

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION**

AT DAR ES SALAAM

REVISION APPLICATION NO. 298 OF 2019

NBC LTDAPPLICANT

VERSUS

STIMA SULEIMAN HASSAN RESPONDENT

JUDGMENT

Date of last Order: 05/06/2020

Date of Judgment: 10/06/2020

Z.G.Muruke, J.

The applicant NBC (National Bank of Commerce Ltd), filed this application, seeking for revision of the decision issued by Commission for Mediation and Arbitration, (CMA) on 28thOctober, 2018, in Labour dispute no. CMA/DSM/KIN/R.790/14/ by Hon. Mbeyale.R, Arbitrator which was in favour of the respondent. The applicant raised the following grounds:

- a) That honorable arbitrator immensely failed to access the applicant's evidence in comparison with the respondent's evidence and erroneously concluded that the respondent was entitled to be paid retirement award which was to be paid on June,2005.
- b) That honourable arbitrator erred in facts and law in dealing with the matter arising from Collective Bargaining Agreement without jurisdiction.
- c) That honourable arbitrator erred in law and facts in dealing with the matter which is time barred.

- d) That honourable arbitrator totally failed to analyze the evidence brought by parties hence reached erroneous conclusion in her findings.
- e) That the arbitrator grossly erred in law and facts in awarding vague claims.
- f) The arbitrator improperly failed to direct his mind on the facts, evidence and law on the respondent's claim which was on interpretation of S.14 (1),2(a)and (b) of Annexure NBC 1 above, to see whether the respondent was entitled to retirement award or not instead the arbitrator brought extraneous matters and based her decision on them.

Application is supported by affidavit of Applicant's Principal Officer Mr. Sweetbert Mapolu. Challenging the application, respondent filed his affirmed counter affidavit. The applicant enjoyed the services of Advocates from Law front advocates, while the respondent was served by Advocates Idd Omary Mlisi and Winnie Simule of Swai Advocates. Hearing was by way of written submission, both parties adhered to the schedule hence this judgment.

Briefly are the facts of the case. On 5th May, 1974, the respondent was employed by the applicant. He worked until 8th July, 2014 when he officially retired as a Manager Business Risk and Control. Having been retired on 10th September 2014, the respondent knocked the CMA doors claiming not to have been paid all his retirement benefits. CMA determined the matter on his favour. Being resentful the applicant filed the present application.

Submitting on the application the applicant's counsel argued that, the arbitrator failed to evaluate the applicant's evidence in comparison with the respondent's evidence and reached to a decision that, the respondent

was entitled to receive the retirement award according to **exhibit P4**, Voluntary Agreement between the applicant and TUICO agreed on 16th June, 2006. The purpose of the agreement was to resolve the issues of welfare of the employees before and after privatization, as the applicant was going through privatization process from NBC 1977 Ltd to NBC Ltd. It was further stated that the retirement award was provided under clause 14 of the agreement. The Clause defines the retirement award on its own perspective not in its literal meaning, and the same was entitled to all employees, citing Clause 14 .1 of the voluntary agreement that reads;

*"For the purpose of this agreement, retirement award is **one – off lump sum payment** to employees under the terms and condition prescribed as"*

Moreover, the applicant's counsel contended that, the applicant had sufficient evidence both direct and circumstantial to prove the respondent was paid. Clause 14:2 of the Voluntary Agreement stated that the said amount had to be paid promptly and without unreasonable delay. And the respondent was a Senior Manager as per exhibit D4 hence aware of the bank's operations. He failed to produce any evidence that he claimed for the non-payment of the retirement award. Also DW2 one of the signatories of the voluntary agreement stated that, all the employees were paid the retirement award and there was no any claim for nonpayment.

Arguing on the 3rd ground, the applicant's counsel submitted that the matter was time barred. The dispute arose on 30th June, 2005 according to voluntary agreement. Clause 14.2 (a) of the same states that "50% of the monthly basic salary times a number of completed years of

services up to 30th June, 2005. That means all the NBC LTD employees were supposed to be paid that 50% up to 30th June, 2005. Therefore the matter was filed out of time contrary to Rule 10 (2) of GN.64.

Applicant's counsel insisted that, the arbitrator wrongly dealt with the matter without jurisdiction. The dispute originated from interpretation and implementation of clause 14 of the Voluntary Bargaining Agreement regarding the retirement award. On such basis failure of mediation either of the party was supposed to refer the dispute to the labour court, citing Section 74 of the Employment and Labour Relations Act, [Cap.366 RE 2019]. Mr. Godfrey Tesha submitted that, the arbitrator erred in law and facts by ordering a vague award contrary to Rule 27(3)(f) of the Labour Institutions (Mediation and Arbitration Guidelines) GN.67 of 2007, The rule provides that an award shall contain among other things ,the order. That at page 10, paragraph 1 of the award, the arbitrator stated that "*it follows that he is entitled to be paid retirement award based on the formula and terms provided under the agreement.*" The same is unambiguous to the extent that is inexcutable. He prayed for the court order to set aside the CMA award.

In reply to the 1st ground of revision, the respondent contended that the applicant had failed to prove that they paid him the retirement award. Court has to draw the adverse inference against the applicant, referring the book of Law of Evidence, 17th Edition Volume 111, by Sir John Woodroffe & Syed Amir Alis Butterworths, New Delhi 2002 at page 4645 where the author have this to say;

"where a party does not produce documents which will clearly show that certain fact should be found in his favour ,an adverse inference may be drawn against him that the evidence if produced will have gone against him. And where a party fails to produce a material document which is available to him, it is natural inference that if produced it will go against him."

Also cited the case of **Khalfan Abdalah Hemed v Juma Mahende Wangenyi**, Civil Case NO. 25 of 2017, HC at Mwanza.(Unreported) when ruled on who has duty to prove on civil cases.The respondent counsel added that the allegation that he was paid his retirement award since 2005 without any valid proof, should be disregarded as he was only paid Tshs.100,000/= which is less than what he was entitled as per Exhibit P4.

Regarding the 3rd ground the respondent counsel contended that, the issue of referring the dispute at the court after mediation was not mandatory as provided under Section 74(b) of Cap 366 RE 2019 used the word may "may" instead of "shall". What was mandatory as per Section 74(a) of the same law which requires the dispute to be referred before CMA, referring the section 53(1) and (2) of the Interpretation of Laws Act (Cap 1 RE 2002).

Regarding the 4th ground Mr. Hassan argued that, It is undisputed that respondent retired on 8th June,2014 and after his retirement he was paid Tshs. 100,000/= as his retirement award contrary to what he was entitled as per the agreement. On 18th August, 2014 he wrote a demand letter claiming to be paid what he deserve, but the same was not taken into

consideration so he decided to lodge the application before CMA. If the retirement award was paid to all employees in 2005, then why did they pay him on his retirement in 2014? Therefore the matter was not time barred as suggested by the applicant Counsel as it was filed within sixty(60) days as required by the law. The arbitrator analyzed the evidence brought by both parties and arrived to a correct decision.

On the 5th ground the applicant stated that, even if the award is not clear, it does not invalidate the same, refereeing Section 90 of Cap 366 RE 2002. In addition to that he stated that he had already filed an application for clarification of the award before the same arbitrator to be determined. In rejoinder, the applicant reiterated what has been stated in submission in chief and lastly prayed for the award to be revised and set aside.

Having gone through the rival submissions of both parties, the following are the issues for determination:

- 1. Whether CMA had jurisdiction to entertain the dispute.**
- 2. Whether the dispute was time barred.**
- 3. Whether the arbitrator properly analyzed the evidence of both parties.**

The 1st issue for determination is, the issue of jurisdiction goes to the root of the powers of any decision making body to hear and determine the dispute before it. Therefore, before entertaining the dispute, CMA has to satisfy itself whether it is vested with requisite jurisdiction before hearing and determining any matter.

In the case of **Maisha Muchunguzi v. Saab Scania Tanzania Branch** Civil Appeal No. 41/1998, CAT DSM (unreported), it was stated that;

“We agree with the learned advocates that the issue of jurisdiction of court is sacrosanct and that that issue takes precedence over every other issue in the proceeding when it is raised.”

The applicant alleged that CMA had no jurisdiction to arbitrate the matter as the parties were supposed to refer the matter to the High Court after failure of mediation.

Section 74 of Cap 366 RE 2019 provides;

Unless the parties to a collective agreement agree otherwise-

- a. A dispute concerning the application, interpretation or implementation of a collective agreement shall be referred to the commission for mediation; and
- b. If the mediation fails, any party may refer the dispute to the Labour Court for a decision.**

[Emphasis is mine]

From Commission for Mediation and Arbitration (CMA **F1**), it clearly shows that the respondent had various claims including subsistence allowance, severance pay, repatriation costs, mileage allowance and the retirement award. What aggrieved the applicant was the arbitrator's decision to determine the claim of retirement award from the Collective Bargaining Agreement.

The wordings of Section 74 as cited above, are very clear that once mediation fails in matters concerning Collective Bargaining Agreement, then either of the party has to refer the matter to the High Court. In the present case what the respondent claimed before CMA was the implementation of clause 14 of the Agreement. The arbitrator in her award determined the issue of retirement award and ordered the applicant to pay the respondent according to the calculations stipulated under the Collective Bargaining Agreement.

It is my view that the arbitrator misdirected herself in determining the same contrary to the law. Jurisdiction is conferred by statute, so the arbitrator cannot assume to possess the same. Since the respondent had several claims in his application, the arbitrator ought to have determined the claims which were within her jurisdiction, and order the parties to refer the claim regarding the retirement award to the High Court as required by the law. CMA had no jurisdiction to entertain the claim for retirement award. I therefore quash and set aside the arbitrator's order regarding the retirement award. I find no need to determine the remaining issue. In view of the above, I hereby allow the application for revision.


Z.G. Muruke

JUDGE

10/06/2020

Judgment delivered in presence of Godfrey Ngassa for the applicant and respondent in person.


Z.G. Muruke

JUDGE

10/06/2020