IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 392 OF 2015

BETWEEN

BARCLAYS BANK (T) LTD .....APPLICANT

VERSUS

AYYAM MATESSA.....RESPONDENT

JUDGEMENT

Date of last order: 23/07/20202

Date of Judgement: 02/10/2020

Aboud, J.

The applicant filed an application at hand for revision of the ruling of the Commission for Mediation and Arbitration (herein referred as CMA) which was delivered on 11/08/2014. The applicant calls upon this Court to revise and set aside the CMA's decision in Labour Dispute No. CMA/DSM/ILALA/168/12 delivered by Hon. Msuri, Mediator.

The background of the dispute gathered from the record is that, the respondent was an employee of the applicant who was employed

on 15/08/2007 as a Sales Agent Unit. The respondent's termination was terminated on 25/04/2012 after being found guilty of gross insubordination and poor performance. At the time of her termination the respondent was working in the position of Collection Manager. Aggrieved by the by the employer's decision the respondent referred the matter to the appellate body within the applicant's company which conformed the decision to terminate her. Dissatisfied by the termination the respondents referred the matter at the CMA where the matter proceeded ex-parte after the applicant failed to enter appearance on several dates. The ex-parte award was delivered on 20/01/2014 in favour of the respondent and ordered the applicant to reinstate her with payment of all remuneration during the period which she was absent from work.

Dissatisfied with the ex-parte award the applicant filed an application at the CMA to set aside the ex-parte award which was dismissed on 11/08/2-14. Still aggrieved, the applicant filed an application before this Court which was also dismissed for lack of merit. Being resentful with the decision of this Court the applicant filed an appeal before the Court of Appeal. In the Court of Appeal it was found that the issues brought by the applicant before this Court

were not determined. It was observed that the High Court Judge determined the issue of non appearance of the applicant herein at the CMA without affording the parties the right to be heard. Thus the matter was remitted back to this court to start afresh.

When the matter was scheduled for hearing the applicant's Counsel Mr. Abdallah Kazungu told this Court that he had nothing to add he therefore urged the Court to adopt their previous submission. The Personal Representative for the respondent Mr. Salum Makunga had nothing to add as well. When the parties were asked to address the issue of non appearance the Learned Counsel for the applicant stated that the reasons for non-appearance are as they are reflected in their affidavit in support of the application and from the CMA records. Therefore this Court is called upon to determine the following issues raised by the applicant at paragraph 10 of his affidavit:-

i. That the Honourable Mediator erred in law by converting himself to Arbitrator and issue ex-parte award without parties consent.

ii. That the Honourable Mediator erred in law by referring the matter to Arbitration stage while no party to the dispute prefer the matter to Arbitration.

iii. That the Honourable Arbitrator erred in law by deciding the dispute without framing issues to the disputes before the Commission for Mediation and Arbitration.

Submitting in support of the application for revision Mr. Abdallah Kazungu prayed to adopt the affidavit in support of the application to form part of his submission. I pray to abandon the second ground of revision found on paragraph 10 (ii) of the affidavit and remained with two grounds for revision at paragraph 10 (i) and (iii) of the affidavit.

On the first ground he submitted that, the respondent was the employee of the applicant, working as a collection manager until she was fairly terminated on the 25/04/2012. She filed a dispute at the CMA challenging termination. He stated that the dispute was registered as CMA/DSM/KIN/342/12/, when all parties were called by the mediator to appear, unfortunately on 26/07/2012 the advocate for the applicant in this case appeared before Hon. Msuri Mediator

and found that Hon. Msuri, Mediator was not present and told to come the next day 27/07/2012.

The Learned Counsel went on to submit that when a Principal Officer of the applicant Mr. Dotto Kahabi appeared before the CMA he could not find follow-up to get another date for mediation and later on found out in January 2013 that there was an ex-parte order to proceed with ex-parte hearing of the dispute. Mr. Abdallah Kazungu submitted that the award was issued by Hon. Msuri, Mediator on the 20th January 2014 in favour of the respondent. He said the applicant filed an application to set aside the ex-parte award at the CMA and the application was dismissed in a ruling delivered on 11th August 2014.

Mr. Abdallah Kazungu argued that after filing a labour dispute at the CMA, the CMA has to appoint a Mediator as per Section 86 (3) (a) of Act No. 6 of 2004. He said once mediation is successful, the Mediator has to sign CMA Form No. 5 specifying that mediation was successful depending on the matter in dispute. He further stated that if mediation is successful, it means the dispute will be over between the parties but if mediation is not successful, it is marked fail and the Mediator will make such comments on the same form No. 5 and refer

the dispute for arbitration and an Arbitrator will be appointed to determine the dispute.

Mr. Abdallah Kazungu went on to argue that section 88 (2) (a) of the Employment and Labour Institution Act, Act No. 6 of 2004 (herein the Act) provides that the CMA will appoint an arbitrator to decide the dispute if mediation fails and after hearing both parties he will proceed to issue an award as provided under Section 89 (1) of Act. The Learned Counsel submitted that in our current application before the Court the CMA did not appoint an arbitrator, the mediator instead converted himself into an arbitrator and proceeded to deliver the award. He argued that, he exercised jurisdiction which was not vested on him and made the award a nullity and unenforceable. To strengthen his argument he cited the case of **Bulyanhulu Gold Mine Ltd. Vs. James Bichuka**, Rev No. 313 of 2008, High Court at Mwanza (unreported) Hon. Rweyemamu, J. and the case of **Agakhan Foundation (FMFA) Vs. Rainlord Chingule** Rev. No. 2 of 2014, High Court at Mtwara (unreported) Hon. Aboud, J. at page 11 held that:-

> "The Hon. Arbitrator Mr. Mkoba had no jurisdiction to determine the matter which he

was not appointed according to the law to determine it".

Mr. Abdallah Kazungu strongly argued that the position of the law is clear once a mediator converts himself into an arbitrator to arbitrate and deliver an award while he/she was not appointed by the CMA to arbitrate the dispute, makes the wholly award a nullity. He added that the stages of mediation are only four according to Rule 9 of the Labour Institutions (Mediation and Arbitration Guidelines) Rules GN. 67 of 2007 (herein GN. 67 of 2007), there are four stages which are (a) introduction, (b) gathering information, (c) exploring option and developing consensus and (d) conclusion. The Learned Counsel was of the view that there is no stage where a mediator can deliver an award.

As to the 2nd ground Mr. Abdallah Kazungu submitted that, according to GN. No. 67 of 2007, Rule 22 (2) arbitration has five (5) stages, these are (a) introduction (b) opening statement and narrowing issues (c) evidence (d) arguments and (e) award after the conclusion of opening statement then the arbitrator will frame issues according to the opening statements of both parties an issues they agree on and do not agree on as in accordance with Rule 24(4) of

GN. 67 of 2007. He stated that, even though the mediator had decided to convert himself to an arbitrator but he did not follow the mandatory stages provided under Rule 27 of GN. No. 67 of 2007. He therefore prayed for the proceedings and the award delivered by Hon. Msuri be declared a nullity and be revised and set aside. He also prayed that if the Court sees it proper order the matter be returned to the CMA to be determined afresh according to the law.

Responding to the first ground Mr. Shirima submitted that, Section 87 (3) (b) of Act No. 6 of 2004 provides for consequences for not attending mediation, mediator may decide the complaint means to arbitrate the dispute. He added that Section 87 (4) of Act No. 6 of 2004, a decision made can be enforceable at any competent Court. Mr. Shirima further stated that Rule 14 (2) (a) (ii) of GN. 67 of 2007 provides the same that where the party fails to appear for mediation, the mediator may do the following, decide the complaint if the other party fails to attend the mediation hearing. He submitted that these two provisions allows the mediator to decide a complaint that means to become an arbitrator where the respondent fails to appear for media.

Mr. Shirima contended that there are other options which the mediator could have taken but reading annexture AY1 to the Counter affidavit of the respondent, which is the ruling to set aside ex-parte award it seems the mediator did try to apply the other options but still the applicant and his officers failed to attend the mediation despite several adjournments. He stated that the mediator had no alternative but to determine the dispute ex-parte which was done after the applicant seriously disrespected the CMA for not entering appearance. He further argued that the two authorities cited by the applicant are irrelevant to the matter before the Court. He stated that in the cases cited, mediation was conducted to its finality and mediator proceeded to arbitrate. While in this matter there was no mediation at all and that's why the mediator applied Section 87 (3) (b) of Act and Rule 14 (2) (a) (ii) of GN. No. 67 of 2007.

Mr. Shirima submitted that one Gasper Tluway and Mr. Dotto Kahabi appeared before CMA on 27/07/2012 but the order of ex-parte hearing was discovered almost 6 months later in January 2014 which means they had forgotten to follow up the matter.

Regarding the second ground of revision the Learned Counsel submitted that, the issue were framed as seen on the CMA award at

page 4 thus it is not true that the issues were not framed. He therefore prayed for the application to be dismissed.

In rejoinder Mr. Abdallah Kazungu submitted that Section 87 (3) (b) of Act No. 6 of 2007 read together with Rule 14 (2) (a) (ii) of GN. No. 67 of 2007 is wrongly interpreted by the Counsel for the respondent to mislead the Court. He stated that the dispute which can be decided by the mediator are dispute for termination based on operational requirements where there is no agreement by virtue of Section 38 (2) of Act. He added that another dispute is one based on collective bargaining by virtue of Section 74 (a) of the same Act.

He further submitted that under the section referred by Counsel for the respondent "to decide" means to deliver decision if mediation is successful or not by looking at the information according to the stages for mediation. He stated that the second stage of mediation, before mediator mediates the parties, the mediator has to determine whether an employee was the employee of the employer and decide whether the applicant was the employer of the respondent. He added that a party aggrieved by the decision according to the provision of Section 87 (5) of Act he/she can file an application to revise such a decision.

Mr. Kazungu was of the view that Section 87 (3) (b) of Act does not confer powers on the mediator to issue an award however such power is only conferred to the Arbitrator as provided under Section 89 of Act. He stated that a mediator can decide and give ruling on the following issues, condonation application, joinder of parties, substitute the party according to Rule 29 (1) (a) of GN. No. 64 of 2007 as well as where the parties decide to use both mediation and arbitration and combine the two proceedings.

On the issue of late follow up by the applicant after 6 months, he reiterated his submission in chief. He therefore urged the Court to revise and set aside the CMA's proceeding, award and the subsequent ruling.

Having gone through the rival submissions by the parties it is my view that the issues for determination before the Court are, whether the Arbitrator erred in law by converting himself into an arbitrator and issued ex-parte award, whether the Arbitrator erred in law by deciding the dispute without framing issues to the disputes before the CMA and lastly is whether the applicant has adduced sufficient reasons to set aside ex-parte award.

On the first issue as to whether the Arbitrator erred in law by converting himself into an arbitrator and issued ex-parte award. At the CMA mediation and arbitration are two distinct stages in determining the matter referred to the CMA. Mediators and Arbitrator perform different function as they are provided under GN. 67 of 2007. In this application it is on record the matter was referred to mediation stage unfortunately the applicant herein did not enter appearance then the mediator proceeded to arbitrate the dispute.

The applicant contends before this Court that it was wrong for the mediator to turn himself as an Arbitrator and issued an award. In the impugned award the mediator stated that the power to proceed ex-parte was derived from the provision of section 87 (3) (b) of the Act. This court will examine the applicability of the relevant provision as they are contested by the parties at hand. The provision in question is to the effect that:-

> "Section 87 (3) In respect of **a complaint** referred under this Act, the mediator may:-
>
> (a) dismiss the complaint if the party who referred the complaint fails to attend a mediation hearing;

(b) **decide the complaint if the other party to the complaint fails to attend a mediation hearing.**

(4) The decision made under this section may be enforced in the Labour Court as a decree of a court of competent jurisdiction."

[Emphasis is mine].

The above provision reads together with Rule 14 of the GN. 67 of 2007 which provides that:-

"14 (2) Where a party fails to appear at mediation, the mediator may do the following:-

(a) In the case of complaint the Mediator may postpone the hearing in accordance with Rule 15 or may:-

(i) Dismiss the complaint if the referring party fails to attend a mediation hearing during the initial 30 days period;

(ii) **Decide the complaint if the other party to complaint fails to attend a mediation hearing"**

[Emphasis is mine].

The learned Counsel for the applicant argued that the above cited provisions do not empower the mediator to arbitrate the dispute that he/she is supposed to decide if mediation has failed or not. The Learned Counsel further contended that the application of the provision of section 87 of the Act is on disputes for termination based on operational requirements where there is no agreement by virtue of Section 38 (2) of Act.

The term decide has a similar meaning as to reach to a determination or decision/ or to make conclusion of a matter. Linking such meaning to the provisions cited above it is my view that the mediator is conferred power to arbitrate the dispute to its finality. I do not agree with the applicant for the respondent submission that the Arbitrator acted converted himself to arbitrator the dispute. I also find the argument that to decide means to state if mediation has succeeded or not, in my view if that was the position of the law as the applicant wish this court to believe there would have be no need

of the provision of section 87(4) of the Act cited above which empowers the Court to enforce the decision made under that particular provision.

As stated early the mediator's power to arbitrate the dispute is conferred in the provisions cited above. The provision which has been elaborated in a number of cases including the case of **Quality Group Ltd. Vs. Philbert Alex Chesso**, Lab. Div. DSM, Rev. No. 294 of 2009, [2011-2012] LCCD 1 this court decided that:-

> "it was proper for Mediator to decide when the respondent did not make appearance at the hearing of the mediation. Thus this application is baseless and it is accordingly dismissed".

Therefore on the basis of the above discussion it is my view that since the applicant herein failed to enter appearance at the CMA the mediator was right to arbitrate the dispute and issued an award. Thus the first ground of the applicant has no merit.

As to the second issue of whether the Arbitrator erred in law by deciding the dispute without framing issues to the disputes before the CMA. Unfortunately the CMA records of this case are misplaced.

However as reflected in the impugned award the mediator raised the issues in which he acted upon as rightly submitted by the counsel for the respondent. I therefore find this ground to have no merit.

Regarding the last issue as to whether the applicant has adduced sufficient reasons to set aside ex-parte award. It is a trite law that for a court to invoke its powers to set aside the ex-parte award the applicant has to adduce sufficient reason for non appearance when the matter was scheduled for hearing. In the application at hand the applicant's reasons for failure to enter appearance are reflected at paragraph 7 and 8 of the affidavit. He stated that on 27/07/2012 Advocate Gasper Tluway assisted with the applicant's Officer they appeared at the CMA however the trial mediator was indisposed and there was no information on fellow mediator who adjourned the case on his behalf. The applicant further stated that he made follow up and became aware of the ex-parte award on January, 2013 and the ex-parte award was issued on 20/01/2014.

From such analysis it is apparent that the applicant made follow up for almost seven five months. As the record reveals the matter was adjourned for several time but the applicant did not enter

appearance. Under such circumstances it is my view the applicant failed to convince this Court that he had been following up this matter. I find the applicant did not act diligent in this case as a serious party to a case cannot lose track of such case for almost five months. I find such reason not to be sufficient to set aside the ex-parte award issued by the CMA.

In the result I find the present application has no merit. As discussed above, firstly the mediator properly decided when the applicant failed to appear at the mediation hearing before the mediator. So mediator had the jurisdiction to hear the matter ex-parte as he did as provided under section 87 (3) of the Act read together with Rule 14 of the GN. 67 of 2007, secondly the applicant failed to adduce sufficient reason for the Court to set aside the CMA's proceedings, ex-parte award and ruling. Thus, the application is hereby dismissed and the CMA's ex-parte award is upheld.

It is so ordered.

I.D. Aboud

JUDGE

02/10/2020