not composed and delivered by the Arbitrator who heard the dispute.

3. That the Commission Award was improperly procured as the change of the Arbitrator and transfer of the case file were illegal.
4. That the CMA Award is not genuine as it was delivered on different dates and by different arbitrators.
5. That the arbitrator erred in fact and law in entertaining the complaint and delivering the award against MANTRAC CAT which is a non – existing entity in Tanzania.
6. That the Arbitrator erred in law and fact by holding that there was unfair termination after holding that the respondents had committed acts of gross dishonesty including theft and forgery.
7. That the arbitrator erred in law and fact by failing to consider that the act of theft or unauthorized possession of the employer's property or fraud or misappropriation of the employer's funds warranted termination and dismissal of the respondents under employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007.
8. That the Arbitrator failed to appreciate that there was sufficient evidence on record to prove that the procedure for fair termination was followed by the applicant.
9. That despite the fact that the award and evidence clearly show that the respondent was duly paid her terminal benefits, the Arbitrator

proceeded to award the remedies contrary to the law and contract of employment.

At the hearing of the application both parties were represented. Mr. Roman S.L. Masumbuko Advocate appeared for the applicant, whereas Mr. Abdallah Kazungu Advocate appeared for the respondent. The hearing of the application proceeded by way of written submissions.

Mr. Roman Masumbuko submitted on the first ground of revision that the Commission for Mediation and Arbitration lacked jurisdiction to entertain the matter and deliver the award. He argued that the dispute arose in Temeke district but it was finalized by Arbitrator from Ilala region. The arbitrator from Ilala Region had no territorial powers to entertain the matter. To support the applicant cited the case of **Elias Mugasa and 7 Others vs. Singita Grumeti Reserve, 2013, LCCD No. 170**; and the case of **Precision Air Services Ltd vs. Diana Semkuruto**, Revision No. 126 of 2017, High Court Labor Division at Dar Es Salaam, (Unreported), where the Court held that;

"It is the established position in law that a dispute shall be mediated or arbitrated by the Commission at his Office having responsibility for the area in which the cause of action arose, unless the Commission directs otherwise."

The record of proceedings shows that the reason of transfer was crash program. There is no proof that the file was transferred to another Arbitrator but the last presiding trial Arbitrator from Ilala decided to move the file to Ilala Registry for the reason that Temeke had few rooms. The applicant is of the view that this is not sufficient reason for transfer of the application from CMA Temeke registry to CMA Ilala registry.

The second ground of revision is that the CMA award was not composed and delivered by the arbitrator who heard the dispute. The applicant argue on this issue that the complaint which was finalized by Hon. Massawe, Arbitrator, but the decision was written by Hon. Lukeha, Arbitrator and was delivered by Hon. Massawe on behalf of Hon. Lukeha. The requirement of the law is that the arbitrator who heard the parties was supposed to compose the award. Rule 27 of G.N. No. 67 of 2007 requires the arbitrator to compose the award after hearing and serve the parties. The applicant cited the case of **Serengeti Breweries Ltd vs. Joseph Boniface**, Civil Appeal No. 150 of 2015, Court of Appeal of Tanzania, at Mbeya, (Unreported), as authority in the position.

The third ground of revision is that the CMA award was improperly procures as the change of the Arbitrator and transfer of the case file was

illegal. Submitting in support of the ground, the applicant stated that the issue of crash program is not a good reason for taking of the dispute from one arbitrator to another. The dispute was heard by hon. Stanslaus, arbitrator, on 4th January, 2016, who heard one witness DW1 and then the file was transferred to Hon, Amos, arbitrator, on 27th July, 2017, who proceeded with cross examination of DW1. When the dispute came for hearing the testimony of DW2 and DW3, the file was taken by Hon. Massawe, Arbitrator, on 30th July, 2018, without the reason for the takeover being assigned to him. On 6th August, 2018, the file was transferred to Hon. Lukeha for the reason of crash programme. Hon Lukeha continued to hear witnesses. The changes of arbitrators were illegally done as a result the award also was illegally procured. To support the position the applicant cited the case of **AAR Insurance (T) Ltd vs. Haruna Dawood Jeremiah**, Revision No. 57 of 2014, High Court Labour Division at Mwanza, (Unreported).

The applicants fourth ground of revision is that the Commission award is not genuine as it was delivered on different dates and by different arbitrators. The applicant submitted that the award have two dates for delivery. The award shows that it was delivered on 10th September, 2018, before Hon. H. I. Lukeha and copies were served to Advocate Samaha Salah

and Anna Marealle. The proceedings shows at page 51 of typed proceedings that the award was delivered on 11th September, 2018, by Hon. Massawe in the presence of Clerk from IMMMA Advocates and first respondent. This is un-procedural for the award to have two different delivery dates and by two different arbitrators.

The fifth ground of revision is that the Arbitrator erred in fact and law in entertaining the complaint and delivering the award against Mantrac CAT which is non – existing entity in Tanzania. The applicant submitted on the ground that the Commission indicated wrongly that the employer to be Mantrac (CAT) while there is no such entity in Tanzania. The respondents were employees of Mantrac Tanzania Ltd as shown in their termination letter. The respondent sued non existing party which makes the proceedings and award to be irregular. To support the position he cited the case of **Inter – Consult Limited vs. Mrs. Nora Kassanga and Another**, Civil Appeal No. 79 of 2015, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported).

The applicant submitted on the sixth ground that the arbitrator erred in law and facts by deciding that there was unfair termination after holding that the respondents committed acts of gross dishonesty including theft and forgery. These offences were against public policy. The arbitrator erred to

hold that the termination was unfair based on procedural issues while gross dishonesty, theft and forgery are listed as issues that lead to termination under item 1, 9 and 10 of the schedule to the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007. The applicant followed all procedure for termination and there was no right which was denied to the respondents. The respondents were given rights to appeal but they refused even to sign termination letters and other documents.

The seventh ground of revision is that the arbitrator erred in law and fact by failing to consider that the act of theft or unauthorized possession of the employer's property or fraud or misappropriation of the employer's funds warranted termination and dismissal of the respondents under employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007. The applicant stated that the submission on the ground is similar to submission in support of the 6th ground of revision that the procedure for termination was adhered.

The applicant's eighth ground of revision is that the Arbitrator failed to appreciate that there was sufficient evidence on record that the procedure for fair termination was followed by the applicant. The applicant submitted that the submission in this ground is similar to his the submission in the 6th

and 7th grounds of revision. The applicant added on the submission that the respondents collected their terminal benefits.

The ninth ground of revision is that despite the fact that the award and evidence clearly show that the respondent were duly paid their terminal benefits, the arbitrator proceeded to award the remedies contrary to law and contract of employment. The applicant submitted on the ground that the respondents had loans and business advances to the tune of shillings 44,000,000/= as per letters of termination. And nothing was refunded by the respondents. As a result, the three months' salary compensation awarded to the respondents for procedural unfair termination was not awarded judiciously. The arbitrator awarded one month salary in lieu of notice but the same has already been awarded to the respondents by the applicant.

The applicant prayed for the application be allowed and the award be set aside.

In reply, the respondent submitted on the applicant's submission on the first ground that the dispute arose in temeke and it was filed in CMA temeke. Nowhere in the award or proceedings which show that the registration number changed or to show that it was heard or determined at

Ilala. It is applicant's wrong assumption that if the title of the award is written CMA Dar Es Salaam it means CMA Ilala. The record shows that matter was placed under crash program before Hon. Lukeha and parties were notified that the Commission will sit at CMA Headquarters' and they were ordered to appear. It was direction of the Commission for the dispute to be heard at CMA Headquarters. The case of **Precision Air Services Ltd vs. Diana semkuruto**, (Supra), is authority in the power of the Commission to direct the place of hearing of the dispute. The award was determined by Hon. Lukeha who heard the matter and after composing the award he signed it and left it before Hon. Massawe to serve it to parties. Thus, Hon. Massawe was not part of the hearing of the dispute. The applicant did not object the hearing of the dispute to be transferred to CMA Dar Es Salaam Headquarter.

The respondent submitted on the second ground as submitted by the applicant that the award was delivered by Hon. Lukeha, and not by Hon. Massawe. Hon. Massawe served the award to parties on behalf of Hon. Lukeha. The award was signed by Hon. Lukeha, the arbitrator who composed it. The notification for the change of Arbitrator was given to both parties who did not object it. It was not among the issue before the Commission where both parties were represented. Section 15 (1) (a) of the

Labour Institutions Act, 2004, provides for appointment, removing and transfer of Arbitrator s which is administrative action.

The applicant was confused when he stated that Hon. Massawe took the file from Hon. Amos and determine it before transfer. Hon. Massawe was not assigned the file but he adjourned it pending crash program. Hon. Massawe served the award to parties because the Arbitrator who composed the award was out of station. Thus, the circumstances of the present application is distinguished from that in the cited case of AAR Insurance (T) Ltd vs. Haruna Dawood Jeremiah, (Supra), where there was change of Arbitrator without assignment to the last Arbitrator. In the present application there was proper assignment of the file to Hon. Lukeha. This ground of revision is baseless and the same should be disregarded.

Regarding the fourth ground of revision as submitted by the applicant, the respondent argued that the award was delivered by Hon. Lukeha on 10th September, 2018, and was served to parties on 11th September, 2018, by Hon. Massawe. The ground is baseless and should be disregarded.

On the applicant submission on the fifth ground, the respondent submitted that in the letter of appointment the applicant introduced himself as MANTRAC CAT. That is the reason for the applicant to refer the dispute

to the Commission in the name found in appointment letter. The applicant has appeared before the Commission and in this Court and defend under the same name.

The respondent submitted on ground number 6 as submitted by the applicant that the Commission had no legal power to declare the respondents guilty of offence of theft or forgery. Therefore there was no need for appealing against the decision. The applicant failed to follow procedure for termination by deviating from conducting investigation before notifying the respondents to appear before the disciplinary committee. Before invoking the guidelines for misconduct, the applicant was supposed to follow procedure for termination. During disciplinary hearing the applicant did not call any witness to prove the charges against the respondents. Further they were not allowed to put forward their mitigation factors which is also contrary to rule 13 (7) of the Employment and Labour Relations (Code of good Practice) Rules, 2007.

Regarding the applicant submission on the 7th ground of revision, the respondent submitted that the misconduct against the respondents were not proved. No witness was called during disciplinary hearing to prove the charges. Clara Rusibamayila – RW1 who testified before the Commission was

not witness before the Disciplinary Hearing but she was a member of Disciplinary Committee. As result the findings of the Arbitrator on the misconduct should be revised and respondents be free from those misconduct.

The respondent submitted on the eighth ground of revision as submitted by the applicant that the disciplinary hearing violated Rule 13 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007. The basis of the accusation is finance department but there is no investigation conducted by the applicant as required by the law. In the disciplinary hearing the respondent were required to prove that they did not commit the misconduct as there was no complainant at the disciplinary hearing as required by rule 13 (5) of the rules. The respondents were not given opportunity to put forward their mitigation, the Chairperson of the Disciplinary Committee was not senior officer but a TUICO officer and the Disciplinary Committee erred to hold a collective hearing while the misconduct was not committed collectively.

The respondent submitted on the applicant's ground number 9 that the applicant did not pay anything to the respondents. The applicant alleges that he deducted the terminal benefits to pay for loans advanced to the

employee. The Employment and Labour Relations Act, 2004, provides in section 41 (6) for condition for deducting employees notice pay is where the employee has refused to work during notice period. The termination letter informed the employee that he has been relieved from duty as an employee and his statutory rights. The applicant is duty bound to show how he paid the respondents. Even the applicant's witness DW1 testified that respondents were not paid terminal benefits due to failure to retire the debts amount. And that the Commission erred to consider rule 32 (5) of the Labour Institutions (Mediation and Arbitration) Rules, 2007, instead of section 40 (1) (c) which provides for 12 months remuneration as the minimum.

The respondent prayed for the Court to revise the award and order compensation for 12 months remuneration instead of 3 months remuneration awarded by the Arbitrator.

In rejoinder, the applicant retaliated his submission in chief and emphasized that the Commission had sufficient evidence before it to prove that the respondents had other debts to pay to the applicant which led to withholding of the benefits. The Commission was supposed to do the same.

From the submissions, there are four issues for determination. These issues are as follows:-

1. Whether there was procedural irregularity in the arbitration process before the Commission.
2. Whether the reason for termination of respondents' employment was fair.
3. Whether the procedure for termination was fair.
4. What are remedies to both parties?

In determination of the first issue whether there was procedural irregularity in the arbitration process before the Commission, there are five stages of arbitration process according to rule 22 (2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, G.N. No. 67 of 2007. The stages introduction; Opening statement and narrowing issues; Evidence; Argument; and Award. The applicant have submitted that the change of trial arbitrator was done without following the proper procedure and that the arbitrator who heard the evidence is not the one who composed the Commission Award. In reply, the respondent submitted that the procedure for transfer of the file from one arbitrator was in accordance with the law and that it is the discretion of the Commission to appoint an arbitrator and to decide the place where the hearing of dispute will take place.

The evidence available in record shows that the complaint before the Commission was assigned first to Hon. Stanslaus, Arbitrator on 4th January, 2016, and he framed the issue and hear testimony of one witness namely Clara Rusibamayila – DW1. However, when the matter came before the Commission for cross examination of DW1 on 27th July, 2017, the suit was presided by Hon. Amos, Arbitrator on behalf of Hon. Stanslaus who had an emergency. On 17th May, 2018, the matter proceeded with cross examination of DW1 and Hon. Amos presided the matter. It is clear from the record that there was nothing to show that there was change of trial Arbitrator from Hon. Stanslaus to Hon. Amos. Hon. Amos proceeded with cross examination and re-examination of DW1 and was adjourned for another date to proceed with hearing of DW2 and DW3.

However, the record show that on 30th July, 2018, the matter was put under crash programme and the same was transferred to be heard at the Commission office at Ilala without the change of registration. On 6th August, 2018, the matter came before Hon. Lukeha, Arbitrator at CMA Ilala office and it was adjourned for the reason that applicant counsel went to CMA Temeke office where he thought the matter will be heard. When the matter came on 9th August, 2018, before Hon. Lukeha, the parties agreed for the matter to proceed from where it ended until it is finalized. The matter was

finalized and the Commission award was delivered by Hon. Massawe on behalf of Hon. Lukeha who composed the Award.

From the evidence available in record, it is clear that the change of trial Arbitrator from Hon. Stanslaus to Hon. Amos was not proper as the reason for the change was not provided and also there is no order whatsoever which shows that the complaints was assigned to Hon. Amos. Further, after taking over of the matter Hon. Amos did not ask the parties if they want to proceed from where Hon. Stanslaus ended or they want the witness (DW1) to start afresh to testify. The Commission being quasi-Judicial body it is supposed to act judiciously in order not to cause any injustice in procedure of handling the matter. It is trite law that where a case has commenced before one judicial officer and the witness(es) have testified, it can be transferred to another judicial officer after providing the reason for the transfer. The Court of Appeal in the case of **M/S Georges vs. Hon. AG and Another**, Civil Appeal No. 29 of 2016, held that:-

".....once a trial of case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason he/she is unable to do that."

The court went on to hold that there are number of reasons why it is important for the trial started by one judicial officer to be completed by the same officer unless it is not practicable. The one who sees and hear witness

is in best position to assess witness credibility and also integrity of the judicial proceedings hinges on transparency justice. The reason for the transfer will help in not compromising the transparency of judicial proceedings.

In the present application, the record of proceedings is silent on the assignment of the matter to Hon. Lukeha. What is found in the proceedings is the endorsement by Hon. Massawe that the file is under crash program and that it will be transferred to be heard at CMA Ilala office by Arbitrators from outside the Dar Es Region. This is proper under rule 22 (1) and (2) of the Labour Institutions (Mediation and arbitration) Rules, G.N. No. 64 of 2007, which gives discretion for the Commission to determine the venue or place of mediating or arbitrating the dispute before it. Despite that, the record is silent as to whom the matter was assigned to, but it appears Hon. Lukeha presided the matter. Hon. Lukeha handling of the matter was proper where he commenced by asking parties if they want to proceed with the matter from where it ended or they have to start afresh. However, as stated earlier it is clear that there is no record in the CMA proceedings which shows the matter was transferred from Hon. Stanslaus to Hon. Amos, and from Hon. Amos to Hon. Lukeha. I'm of the opinion that the Commission being quasi-judicial body had duty to perform its adjudication functions judiciously which in this matter includes to provide for the reason for transfer

of the respective Arbitrator. The arbitrator had duty to put in record as to the reason of taking up the matter that is partly heard. The Arbitrator also have to give parties right to call witnesses or to cross examine them. The same was not done in the dispute before the Commission, especially in the transfer of the matter from Hon. Stanslaus to Hon. Amos.

The respondent was of the view that the Commission Rules are silent on the procedure for transfer of the file from one Arbitrator to another. I agree with the respondent that the laws are silent on the procedure for transfer of Arbitrator. And I'm of the opinion that the same need to be provided by the labour laws especially the rules. But, as a matter of practice in judicial bodies, the Commission being one of quasi-judicial bodies, the reason for the transfer has to be provided in the record and the parties have to be given right to decide whether to proceed with the matter from where it ended or to call and cross examine witnesses. Therefore, it is my finding that there was procedural irregularity in the transfer of the file from one Arbitrator to another. As the result the whole proceedings before the Commission was a nullity.

Consequently, I hereby quash the proceedings before the Commission and set aside Commission award. I revert the file back to the Commission Office at Temeke and I order that the Arbitration to start afresh before

another Arbitrator within 60 days from the date of service of this decision if the respondents are still interested with the dispute.

As the first issue have disposed of the matter, I'm not going to determine the remaining issues. No order as to cost.

A handwritten signature in blue ink, appearing to read 'A. E. Mwipopo', with a long horizontal stroke extending to the right.

A. E. Mwipopo

JUDGE

18/09/2020