IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 208 OF 2020

BETWEEN

PAULO CHANDO…… …… APPLICANT

AND

ICEALION GENERAL INSURANCE …… RESPONDENT

JUDGMENT

Date of last order 12/10/2021
Date of judgment 03/11/2021

B.E.K. Mganga, J

On 31st December 2004 the respondent employed the Applicant to the position of Filing Clerk. On 21st September 2018, respondent terminated employment of the applicant on allegation that applicant was involved in promoting Pawl insurance hence conflict of interest with the respondent. Applicant was aggrieved by termination as a result on 19th October 2018, referred the Dispute to the Commission for Mediation and Arbitration henceforth CMA claiming reinstatement and to be paid TZS 150,000,000/= being 12 months' salary and other benefits. In the CMA F.1, applicant indicated that Employer (respondent) failed to prove that applicant had conflict of interest and that procedure for termination was not followed as there was bias, that he was denied right for mitigation

and that the principles of natural justice namely right to be heard was violated.

On 30th April 2020, Msina, H. H, arbitrator issued an award in favour of the respondent that there was valid reason for termination and that procedures for termination were followed. The arbitrator awarded applicant to be paid one-month salary. Applicant was further aggrieved by the award as a result on 8th June 2020 he filed this revision application. The notice of application was supported by his affidavit contains ten grounds namely:-

> " *(a) the Commission erred in law, in its Award as termination of the Applicant is null and void for the biasness of Ms. Florentina Bernard being Ass. Manager HR and Administrator who was the Complainant (and the Judge at the same time.*
>
> *(b) the Award is null and Void for indicating an improper Respondent who is not a person in law contrary to the CMA Form 1.*
>
> *(c) The Commission erred in law and unlawfully invoked and misconstrued the doctrine of conflict of interest in a relationship between the agent and principal.*
>
> *(d) The Commission erred in law in holding that Exhibit AP.2 established conflict of interest in total disregard of its contents/promotion which are in favour of the respondent's business and that it was a mere draft.*
>
> *(e) The Commission erred in law and unlawfully established a conflict of interest in total disregard of the Applicant's job description relating to Cooperating and teamwork.*

(f) The Commission erred in law and fact for failure to recognize that no investigation was conducted before disciplinary hearing in terms of Rule13(1) of the Code of Good Practice GN. No. 42 of 2007.

(g) The Commission erred in law and arrived on unlawful conclusion for failure to recognize that Applicant was not afforded an opportunity to put forward mitigating factors before the decision as per Rule 13(7) of the Code of Good Practice GN. No. 42 of 2007.

(h) The Commission erred in law and unlawfully reached at a wrong conclusion for failure to recognize unlawful denial of the right of representation/hearing as per Rule 13(9) of the Code of Good Practice GN. No. 42 of 2007 .

(i) The Commission erred in law and reached at unlawful conclusion for failure to take into account the Applicant's long service (13 years) of employment with the respondent.

(j) The Commission exercised its jurisdiction illegally and with material irregularities for ordering one-month salary compensation contrary to the relief(s) pleaded in the CMA Form No. 1.

(k) That the award and the orders therein are unlawful, contradictory, illogical, irrational and improperly procured for failure to analyzed the clear evidence on record.

The application was resisted by the respondent who opted to file a counter affidavit sworn by Florentina Bernard.

The application was argued by way of written submissions. Applicant preferred to defend himself while the respondent enjoyed the service of Peter Ngowi, advocate.

In the written submission, applicant submitted that Ms. Florentina Bernard wrote and signed a letter dated 9th August 2018 (exh. D1) as complainant on behalf of the management that the applicant committed the alleged gross misconduct (conflict of interest). Applicant argued further that the said Ms. Florentina Bernard wrote a letter (exh. D3) showing that the management was not satisfied by written explanation of the applicant and that she was the secretary to the disciplinary hearing committee as per exh. D4. Applicant cited the cases of ***Mary Mbelle v. Akiba Commercial Bank LTD*** [2015] PART I, LCCD 50, ***Onael Moses Mpeku v. National Bank of Commerce Limited,*** Revision No. 461 of 2019 and ***Jimmy David Ngonya v. National Insurance Corporation Ltd*** [1994] TLR 28 to the effect that a person cannot be a complainant, witness and a judge as that is against the principle of natural justice that no one shall be a judge on his own case.

Responding to this ground, Mr. Ngowi counsel for the respondent submitted that bias was not among the issues raised or complained during hearing at CMA hence it is a new issue raised at revision. That, applicant has failed to show how the said Florentina Bernard who was a mere secretary was biased as she was not a member of the disciplinary committee in Exh. D4. Counsel for the respondent argued that, applicant

has failed to show the said Florentina Bernard was a complainant, witness or chairperson during the hearing. Counsel argued further that applicant did not raise objections for participation of the said Florentina Bernard at the disciplinary hearing. Counsel for respondent argued that cases cited by applicant are distinguishable on ground that they are inapplicable in the circumstances of this application as the said Florentina Bernard was neither the chairperson nor the prosecutor and that she did not participate in decision making.

I have examined show cause letter (exh. D1) in which the applicant was required to give explanation within three days as to why the management should not take disciplinary action against the applicant for promoting PAWL Insurance Agency, an act that was in conflict of interest with the business of the respondent, call to attend the disciplinary hearing (exh. D3) and the report on the findings by the committee that conducted inquiry (disciplinary hearing minutes) on the conduct of the applicant (exh. D4) and find that all were authored by the said Florentina Bernard as submitted by the applicant. In fact, the said Florentina Bernard was a secretary to the disciplinary hearing as conceded by counsel for the respondent. Counsel for the respondent has argued that the said Florentina Bernard was not a member of the

disciplinary hearing and that applicant failed to prove how the said Florentina Bernard was biased as she was neither the complainant, witness nor chairperson. In short, counsel was of the view, that the said Florentina Bernard being a secretary to the disciplinary hearing had no influence whatsoever to the outcome of the meeting. With due respect to counsel for the respondent, it is a long-established principle that justice should not only be done but should manifestly seen to have been done. In the circumstances of this application, in no way, bias whether real or perceived can be eliminated. The complaint by the applicant, in my view has substance as demonstrated hereunder.

The procedure for disciplinary hearing is provided in Guidelines for Disciplinary, incapacity and incompatibility policy and procedure made under the Employment and Labour Relations (Code of Good Practice) Rules, 2007, GN. No. 42 particularly guideline 4. Guideline 4(6) requires the Management to present its case and give an opportunity to the employee to respond to the allegations and be afforded right to call witness(es) and cross examine witnesses called. In terms of Guideline 4(7) after hearing, the chairperson is required to make a decision and in terms of Guideline 4(2) chairperson is should be impartial. It is clear under Guideline 4(4) that an employee has a right to choose another

employee or a trade union representative to represent him at the hearing to provide assistance. The Guideline is clear that the management should present her case and decision be made by the chairperson. In the application at hand, all references were made to what Florentina Bernard allegedly found in possession of applicant and no evidence was tendered by the said Florentina as she was recording. It is unknown at what time she stopped to record and present a case for the respondent as required by Guideline 4(6) and thereafter resumed recording. If it happened that she stopped recording and give evidence as required by the Guideline 4(6), the correctness of the disciplinary hearing is questionable. As she was the complainant and secretary to the disciplinary committee, possibility of recording what was not stated by the applicant is high. In short, in circumstances of this application, likeliness of bias cannot be excluded, whether real or perceived. I therefore subscribe to the holdings in ***Mbelle's,*** ***Mpeku's*** and ***Ngonya's Cases,*** supra, and hold that there was bias.

In the 2nd ground, applicant submitted that in the CMA F.1 he indicated that the dispute is against Icea Lion General Insurance Company (T) Ltd but in the award arbitrator indicated that the dispute

was against Icealion General Insurance, which is a non-existing person. He prayed the award be nullified for being null and void.

Responding to this ground, Mr. Ngowi, counsel for the respondent submitted that applicant in his pleadings used these names interchangeably. Counsel submitted that under Rule 33 of the Labour Institutions (Mediation and Arbitration Guideline) Rules GN. No. 67 of 2007 that clerical mistake would have been corrected by the arbitrator if applicant wished without nullifying the award.

This ground cannot detain me. As correctly submitted by counsel for the respondent, Rule 33 of GN. No. 67 of 2007 is clear that clerical mistakes or errors can be rectified by the arbitrator upon application of a party to the proceedings or on his motion. I have noted that in final submission at CMA applicant named the respondent as Icealion General insurance but in the CMA F.1 he indicated that the respondent is Icealion General Insurance Company (T)Limited. The award show that the respondent is Icealion General insurance while CMA F. 1 shows Icealion General insurance company (T) Ltd. This, in my view, is an error that cannot invalidated the award as it can be regarded as a typing error and can be corrected as per Rule 33 of GN 67 of 2007 supra.

In addressing correctness of names of the parties, courts have been using the Doctrine of finger litigation or misnomer. The said doctrine was used by the court of Appeal in the case of **Christina Mrimi v. Coca Cola Kwanza Bottlers Ltd,** Civil Application No. 113 of 2011, CAT (unreported) wherein the Court of Appeal endorsed the holding in the case of ***Evans Construction Co. Ltd. versus Charrington & Co. Ltd. and Another*** (1983) I All E R 310 where it was held:-

> *"...As the mistake in this case which led to using the wrong name of the current landlords did not mislead the Bass Holdings Ltd., and as in my view there can be no reasonable doubt as to the true identity of the person intended to be sued…it would be just to correct the name of the respondent ...."*

Applying the same doctrine, the Court of Appeal in Christina's case, supra, the Court of Appeal held:-

> *"We are satisfied that it is just to correct the name of the Respondent from Coca Cola Kwanza Bottlers Ltd. to Coca Cola Kwanza Ltd".*

For the foregoing, this ground therefore fails.

Applicant argued the 3rd, 4th and 5th grounds together. He argued that the arbitrator misconstrued the doctrine of conflict of interest in relationship between the Agent and Principal and erred in holding that Exhibit AP2 established conflict of interest disregarding its contents that

were in favour of the respondent's business. Applicant submitted further that, arbitrator disregarded applicant's job description and teamwork. He went on that; Pawl Insurance Agency & Consultant was an official agent of the respondent as per certificate attached. He submitted that there is no conflict of interest as he did not personally gain by not acting in principal's interest. He concluded that reasons for termination based on conflict of interest was not established hence it was unfair termination.

Mr. Ngowi, counsel for the respondent submitted that applicant was caught promoting Insurance Agency while he was aware that the rules of his company does not allow. Counsel submitted that exhibit AP2 tendered by the respondent was found in possession of applicant. That exhibit AP2 shows that respondent exhibited promotion material in the name of PAWL Insurance Agency as the contact number that was used belongs to the applicant.

I have carefully examined exhibit AP2 and find that it does not clearly show that applicant was promoting insurance business of PAWL insurance agency as alleged by the respondent. The said Exhibit AP 2 reads:-

" ***KARIBU KATIKA KAMPUNI YETU YA BIMA YA ICEA LION GENERAL*** *INSURANCE TANZANIA KATIKA KAMPUNI YETU TUNATOA BIMA ZA MAGARI, BAJAJI, MABASI YA DALADALA NA MABASI YA KAWAIDA…*

KWA MAWASILIANO PIGA 0713692905/077777977 AU TEMBELEA OFISI ZETU ZILIZOPO MIKOCHENI…"

The above quoted paragraph from exhibit AP2 in no way, can be said relates to PAWL insurance agency as was alleged by the respondent and submitted by her counsel that created conflict of interest. It is my firm view that, exhibit AP 2 does not show that applicant was doing promotion of insurance business for his own or other person but for respondent. Conflict of interest as per Black's Law Dictionary, 8th Edition by Bryan A. Garner, ***is defined to mean real or seeming incompatibility between one's private interests and one's public or fiduciary duty***. The issue is whether it was established by evidence that there was incompatibility of business in relation to what applicant is alleged to have done with that of the respondent. In my view, the issue is answered in negative.

Applicant submitted that the arbitrator disregarded applicant's job description and teamwork. This criticism to the arbitrator is unfounded as job description and teamwork was not tendered in evidence. That argument fails.

Applicant submitted that Pawl Insurance Agency & Consultant was an official agent of the respondent and attached a certificate to that effect. With due respect to applicant, no evidence was tendered at CMA

to show that Pawl insurance is an agent of the respondent. Not only that but also, the certificate attached to the affidavit in support of the application showing that that Pawl Insurance is an agent of the respondent was not tendered, as such, cannot be brought at this revision stage. It was open by the applicant if he so wished, and if he had that knowledge, to tender the said certificate while at CMA so that he can be cross examined on it. He failed to use that chance at CMA. He cannot be allowed to use a backdoor while circumventing hearing procedure provided for under Rule 25 of the Labour Institutions (mediation ana Arbitration Guidelines) Rules, 2007, GN. No. 67 of 2007. That cannot be allowed. As there is no proof of conflict of interest, I hold that there were no valid reasons for termination. In short, termination was unfair on substantive.

Other grounds were not argued by the applicant and counsel for the respondent. Having found that there was no valid reason for termination hence unfair termination, I have found that there is no need of addressing other grounds that were not covered by the parties.

For all said hereinabove, I hereby allow the application and revise the CMA award. I hereby order that applicant be paid TZS 7,644,120/= that is equivalent to twelve-month compensation as his monthly gross

salary was TZS 637,010/=, and one-month salary in lieu of notice. For avoidance of doubt, applicant will be paid TZS 8,281,130/= in total.

It is so ordered.

B.E.K. Mganga
JUDGE
3/11/2021