IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 571 OF 2019

BALTON TANZANIA LIMITED.....APPLICANT

VERSUS

VEDASTUS MAPLANGA MAKENE..... RESPONDENT

(From the decision of the Commission for Mediation & Arbitration of DSM at Kinondoni)

(Mkombozi: Arbitrator)

dated 15th November 2019

in

REF: No. CMA/DSM/KIN/R.1400/17/8

JUDGEMENT

20th September & 22nd October 2021

Rwizile J.

This application for revision, arises from the decision of the Commission for Mediation and Arbitration, to be referred herein as the Commission. The applicant petitions this court to call for records of the Commission in dispute No. CMA/DSM/KIN/R.1400/17/8, revise and set aside, the award dated 15th May 2019.

By its history, it has been recollected that the applicant is a registered company under the laws of Tanzania, doing a range of financial business such as mining, construction, infrastructure development projects, agriculture and telecommunications. On 11th May 2015, the applicant entered in a long-term contract of employment as an IT sales Manager- Mining sector at the communication department to commence on 01st July 2015. Five months later, the applicant transferred his employment to Balton Tanzania Communications Limited (BTCL) with effect from 15th December 2015. On 18th October 2017, the respondent was suspended from employment due to involving himself with other companies doing the same business as the applicant. He was later on 23rd October notified to attend a disciplinary hearing on 26th October 2017. He was charged for three offences of gross dishonest and breach of trust, gross negligence contrary to the labour laws and causing severe loss to the employer. He was found guilty and terminated.

Aggrieved by termination, he filed a dispute with the Commission claiming for 102, 367,653 as compensation for unfair termination; that is 12 months' salary, severance pay and unpaid commission as his contract of employment. The commission granted the prayers

after finding that termination was unfair. The applicant has been aggrieved hence this application. The applicant has advanced only two grounds for determination;

i. *Whether the award is illogical for failure to analyse issues in relation to evidence*
ii. *Whether the arbitrator erred in law by wrongly interpreting the notion of transfer from BTL to BTCL*

At the hearing, Mr. Herman Lupogo appeared for the applicant.

He submitted that the award was illogical because it did not consider the evidence by the applicant. He said, after having found that the respondent's employment lasted for 5 months with BTL, based on the transfer to BTCL and that there was no employer -employee relationship, then it was illogical to hold the applicant accountable for termination. He submitted that the Commission therefore had no jurisdiction to entertain the matter. He went on submitting that section 61 of the Labour Institutions Act, [Cap. 300 R.E 2002] provides for a definition of an employee. In this case, it was argued, the Commission had so found that the relationship between the applicant and the respondent was not that falling under the law. This

argument followed a ruling that upon transfer of the applicant from BTL to BTCL, then the applicant had no supervisory role over him.

The learned counsel submitted, the applicant having been found to have no supervisory role over the respondent, it was not proper to hold that there was no valid and fair termination. It follows, the learned advocate submitted, that payment of terminal benefits couldn't flow from the applicant who was found to have no employer-employee relationship with the respondent. He asked this court to allow this application by setting aside the award.

Mr Makene counsel for the respondent was of the argument that the decision was about whether termination was fair or otherwise. It was submitted that as per Dw2, the applicant and BTCL worked under the same umbrella, which in the counsel's view is correct. He said, since there is no dispute that the respondent was employed by the applicant and is the one who transferred him, and later suspended him. It was clear to him that there was an employer and employee relationship. He went on submitting that supervisory powers over the respondent by the applicant ceased upon transfer to another company. This means, the applicant could not suspend the employee

who is out of his scope of employment. From this, the applicant held the view that the applicant was unfairly terminated.

Further, it was submitted that the procedure for termination was not followed, since he was terminated by the disciplinary committee and that his termination was as the result of only upholding the committee's decision. It was his submission that the applicant was therefore not right in doing what she did. Mr. Makene therefore asked this court to dismiss this application.

In rejoining, Mr. Lupogo was of the view that, the applicant as per the award was not an employer of the respondent. It was therefore clear that the remedies for unfair termination were irrational because the commission had no jurisdiction to adjudicate on an issue not arising from employment. In his view, the Commission was right in holding that the transfer to BTCL ended control of the applicant over the respondent. The learned counsel concluded that BTCL was the one to pay price.

Having heard arguments by both counsel, I have to say, unlike the applicant, it is pertinent to determine the second issue first. It is so because all arguments by Mr. Lupoga attacked the finding of the Commission which held, the respondent to have been the employee

of BTCL, but yet proceeded to punish the applicant. In the same vein, Mr. Makene, made sort of contradiction on the same point.

While admitting that there was relationship between parties to this case, still held the view that it was right for the applicant to pay for unfair termination.

On my party, I think I have to say that in elementary company law, Balton Tanzania Limited is a company separate from Balton Tanzania Communications limited. The reasons for so holding are as clear as crystal; **first**, they are both incorporated in the United Republic of Tanzania at different time, **second**, each has its board of directors, **third**, each has its name separate from the other with different dates of incorporation. While BTL has its incorporation date as 21st March 1968, BTCL's incorporation date is 23rd October 2015, **fourth**, their corporate numbers are different which are BTL as 4264 while BTCL as 121114. All this information is according to letters from BRELA dated 24 & 28th August 2017. It is from this background information, I think, the award referred them as different companies.

That being clear, it is also apparent that the respondent was employed by the applicant as shown before. His transfer, which was the basis of discussion at the Commission was plain and was done

after five months. In certain terms, the transfer letter exhibit BT8 is instructive that his duties were transferred to BTCL and so is relocated there, in the same capacity and without loss of benefits. This means, the applicant transferred all his duties of communication to BTCL, while remaining the overseer of other businesses.

From the foregoing, it is true of Dw2 who said, the two companies are working under the same umbrella. I share her position because of the overwhelming reasons.

To start with, in the Employee's handbook, exhibit BT14 both companies share services, products, policies and procedures, and it is for both companies. They are all being owned by the same person which is Balton CP, a multinational conglomerate registered in London, as per its profile and the two letters from BRELA, (BL7), as well, they are happening to share principal place of business, as 23 Coca Cola Road, Mikocheni, Light Industrial Area, DSM. Apparently, from 1st August 2017, they have one director going by the name of Mr. Delwin William Moldenhauer Butch appointed by the board of director appearing to be shared by both (BL-5).

In my considered view, it is a wrong premise, shared by the Commission and both counsel that because the respondent was transferred by the applicant to BTCL, and since these are two companies, then the applicant ceased control. To be able to appreciate my finding, I have to venture on what establishes employer – employee relationship. This being a labour dispute, the labour laws have the answer. The applicant cited without much ado and never elaborated the import of section 61 of the labour Institutions Act.

For easy reference it states as hereunder;

> *For the purpose of a labour Law, a person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present.*
>
> *(a) the manner in which the person works is subject to the control or direction of another person;*
>
> *(b) the person's hours of work are subject to the control or direction of another person;*

(c) in the case of a person who works for an organization, the person is a part of that organization;

(d) the person has worked for that other person for an average of at least forty-five hours per month over the last three months;

(e) the person is economically dependent on the other person for whom that person works or renders services;

(f) the person is provided with tools of trade or work equipment by the other person; or

(g) the person only works for or renders services to one person.

From the foregoing provisions, any one or more means, the applicant has to prove that there was an employer-employee relationship. The Commission rule out that there was none. The applicant also submitted in support of the same finding albeit for different reasons. For Mr. Lupogo, upon holding that the applicant had no such a relationship, then, the commission ceased to have jurisdiction. As I

said before and from the records both positions are wrong. The respondent is well aware, that despite having been transferred to a company that did not employ him, still he went on performing same duties as per his contract, received instructions from the same persons and above all, he was being paid salaries from the applicant. Tools of work were as well provided for by the same person.

That is why, he was accused of having done business which the applicant has been doing and that he used the assets of the same applicant for personal gain. For instance, it is the applicant who paid for his insurance as per the letter dated 16th May 2016 to AAR Insurance Tanzania Ltd, same paid for his contributions to social security fund, provided him with motor vehicle, paid for leave, and salaries as per exhibits BT9, 10, 11,12 and 13. The same is as good as testified by Dw2. Explicitly therefore, he who pays the piper, as the saying goes, calls the tune. The applicant was still in control of the respondent and therefore vested with powers to terminate him. In this, I hold that the Commission was wrong to hold otherwise.

Turning back to the first point, the issue here is whether termination was fair both, in terms of substance and procedure. The learned counsel for both sides did not discuss this issue with lucidity. As

crucial as it is, I have to commend the Commission for having discussed it at length. Termination to be fair, as held by the commission, there must be valid reasons and should be founded on fair and valid procedure. The law enjoins the employer to prove so under section 39 of ELRA.

Section 37 of ELRA, is clear and states that the employer has to prove not only that termination was for valid reason but also that the reasons were fair.

Termination for misconduct as in this case is governed by Rule 12 of the Code of Good Practice GN No. 42 of 2007.

Having gone through the reasoning of the arbitrator and the records available, I am in no doubt that rule 12 was not complied with.
The offence charged were grounded on misconduct as stated proved to exist as in the Employee's handbook exhibit BT14. But since, it is the duty of the employer to prove at the balance of probability that there were valid reasons for termination, it cannot be said, the respondent was terminated for valid reasons. I therefore hold the view that termination had no proved valid reasons.

But fairness of procedure stated under rule 12, must be excised fully as under ruled 13. Rule 13(1) provides, there must be investigation first, to establish if there is a need for conducting a disciplinary hearing. In my view, this stage is important since it puts the whole disciplinary machinery process into motion. I consider this a foundation. It can be taken as reins that are usually used to control the unruly horse. Experience has shown most employer despite having good grounds and valid reasons for termination, they fail to explore the proper procedure, thereby landing to unfair termination.

As far as I am aware, in this case, the Commission held that the applicant did not conduct investigation for the reason that it was not compulsory for it is an internal arrangement. This I think was wrong. The respondent sent emails to an institution different from where he worked. He was alleged to have used the office tools for his personal gain, and was engaging in the business done by his employer. In the circumstances of this dispute, investigation was inevitable. Above all, the respondent was suspended. Investigation, especially on serious offences, could have shed some clue and light as to the extent of the truthfulness of the alleged misconduct.

The respondent had not admitted committing misconducts, which would have made the whole process of investigation nugatory. In deciding as I have done, I am not landing in the virgin land, where eagles themselves have never landed. The Court of Appeal has held that failure to conduct investigation and avail the employee with the investigation report, is denying the respective employee the right to defend himself from the allegations. See the case of **Severo Mutegeki and Another vs. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA),** Civil Appeal No. 343 of 2019, Court of Appeal of Tanzania at Dodoma).

It can therefore be held that the provisions of the law were not complied with. Failure to comply with the mandatory legal requirement stated in the case cited and in rule 13(1) of the Code of Good Practice, however smart the disciplinary hearing may be, it cannot lead to fair termination. In as much as I agree with the applicant that the respondent may have committed misconducts, still termination procedures must be fully followed. For the foregoing, this application has no merit. It is dismissed with no order as to costs.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) (Labour Division) DIVISHENI YA MAHAKAMA YA KAZI

A.K.Rwizile
JUDGE
22.10.2021