IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 282 OF 2020

BETWEEN

HIGHER EDUCATION STUDENT'S LOAN BOARD ..... APPLICANT

AND

GOIMA PETER MSIMBIRA.....RESPONDENT

JUDGMENT

Date of last order: 21/9/2021
Date of judgment: 29/11/2021

B. E. K. Mganga, J

On 5th July 2006, applicant employed the respondent as Loans officer grade II and his duty station was Dar es Salaam. On 29th November 2011, respondent was interdicted at a half monthly salary pay to give room for investigation of a criminal case against him as he was suspected to have forged disbursement loans to students of University of Dodoma for the year 2011/2012. On 18th July 2012, the applicant required the respondent to submit his defence within 14 days in relation to two disciplinary charges that were laid against him. In the charges, it was alleged that respondent; (i) intentionally or negligently prepared Loan Disbursement schedules purportedly being payment of two existing students and fifteen non existing students of the University of Dodoma

(UDOM) for 2011/2012 academic year, the payment which turned out to be forgeries amounting to TZS 10,986,250.00, leading to a potential loss to the Board; and (ii) intentionally or negligently prepared other Loan disbursement schedules totaling TZS. 48,771,250.00 being forged payment to Seventy-seven non existing students at the University of Dodoma (UDOM) for 2011/2012 academic year, leading to potential loss to the Board. On 6th August 2012, respondent served his defence to the applicant. In his defence, respondent argued that all Seventy-seven (77) students were allocated and then approved by the Loan allocation and repayment committee and that they were not non existing students. That, he prepared loan disbursement schedules for 3,426 successful loan applicants' students of University of Dodoma (UDOM) college of Education (COED) by following all process necessary for computerized preparation of disbursement. On 21st May 2012, applicant terminated employment of the respondent. Aggrieved by the said termination, on 11th October 2013, respondent filed Labour dispute No. CMA/DSM/KIN/R.695/13/120 to the Commission for Mediation and Arbitration henceforth CMA claiming to be reinstated on ground that there was breach of natural justice in the entire process leading to termination of his employment and that respondent did not comply with

procedure stipulated in regulations of HESLB. In CMA F.1, respondent indicated that the dispute arose on 27th May 2013 in Dar es salaam. He indicated that reasons for termination as involvement in forgeries. On substantive the issue, he indicated that the employer (i) based her findings on speculative offences and, (ii) that reasons for termination of employment included a new offence that was not in the charge sheet. On procedural issue, he indicated that no representation was made by the employee before the Disciplinary Committee.

On 12th June 2020, Hon. Alfred Massay, Arbitrator delivered an award in favour of the respondent. In the award, the arbitrator stated that the respondent was charged for causing loss of TZS 59,757,500/= the amount that appear in the termination letter, but inquiry committee report shows that loss is TZS 48,771,250/= which brings contradiction. Arbitrator held that evidence on record indicates variance between the charge and the reason leading to termination which suggest that complainant was not afforded fair opportunity to defend himself on the ground leading termination. The arbitrator, ordered respondent be reinstated and be paid TZS 166,640,000/= as outstanding remuneration.

Applicant was aggrieved by the award as a result she filed a Notice of application supported by an affidavit of Abdallah M. Mtibora, the

Assistant Director of Legal affairs seeking the court to revise the said award on three grounds namely:-

> *"(i) The Commission for Mediation and Arbitration (CMA) at Dar es Salaam erred in entertaining the complaint that was time barred.*
>
> *(ii) The Commission for Mediation and Arbitration (CMA)erred in exercising jurisdiction not vested on it and presiding over a dispute that was not properly before it.*
>
> *(iii) The Commission for Mediation and Arbitration (CMA) erred by disregarding the testimonies of the applicant witnesses.*

The application was resisted to, by the respondent who filed a counter affidavit.

Initially the application was disposed by way of written submissions whereas applicant enjoyed the service of Brighton Mtugani, a State Attorney, while the respondent enjoyed the service of Alipo Atunkolepo Mwakanyika, advocate. In the course of composing my judgment, I found that the issue of time limitation was not properly addressed by both parties. The CMA record shows that, 20th November 2013, by consent, application for condonation was withdrawn, but the same complaint that the dispute was time barred was included in grounds of revision. I also found a new issue on procedural aspect relating to taking over the file for arbitration from one arbitrator to the other. The CMA record shows that, on 20th November 2013, Hon.

Massay, Arbitrator issued an order that application for condonation is withdrawn as referral form CMA F.1 was filed in time and ordered hearing for mediation on 6th December 2013. On 6th December 2013, Hon. Lemwely, Mediator, issued CMA F.5 and marked the matter un-resolved. On 11th February 2014 the dispute was before Hon. Basil Mwakajila, Arbitrator, but on 4th May 2014 it landed in hands of Hon. Massay, Arbitrator, who heard the parties and issued an award. For all these, I therefore, summoned learned counsels to address the court on whether, the alleged consent on limitation of time and the procedure of taking over from one arbitrator to the other, was proper.

On the issue of condonation and consent of the parties, Mr. Mtugani, State Attorney submitted that the dispute was out of time and consent of the parties on 20th November 2013 was made by mistake and by misleading the arbitrator. He submitted that CMA F.1 shows that the dispute arose on 27th May 2013 when the respondent was terminated from employment, but the dispute was referred to CMA on 7th October 2013 out of the 30 days provided for under Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, 2007 GN. No. 64 of 2007. Mr. Mtugani submitted that, from the date the dispute arose to the date of referring it to CMA, is 107 days and that respondent was out time for

77 days. State Attorney submitted that the remedy available is to quash proceedings and order application for condonation that was withdrawn by the applicant be heard on merit. State Attorney submitted further that, the procedure of taking over from one arbitrator to another was not proper.

On his part, Mr. Mwakanyika, counsel for the respondent submitted that application for condonation is filed when a person believed that s/he is out of time and that, respondent was out of time, which is why, he filed application for condonation. Counsel submitted that respondent was terminated on 27th May 2013 and referred the dispute at CMA on 11th October 2013 while out of time for 77 days. Mr. Mwakanyika, counsel for respondent, submitted that parties consented to withdraw condonation and not to grant condonation. Counsel submitted that, final decision for termination was made on 17th June 2013 and that respondent had 30 days from the date of final decision for termination within which to refer the dispute to CMA in terms of Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, 2007 GN. No. 64 of 2007. He was quick to submit that, respondent was served with final decision on **12th November 2013** and that it was not necessary to hear application for condonation as the final decision was

made while respondent has already filed the dispute at CMA. In so submitting, he was suggesting that the dispute was not time barred. When he was referred by the court on CMA F.1, he conceded that it does not reflect that the dispute arose on 12th November 2013 and that no amendment to CMA F.1 was done.

On procedure of taking over from one arbitrator to the other, Mr. Mwakanyika, counsel for the respondent submitted that it is not clear as who appointed Hon. Massay to arbitrate the dispute between the parties by taking over from Hon. Basil Mwakajila, arbitrator. With all these, counsel for the respondent submitted that everything was done in accordance with the law. He relied on Rule 29(11) of the Labour Institutions (Mediation and Arbitration) Rules, 2007 GN. No. 64 of 2007 and submitted that an application at CMA can be determined as the arbitrator deems fit.

I have heard submissions by counsel for the parties who at once are in agreement that some irregularities were committed at CMA. Let me start with the procedural aspect of assignment of disputes or taking over of disputes from one arbitrator to the other as both counsels are in agreement that the procedure was flowed with irregularities. Section 15(1)(b) of the Labour Institutions Act [Cap.300 R.E.2019] provides:-

"15(1) In the performance of its functions, the Commission may-

(b) ***assign mediators and arbitrators to mediate and arbitrate disputes in accordance with the provisions of any labour law****;"*

On the other hand, section 88(2)(a) and (3)(a) of the Employment and Labour Relations Act [Cap. 366 R.E 2019] provides:-

"88(2) Where the parties fail to resolve a dispute referred to Mediation under section 86, the Commission shall-

(a) ***Appoint*** *an arbitrator to decide the dispute;*

(3) Nothing in subsection (2) shall prevent the Commission from-

(a) ***appointing a****n arbitrator before the dispute has been mediated;"*

It is clear in my mind from the two cited statutes that an arbitrator has to be appointed and assigned the dispute to arbitrate and that there is no room for arbitrator to takeover any dispute from another arbitrator without being so appointed or assigned by the Commission. It is in my mind that, the reason and logic behind the aforementioned provision is to avoid scramble for disputes among arbitrators or one arbitrator taking over the dispute that is being arbitrated by another arbitrator without knowledge of the other. It is therefore my view, that evidence of assignment of a particular dispute or appointment to arbitrate a particular dispute has to be kept in each and every CMA file. This, in my

view, will also ensure compliance with the Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrators) Rules, 2007, GN. No. 66 of 2007 that requires Mediators and Arbitrators to act with honest, impartiality, integrity, due diligence and be independent of any outside pressure. Rule 6(4) of GN. No. 66 of 2007, supra, requires the Mediator and or Arbitrator to withdraw where conflict of interest exist. The rules are silent as after withdrawal, where the file relating to the dispute between the parties should be sent. In my view, it has to be sent to the person who assigned or appointed the Mediator or arbitrator to mediate or arbitrate the dispute. It is my view that there is a lacuna in these Rules and the same need to be cured by amendment.

It is clear from CMA record that, on 31st October 2013, parties were before Hon. Massay, Arbitrator for application for condonation and that advocate Alipo appeared on behalf of the herein respondent who was the applicant and Advocate Kobas appeared on behalf of the herein applicant who was the respondent and prayed for adjournment to file a counter affidavit as respondent (herein applicant) was just served with the application. Prayer for adjournment was granted and it was ordered that the application will be heard on 20th November 2013. On 20th November 2013 the record shows:-

" ***Date : 20/11/2013***

Coram: *Hon. Massay-arb*

Complainant: advocate Alipo for the complainant

Respondent: advocate Marma for the respondent

Complainant: by consent in the view of the final decision of termination served to the complainant on 12th November 2013 by EMS application for condonation is deemed unnecessary we therefore pray to withdraw.

Respondent: no objection

Order: application is withdrawn. Referral form CMA F1 is filed on time. Hearing of mediation on 6th December 2013

Sgd.

Date: 6/12/2013

Coram: *Hon. Lemwely – Mediator*

Complainant: advocate Alipo for the complainant

Respondent: advocate Kobas for the respondent

Commission: matter is coming for mediation.

Order: after discussion matter is marked un-resolved. CMA F5 issued

Sgd

Lemwely- Mediator

11/2/2013

Coram*: Hon. Basil Mwakajila arb*

For Complainant: present in person

For respondent: absent

Complainant: I pray for another date as my advocate is absent

Order: Mention on 14th April 2014.

Sgd

Thereafter the dispute was adjourned for mention to 15/6/2014, 16/9/2014, 15/11/2014, 14/2/2015, 25/4/2015,17/6/2015, 18/8/2015, 16/10/2015, 12/2/2016 and 4/5/2016 before Hon. Basil Mwakajila arbitrator. On 4/5/2016 the record shows:-

4/5/2016

Coram: *Hon. Massay- arb*

For complainant: Alipo advocate

For respondent: advocate Majura

Status: matter is coming for arbitration hearing.

Commission: the then presiding arbitrator has been assigned other duties hence appointment of current arbitrator.

Parties: previous proceedings be adopted; matter continue with hearing.

Order: proceedings are adopted.

After adopting the proceedings, arbitrator and parties drafted issues for consideration. The dispute was adjourned to 14/7/2016 and the record shows that on this date both Mr. Alipo counsel for the herein respondent and Kobas counsel for the herein applicant attended.

From the quoted paragraphs of the proceedings, I have noted that, there is no evidence of assignment of the dispute from Hon. Massay to Lemwely, Mediator, from Lemwely, mediator to Basil Mwakajila, arbitrator and from Basil Mwakajila arbitrator back to Massay Arbitrator. The indication that Mr. Basil Mwakajila arbitrator has been assigned other duties is not supported by evidence as it is unclear as who assigned the file to Massay arbitrator. I therefore agree with counsel for the respondent on that aspect. It is clear therefore that, the provisions of section 88(2)(a) and (3)(a) of the Employment and Labour Relations Act [Cap. 366 R.E 2019 and Section 15(1)(b) of the Labour Institutions Act [Cap.300 R.E.2019] were violated.

There is a plethora of case laws insisting that in order to have transparency in administration of justice and avoid chaos, when a judicial officer takes over the matter from another, reasons has to be assigned and recorded. For example, in the case of ***Priscus Kimario vs Republic,*** Criminal Appeal No. 301 of 2013 (unreported), the Court of Appeal stated as follows:-

> *"...where it is necessary to re-assign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete must be recorded.* ***If that is not done, it may lead to chaos in the administration of justice. Anyone, for personal reasons could just***

pick up any file and deal with it to detriment of justice*. This must not be allowed". phasis is mine)*

In the case of ***Charles Chama and 2 Others vs The Regional Manager TRA and 2 Others***, Civil Appeal No. 224 of 2018 (unreported), the Court of Appeal held:-

"the justification for a judge or magistrate to provide reasons upon taking over the case from another is two folds; one, that the one who sees and hears the witness is in the best position to assess the witness's credibility which is very crucial in the determination of any case before a court; and two ***that the integrity of judicial proceedings hinges on transparency. Where there is no transparency, justice may be compromised****." (emphasis is mine)*

In the case of ***Fahari Bottlers and Southern Highland Bottlers Ltd vs The Registrar of Companies and the National Bank of Commerce (1997) Ltd***, Civil Revision No.1 of 1999 (unreported) the Court of Appeal held:-

"... the individual calendar system requires that once a case is assigned to an individual judge or magistrate, it has to continue before that particular judge or magistrate to its final conclusion, unless there are good reasons for doing otherwise. The system is meant not only to facilitate case management by trial judges or magistrates, but also to promote accountability on their part. The unexplained failure to observe this procedure in this case is very irregular, to say the least. Such irregularities and the accompanying confusion, in our view are not amenable to the appellate process for remedy. They are amenable to the revisional process"

Yet in the case of ***VIP Engineering and Marketing Limited vs Mechmar Corporation (Malaysia) and Another***, Civil Application Number 163 of 2004 (unreported) the Court of Appeal held:-

> *"The individual calendar system requires that once a specific judge or magistrate is assigned a certain matter then that judge, or magistrate remains to be the one to deal with such matter to its conclusion unless there are exceptional circumstances for removing the matter from the specific judge or magistrate so assigned. Such exceptional circumstances must be recorded.* ***This will no doubt avoid unnecessary speculation and is in line with transparency, which is vital in the dispensation of justice****" (phasis is mine)*

For all what I have pointed above, I am in agreement with both counsels that there were irregularities in handling this matter by arbitrators and mediator as it is not known how Massay was assigned this matter and how it went to Lemwely, Mediator for mediation then to Basil, arbitrator then back to Massay, arbitrator.

I have noted that, there are no handwritten proceedings and that proceedings of 31st October 2013, the date it is alleged the parties consented that the dispute was in time and the herein respondent prayed to withdraw application for condonation and Hon. Massay, arbitrator marked it as withdrawn, were not signed by the said Massay arbitrator. All proceedings that are shown that were conducted before

Hon. Lemwely, Mediator and Basil Mwakajila, arbitrator were no signed. In short, all proceedings quoted hereinabove though indicated that they were signed, they were not signed. The only proceedings that were signed are those taken by Massay, arbitraror from 4th May 2016 onwards. Failure to sign or certify that the record is correct is in violation of Rule 32(5) of the Labour Institutions (mediation and Arbitration) Rules 2007, GN. No.64 of 2007 that requires the maker of the transcript of the electronic record to certify that the same is correct. In terms of sub rule (6) of Rule 32 of the said GN, once certified as correct, it has to be presumed as correct unless the Labour Court decides otherwise. In my view, as the proceedings of 20th November 2013 were not certified or signed by Hon. Massay, arbitrator, it is uncertain as to whether it reflect what transpired at CMA on that day, namely, on 20th November 2013 when the prayer to withdraw the application for condonation was made. Again, as pointed out hereinabove, there is no assignment or appointment of the said Massay, arbitrator to handle the dispute between the parties.

One important thing that is worth to be pointed out in this application is appearance of advocates at CMA on the dates quoted above. On 20th November 2013 the record shows that one Marma

advocate appeared on behalf of the herein applicant while Alipo, advocate represented the herein respondent and that parties consented to withdraw application for condonation on ground that the dispute was within time and Hon. Massay, arbitrator marked it withdrawn. On 4th May 2013, when Hon. Massay, arbitrator took over in the way he did, appeared Mr. Alipo for the herein respondent and Mr. Vedastus Majura appeared for the herein applicant. On this date it is recorded:-

> "…
>
> *Parties: previous proceedings be adopted; matter continue with hearing.*
>
> *Order: Proceedings are adopted".*

Parties, namely, respective advocates were not individually asked and recorded their reply as whether they consent for the previous proceedings be adopted or not. It was just a lumping together that parties have agreed to adopt previous proceedings. This, in my view, was also not proper.

From the foregoing, it appears that the herein applicant on 20th November 2013, was represented by Marma, advocate and on 4th May 2016 was represented by Vedastus Majura advocate. But, in the rest of the days including the first appearance date, she was represented by Kobas advocate. Mr. Mtugani, State Attorney for the applicant submitted

that instructions were given to Mr. Kobas to represent the applicant at CMA and that now the matter is being handled by themselves following government policy and the amendment of the law.

I have read Section 88(9) of the Employment and Labour Relations Act [Cap. 366 R.E.2019] and find that the same is clear to appearance at CMA as it provides:-

> *"88(9) in any arbitration hearing, a party to a dispute may be represented by-*
>
> *(a) Member or official of that party's trade union or employer's association;*
> *(b) An advocate or;*
> *(c) Personal representative of the party's own choice".*

From what I have observed in this application, there is a need of parties to file a notice of representation at CMA as assurance that whoever appears, does so on behalf and on instruction of the parties to the dispute. The said notice has to be signed by the party to the dispute and not an advocate, personal representative or member or official from trade union or employers' association. If appearance at CMA is not properly controlled, a person may appear without authorization and do anything prejudicial to the interest of the party to the dispute or authorized by the party but later on the party allege that he/she does not know that person and that no authorization was given. This proposal

is in line with the procedure in this court where parties file a Notice of representation.

On the issue of condonation, both counsels submitted that respondent's employment was terminated on 27th May 2013 and that he referred the dispute at CMA on 11th October 2013. They both agree that respondent filed an application for condonation, and it was neither granted nor dismissed as parties purportedly, consented that the dispute was not time barred, and allegedly, respondent withdrew application for condonation. As pointed herein above, one of the grounds advanced by the applicant is that the dispute was time barred as such CMA arbitrator lacked jurisdiction. Counsel for the respondent submitted that there was consent to withdraw condonation and not to grant condonation. It is clear that condonation was not granted as a result the dispute was improperly heard. Counsel for respondent was quick to argue that respondent was served with the final decision of termination on 12th November 2013. Whether that is correct or not, needed proof at CMA. At any rate, if that is the position, respondent was supposed to amend his pleading in CMA F.1 to reflect that the dispute arose on 12th November 2013, but the dispute was heard by the arbitrator based on the CMA F.1 indicating that the dispute arose on 27th May 2013.

For all said and done, I hereby nullify CMA proceedings starting from 20th November 2013 to conclusion of hearing, set aside the award arising therefrom and return the matter to CMA to be handled properly by another arbitrator.

It is so ordered.

B.E.K. Mganga

JUDGE

29/11/2021