THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 161 OF 2020

BETWEEN

SBC (T) LIMITED ..... APPLICANT

VERSUS

MARY S. SHILINDE ..... RESPONDENT

JUDGMENT

Last order 13/8/2021
Date of Judgment 10/09/2021

B.E.K Mganga, J

On 2nd May 2003, applicant employed Mary Shilinde, the respondent as store clerk and later on promoted her to the position of store assistant. On 18th April 2017 applicant terminated her employment on allegation that she deliberately concealed stock shortage information, prepared wrong stock reconciliation report and lying to the management on full stock status through daily, monthly stock reconciliation. Aggrieved by termination, respondent filed labour dispute at the Commission for Mediation and arbitration henceforth CMA for unfair termination of her employment. On 20th March 2020, Mbeyale. R, Arbitrator, issued an award that termination was unfair as there were no valid reasons for termination and proceeded to order applicant to pay respondent TZS 12,210,564/= as compensation for

unfair termination, TZS 2,739,549/= as severance pay, TZS 1,017,547/= as annual leave pay, and TZS 1,017,547 in lieu of notice pay all amounting to TZS 16,985,207/=. Aggrieved by the award, on 4th May 2020 applicant filed Notice of Application supported by an affidavit of Patrick David Mhina seeking to revise the said award. In the affidavit in support of the application, applicant raised the following legal issues:-

1. *Whether termination of the employment of the respondent followed a fair procedure;*
2. *Whether the termination of the employment of the respondent had valid and fair reasons;*
3. *Whether the Applicant afforded the respondent right to be heard*
4. *To what reliefs are the parties entitled to.*

When the application was called for hearing, Mr. Jacton Koyugi, Advocate assisted by Haron Oyugi, Advocate appeared and argued for and on behalf of the applicant while Peter Mnyani, the Personal Representative argued for and on behalf of the respondent.

Mr. Koyugi, counsel for the applicant adopted the affidavit of Patrick David Mhina in support of the application and submitted that the CMA Award is illogical, unlawful, irrational and tainted by material irregularity. He submitted that the TZS 12,210,564/= as compensation for unfair termination, TZS 2,739,549/= as severance pay, TZS 1,017,547/= as

annual leave pay, and TZS 1,017,547 in lieu of notice pay all amounting to TZS 16,985,207/= awarded to the respondednt has not suffered the mandatory income tax reduction as required by Section 7(2)(e) of the income tax Act [Cap 332 R.E. 2019] that requires payment for termination of employment be subjected to income tax. Counsel for applicant submitted that tax payable on the total sum awarded to the respondent is TZS. 4,923,562.10. That this amount was supposed to be retained by the employer (applicant) who is agent of the tax collector. He submitted that after deduction of that tax, respondent is supposed to be paid TZS. 12,610,644.90. He concluded that applicant expected CMA to reduce the award to TZS. 12,610,644.90 and prayed that the decretal sum should be paid subject to income tax.

Counsel for applicant submitted further that, the Arbitrator faulted termination procedure adopted by the applicant on the basis that applicant did not call key witness namely Mr. Bavick Marsh Patwa during disciplinary committee hearing. He argued that the said Bavick Marsh Patwa testified at CMA as **DW2** and that the law does not bind the employer to bring a particular witness at disciplinary hearing. His reliance for that argument was Rule 13(5) of the Employment and Labour Relations (Code of Good Practice) Rule GN. No. 42 of 2007. He went on that an employer has option

to call witnesses or not. He submitted that DW2 adduced evidence in the Disciplinary Committee whereas the respondent had a right to cross examine him. That the minutes of the Disciplinary Committee (exh. D5), shows that Patwa-DW2 attended Disciplinary Committee hearing and that his name is 2nd on the list of attendants although he did not sign the said minutes and that he testified against the respondent. He submitted further that the respondent had an opportunity to cross-examine DW2 but she didn't. Counsel concluded that at the Disciplinary Committee hearing, the respondent was given rights and that there was no irregularity in the procedure to amount to unfair termination.

Counsel for applicant submitted further that, arbitrator faulted termination procedure on ground that applicant did not issue investigation report to the respondent. He submitted that the arbitrator erred because under Rule 13(1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007, an employer is not obliged to give investigation report to the Respondent. He argued that the said rule requires only an employer to conduct investigation. He submitted that DW**1** testified that investigation was done. He concluded whatever the case, respondent was not prejudiced for not being given the investigation report.

Submitting on the reliefs parties were entitled to, Mr. Koyugi advocate, submitted that respondent was paid accrued salary for March 2017, one month salary in lieu of notice, and eighteen days as per termination letter (exh. D3). He submitted that the arbitrator awarded the respondent the same amount hence double payment. He therefore prayed that amount be deducted from the award.

In arguing ground No. 2 and 3 together, Counsel for applicant submitted that Respondent participated in collusion and fraudulent acts that occasioned loss and mistrust to the applicant. He concluded that legal administration of justice should facilitate investment to business and not to frustrate it by condoning illegal acts of employees. He therefore prayed the award be revised as there was valid reasons for termination and that respondent was not entitled to the amount she as awarded.

Submitting on the complaint that the award has not complied with the income tax Act, Mr. Mnyani replied that Section 7(2)(e) of the income Tax does not cover the award by the Arbitrator. He argued that that section covers situations where employer terminates an employee and pay him. He insisted that the Award is not subject to income tax. Mr. Mnyani submitted further that the Arbitrator has power to call a tax officer to make calculations for taxation whenever he deems fit at the time when the

arbitrator is dealing with costs. He argued that there was no issue of cost for the arbitrator to invoke the aforementioned provisions.

Mr. Mnyani, submitted that DW2 did not attend hearing at the Disciplinary Committee as admitted in his evidence and corroborated by discipline hearing form (exh.D4). Mr. Mnyani argued that DW2 was the one who discovered the alleged loss and that his failure to attend disciplinary hearing denied the respondent right to be heard properly as she was not afforded right to cross examine him prior to her termination.

Responding to the submission that respondent was paid some terminal benefits, Mr. Mnyani submitted that amount paid to the respondent was not raised at CMA hence there is no evidence to prove that the respondent was paid terminal benefits. He however conceded that the respondent was given certificate of service. He argued that the respondent was receiving her salary through NMB Bank at Ilala Branch in the name of Mary Simon Shilinde and that no money was credited as proof of what is indicated in exh. D3.

On grounds No. 2 and 3, Mr. Mnyani was very brief that the respondent was unfairly terminated as the procedure was partially followed and that she did not participate in the alleged fraud.

I have carefully examined arguments of the parties and the award under consideration and it seems the parties are of the view that the decision of the arbitrator on unfair termination is based on procedure. With due respect, that is not the position. The arbitrator issued the award that termination was unfair as there were no valid reasons for termination. At page 17 of the award, the arbitrator held:-

> *"...kwa mantiki hiyo, sababu ya kusitisha ajira ya mlalamikaji haijathibitishwa na utaratibu ingawa ulifuatwa kwa sehemu, haukuwa na mantiki kwani sababu ya kusitisha ajira haikuthibitika. Hivyo imethibitika usitishwaji wa ajira ya mlalamikaji haukuwa halali."*

From the quoted paragraph, it is a misconception on both the applicant and the respondent to base their argument on procedure. As to whether there were valid reasons for termination or not, one has to revert on ground No. 2 of revision namely, *Whether the termination of the employment of the respondent had valid and fair reasons.*

For convenience therefore, in this judgment I will first address the 2nd ground i.e., whether the applicant had valid and fair reasons in terminating employment of the respondent. This in my opinion, is the core issue in this revision application.

It was argued on behalf of the applicant that the Respondent participated in collusion and fraudulent acts that occasioned loss and

mistrust to the applicant to justify termination. That argument was refuted by the representative of the respondent. In order to resolve this issue, I have read evidence of the parties in the CMA record to see whether there was justification for termination of employment of the respondent.

The evidence of Ireneus Mushangi (DW 1) and Bavick Maresh Patwa (DW2) apart from showing that there was loss and fraud that occasioned loss to the applicant, their evidence fell short to prove involvement of the respondent. DW2 admitted that there were five persons namely Emmanuel Taggi, Mary S (the respondent), Amon Mwakalukwa, Maneno Kabue and Chacha and that all used to work by shift. When under cross examination, DW2 is recorded saying:-

"...wakati wa tukio la wizi linafanyika, Mary siku hiyo alikuwa hayupo ila aliingia shifti ya mchana..."

From the quoted sentence, it is clear that the respondent was not present at work on the fateful date.

Another witness who testified for the applicant is Amon Mwakalukwa (Dw3) who prior termination of the respondent was also a store assistant in the same place but on a different shift. He conceded that loss occurred at his workplace as a result each individual was called to the Disciplinary hearing Committee at his or her own time and later on was terminated. That he was terminated as a result, he filed a dispute at CMA against the

applicant but later on he withdrew it. When he was under cross examination, DW3 is recorded saying:-

S: una Ushahidi kuthibitisha shortage mlikuwa mnaufahamu wote wa 5?

J: Ushahidi wangu mimi ni kwamba nilifungua shauri ndo nimelifuta kwa hiyo maelezo yangu ndo maelezo yake

S: umesema short ya kreti 160 mlikuwa mnaifahamu wa2 , Mlihusika na kutokea kwa upotevu huo.

J: ***Nimesema doesn't matter tulihuisika au la lakini dhamana tuliyopewa na SBC ya kufanya kazi maeneo yetu ya kazi kumetokea shida hiyo Co iliamua kutuwajibisha kwa nafasi zetu***.

S: Je ktk shift hizo kulikuwa na makabidhiano ya shift-shift

J: ndio utaratibu.

S: utakubaliana nami basi kwakuwa kulikuwa na makabidhiano, ilikuwa rahisi kugundua shortage imetokea kwenye shift ipi?

J: Ni sahihi kabisa

S: ni dhahili pia kujua waliohusika

J: sawa sawa.

S: kuna stock -reconciliation ya kila siku

J: ipo.

From the above quoted evidence, applicant was in a position to know who cased the alleged loss. I have read CMA file and find that there is no evidence showing that the respondent participated in the alleged fraud. In fact, the respondent (PW1) is recorded saying that there is handing over at every time a person takes over or hands over the shift. She gave evidence that she was sick since 12th March 2017 to 17th March 2017 and excused

from duty as such she did not attend at work. This evidence is not contradicted by the applicant. Respondent testified that she was notified of the said loss on 17th March 2017 while at home and that she resumed work on 20th March 2017. In her evidence, respondent (PW1) is recorded saying:-

> ***"...Nililipwa mshahara wa mwezi mmoja, siku 18 za likizo na certificate of service".***

Considering the above evidence of PW1, DW2 and DW3, it is clear that it was not proved that the respondent participated in the alleged fraud. Her termination was a result of accountability as stated by DW3 in the above quoted piece of evidence. In my view, that was not sufficient ground for termination taking into consideration that the incidence occurred in her absence. It seems, the applicant and her counsel know the truth behind, that is why there was no much pressing in submission on issue of presence or absence of valid reasons for termination. I therefore hold that the respondent was unfairly terminated as there was no valid reasons for termination of her employment.

Having held that respondent was unfairly terminated, the question that follows is the relief she is entitled to. It was argued on behalf of the applicant that the respondent was paid one-month salary in lieu of notice and eighteen days as per termination letter (exh. D3). That, the arbitrator

in awarding the same in the award amounted to double payment. Mr. Mnyani personal representative for the respondent disputed that claim. This issue cannot waste my time as the answer is clearly provided in the testimony of the respondent (Pw1) quoted above that she was paid one-month salary in lieu of notice, eighteen days leave and was given a certificate. Since the respondent was paid that amount as admitted in her evidence, she is not entitled to receive the same amount again. I therefore revise the award to such extent of deducting TZS 1,017,547/= awarded as leave pay and TZS 1,017,547/=awarded in lieu of Notice pay all amounting to TZS2,035,094/=from the award.

I have carefully examined the rival arguments of the parties as to whether the amount that was awarded to the respondent is taxable or not. Counsel for the applicant submitted that it is taxable while Mr. Mnyani for the respondent submitted on the opposite. Mr. Mnyani submitted that the Arbitrator has power to call a tax officer to make calculations for taxation whenever he deems fit at the time when the arbitrator is dealing with costs only. He, however, did not cite any provision. I have read the Income Tax Act [cap. 332 R.E. 2019] and find that the award it is taxable. Section 7 of the said Act reads: -

7.-(1) An individual's income from an employment for a year of income shall be the individual's gains or profits from the employment of the individual for the year of income.

(2) Subject to the provisions of subsections (3), (4) and (5) in calculating an individual's gains or profits from an employment for a year of income the following payments made to or on behalf of the individual by the employer or an associate of the employer during that year of income shall be included:

*(a) payments of wages, salary, **payment in lieu of leave**, fees, commissions, bonuses, gratuity or any subsistence travelling entertainment or other allowance received in respect of employment or service rendered;*

(b) payments providing any discharge or reimbursement of expenditure incurred by the individual or an associate of the individual;

(c) payments for the individual's agreement to any conditions of the employment;

(d) retirement contributions and retirement payments;

*(e) **payment for redundancy or loss or termination of employment;***

(f) other payment made in respect of employment including benefits in kind quantified in accordance with section 27;

(g) other amounts as may be required to be included under Division II of this Part; and

(h) annual director's fees payable to a director other than a full time service director.

(3) In calculating an individual's gains or profits from an employment, the following shall be excluded -

(a) exempt amounts and final withholding payments;

(b) on premises cafeteria services that are available on a non-discriminatory basis;

(c) medical services, payment for medical services, and payments for insurance for medical services to the extent that the services or payments are -

(i) available with respect to medical treatment of the individual, spouse of the individual and up to four of their children; and

(ii) made available by the employer and any associate of the employer conducting a similar or related business on a non- discriminatory basis;

(d) any subsistence, travelling, entertainment or other allowance that represents solely the reimbursement to the recipient of any amount expended by him wholly and exclusively in the production of his income from his employment or services rendered;

(e) benefits derived from the use of motor vehicle where the employer does not claim any deduction or relief in relation to the ownership, maintenance or operation of the vehicle;

(f) benefit derived from the use of residential premises by an employee of the Government or any institution whose budget is fully or substantially out of Government budget subvention;

(g) payment providing passage of the individual, spouse of the individual and up to four of their children to or from a place of employment which correspond to the actual travelling cost where the individual is domiciled more than twenty miles from the place of employment and is recruited or engaged for employment solely in the service of the employer at the place of employment;

(h) retirement contributions and retirement payments exempted under the Public Service Social Security Fund Act;

(i) payment that it is unreasonable or administratively impracticable for the employer to account for or to allocate to their recipients;

(j) allowance payable to an employee who offers intramural private services to patients in a public hospital; and

(k) housing allowance, transport allowance, responsibility allowance, extra duty allowance, overtime allowance, hardship allowance and honoraria payable to an employee of the Government or its institution whose budget is fully or substantially paid out of Government budget subvention.

(4) ***In calculating individual's gain or profit from payment for redundancy or loss or termination of employment, any payment received in respect of a year of income which expired earlier than five years prior to the year of income in which it was received, or which the employment or services ceased, if earlier such payment shall, for the purposes of calculation of the tax payable thereon, be allocated equally between the years of income in which it is received or, if the employment or services ceased in an earlier year between such earlier year of income payment is so received or as the case may be, such earlier year of income in which the employment or services ceased, and each such portion, allocated to any such year of income shall be deemed to be income of that year of income in addition to any other income in that year of income.***

(5) ***Where amount received as compensation for the termination of any contract of employment or services, whether or not provision is made in such contract for the payment of such compensation-***

(a) if the contract is for a specified term, the amount included in gains or profits shall not exceed the amount which would have been received in respect of the unexpired period of such contract and shall be deemed to have accrued evenly in such unexpired period;

(b) if the contract is for an unspecified term and provides for compensation on the termination thereof, such compensation shall be deemed to have accrued in the period immediately following such termination at a rate equal to the rate per annum of the gains or profits from such contract received immediately prior to such termination; and

(c) ***if the contract is for an unspecified term and does not provide for compensation on the termination thereof, any compensation paid on the termination thereof shall be deemed to have accrued in the period immediately following such termination at a rate equal to the rate per annum of the gains or profits from such contract received immediately prior to such termination, but the amount so included in gains or profits shall not exceed the amount of three years' remuneration at such rates.***

In terms of section 7(1) and (2)(e) of the Income Tax Act, supra, the award is taxable. It was argued on behalf of the applicant that Arbitrator was supposed to deduct TZS 4,923,562.10 as tax from the award. With due respect to counsel for the applicant. That argument was not put before the Arbitrator therefore he cannot be criticized for that. Not only that but also, the duty of Arbitrator is not to calculate taxable amount. This is a domain of a specific department or institution within the government of which CMA has no that mandate. The calculations of TZS 4,923,562.10 as tax as submitted by counsel for applicant is unreliable because he is not a taxman and there is no evidence to show how he arrived at that figure. The calculations are supposed to be made in terms of section 7(4) and

(5)(c) above of the Income Act, Supra because the ***contract of the respondent is for*** ***unspecified term and does not provide for compensation on the termination thereof.*** The said that section is so technical such that only people trained in that field can make calculations or any other person can only be able to do so after being advised how to do. In the application at hand, nothing was mentioned by counsel by applicant that the said figure was arrived at by a competent authority. Even if it can be assumed that counsel has that expertism, in my view that is not a base for this court to act on that figure. The reason is clear that he was submitting as counsel for the opponent party and not as an expert. In such a situation, possibility of bias cannot be eliminated. The respondent has not been heard on how that amount was arrived at, hence infringing her rights. My decision is fortified by the submission by counsel for the applicant that the said money was supposed to be retained by the applicant (employer) who collects tax on behalf of the tax collector. The issue is, how can the taxman know that a certain amount was deducted from the award as tax. The possibility is that the employer /applicant may only pay small amount especially the one reflected in letter of termination if any and hide the rest. For that reason, the alleged TZS 4,923,562.10 as tax payable by the respondent is hereby rejected and there is no logic for that money to be channeled through the

applicant. Instead, I direct the Deputy Registrar to serve this judgment to the Commissioner General of Tanzania Revenue Authority (TRA) and summon his officers to appear and make calculations of tax payable by the respondent in presence of the parties. The taxable amount shall be paid to TRA and not to the applicant.

For the foregoing and for clarity, TZS 1,017,547/= awarded as leave pay and TZS 1,017,547/= awarded in lieu of one month notice pay all amounting to TZS 2,035,094 /= shall be excluded from the award as the same amount was paid to the respondent prior filing labour dispute and the award arising therefrom. Respondent is entitled to be paid TZS TZS 12,210,564/= as compensation for 12 months and TZS 2,739,549 as severance pay all amounting to TZS 14,950,113 subject to taxation by the Commissioner General of Tanzania Revenue Authority (TRA).

It is so ordered.

B.E.K. Mganga
JUDGE
10/09/2021