IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

REVISION NO. 816 OF 2019

BETWEEN

SHELYS PHARMACEUTICALS LIMITED ..... APPLICANT

VERSUS

SALOME MAWOLLE..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The relationship between the applicant ("the employer") and the respondent ("the employee") dated back to 15/06/2001 when the respondent was employed as a Sales Representative Promotion trainee. She rose to managerial position as Logistics and Distribution Manager. The current dispute arose on the 07/09/2016 when the respondent was served with a suspension letter by her employer. The suspension was allegedly to pave way for an investigation on allegations of theft against her (Exhibit S3). Subsequently on the 03rd October, 2016, the Applicant allegedly wrote a letter to the Respondent informing her that she was supposed to report back for duty on 04th October 2016 (EXS6), the respondent did not report

as requested. On 10th October, 2016 another letter requiring her to report back to office was written (EXS4).

On the 13/10/2016, the respondent reported to work only to be served with a termination letter informing her of her termination with effect from 13th October, 2016 (EXS 5). Dissatisfied by the termination, the Respondent referred the matter to the Commission for Mediation and Arbitration (CMA), the matter was admitted as Labour Dispute No. CMA/DSM/KIN/R.11 19/16 ("The Dispute"). In its decision dated 07th day of August, 2019, the CMA ordered reinstatement of the respondent without loss of remuneration. Dissatisfied with the said decision, the applicant has lodged this Revision praying that this Court:

1. That this Honourable Court be pleased to call for and examine and revise the proceedings, ruling, decision and orders of the Commission for Mediation and Arbitration, Dar es salaam Zone in Labour Dispute Ref. No. CMA/DSM/KIN/R.1119/16/233 dated 7th day of August, 2019 by Hon. Grace Wilbard Massawe, Arbitrator.
2. That, this Honourable Court be pleased to make any other or further orders as it may be just and convenient in the circumstances of the case.

As per the affidavit in support of the Chamber Summons, the following legal issues were said to arise from the material facts:

1. The Honourable Arbitrator erred in law and fact by holding that the Complainant (now Respondent) did not refuse to resume work while in fact the evidence of DW 1, DW2 and PW1 was clear that the was advised to report for duty but she refused to do so on the ground that the investigation was still going on in the police. In cross examination PW 1 was categorically clear that when she was called by the Applicant's officer to be advised to report back to duty she replied that the matter was in the police and, therefore, the procedure should be followed.
2. The honourable Arbitrator erred in law and fact holding that the Applicant had no justifiable reason for termination the Respondent for absenteeism while in fact the Respondent was advised to report back to work but she refused and/or neglected to do so.
3. The Honourable Arbitrator erred in law and fact by holding that the Applicant did not follow the procedure while in fact circumstances were such that the Respondent could not be given right to be heard as she refused to report for duty and/or cooperate.

4. The Honourable Arbitrator erred in law and fact by ordering reinstatement of the Respondent while in fact the Respondent's acts have irreparably damaged the trust and confidence of the Applicant.
5. The Honourable Arbitrator erred in stating that the Respondent's las salary was TZS 2,626,400/= (gross salary) while in Fact Exh. M2 shows that the Respondent's salary was TZS 697,456. She should have held that other items in the pay slip such as transport allowance were not part of salaries and were payable to employees who were in employment only.
6. That the exhibits admitted were not certified by the honourable Arbitrator.
7. The award was not issued within 30 days after closure of hearing as per law.
8. That generally, the finding by the Arbitrator were based on assumption and the Respondent's facts which were not substantiated that in effect led to material irregularity that affected the merits of the Dispute No. CMA/KIN/R.1119/16/233) and caused injustice to the Applicant.

The relief sought;

(a) The relief sought in this mater is that the Court may be pleased to revise and set aside the award of Commission for Mediation and Arbitration at Dar es Salaam Zone referred to herein.

(b) Any other relief that the Honourable Court may deem fit to grant.

I have considered the grounds of revision and the legal issues framed therein. In this dispute, the issue that is in controvery between the parties is whether the termination of the applicant was fair both procedurally and substantively. There was also an issue that the exhibits were not properly certified by the arbitrator and that the award was not issued within 30 days after closure of hearing as per the law.

I will start with the fairness of the substance, from the gathered fact, it would appear that the final ground that the employer used to terminate the employee was abseentism. In his submissions to support the application, Dr. Onesmo Michael, learned Counsel representing the applicant, argued that the respondent was served with a letter to come to work twice but she refused. He pointed out the testimony of DW1 and DW2 was to the effect that on two occasions the Respondent was requested to report for duty but refuse and that this evidence was not seriously challenged.

On her part, the respondent submitted she could not report back to duty because she was never served with letter to end the suspension. Further that according to the evidence of DW1 and DW2, there is nowhere which shows that the respondent was contacted by phone or by any formal means and refused to cooperate. She also argued that to prove that the applicant was not telling the truth, they could not explain why the suspension letter and the termination letter reached her.

On my part, I am inclined by the respondent's argument that she could not report back for duty because the matter was still at the police, and the allegations she was charged with were serious.

The respondent's defence was that she was not provided with a first-hand information that the case at the police was withdrawn, neither was there tendered any proof at the CMA to show that the respondent was actually served with the notice to report back to duty before the 13th. I have also taken into consideration of what the respondent argued, she was suspended on allegations of theft, arrested, detained in police custody before she was released. It was hence the duty of the applicant to inform the respondent that the case lodged at police was withdrawn and charges against her was dropped. Therefore, under the circumstances, in the

absence of proof that the information reached her, she could not have dared to report to duty while she was still on suspension and not informed that the charges against her were dropped.

To show more intention to terminate the respondent on the part of the applicant, just because the respondent could not come to office twice (despite the fact that they failed to prove that she received a message to call her back to office), they came up with another excuse, abseentism, to terminate the respondent. The question is whether abseentism is a fair ground for termination of an employee. Generally speaking in the labor regime, absenteeism over short periods (a day or two) without leave or without good reason is a minor misconduct. Looking at the way the letter for termination is crafted and the fact that the respondent was absent only for one day, the question is then whether it was fair to terminate the applicant after being absent only for a day? There is no law which provides for such reason of termination.

In the persuasive decision of a South African case of **In Siswana Vs. Charles Thomas t/a as Thomas Restoration (2007) 1 BALR 12 BCFMI** the court confirmed that an employer must attempt to contact the

employee at the employee's last-known address before termination for abseentism. As shown above, the applicant could not prove that she contacted the respondent before terminating her for abseentism. On those grounds, I am convinced by the evidence and so hold that the termination of the respondent was substantively unfair.

Having noted that the reason for termination was substantively unfair, let me now see whether the procedure for termination was followed. In this issue, I need be detained much. The chain of events is clear that the respondent was first suspended on serious allegations of theft and put to police custody. Then after six months she received a letter asking her to report back to work on 12/07/2016 and she went on 13/07/2016 and was informed that she was terminated on the ground of abseentism.

Rule 8(2)(d) of the provides:

"Employer may terminate the contract-

(i) by giving notice of termination: or

(ii) without notice, if the employee has materially breached the contract."

The catching words here are notice of termination and material breach. Therefore, it was the duty of the applicant to prove that such notice was issued to the employer or in the absence of notice, she had to prove that there was a material breach of the contract. As per the records, none of the above was successfully established at the CMA.

Rule 13 of the same Code requires the employer to investigate the allegations, inform the employee of the allegations, give her time to prepare conduct a hearing and the list goes on. All these provisions were made so as to ensure that before an employee is terminated and his/her right to work is taken from her, she/he was afforded right to be heard. As for this case, none of those procedures were followed. Any decision made without affording the adverse party a right to be heard is a nullity.

In conclusion, there is no dispute that the respondent was never called to any disciplinary hearing, she was summarily dismissed without being afforded any right to be heard. The termination was hence procedurally unfair.

Having found concurrent with the CMA that the termination was unfair both procedurally and substantively, the next ground is on the reliefs the parties are entitled to. According to Dr. Onesmo, he is opposing the

order of reinstatement issued by the CMA. His argument is that it is on record that before she was terminated, the Respondent was under investigation of fraud. He hence argued that indeed, the relationship between the two parties has been damaged irreparably and therefore, it is impracticable for the Applicant to work with the Respondent again.

He further argued that the Respondent was terminated on 13th October, 2016, almost six years down the line and that things must have changed tremendously in the period of six years, so reinstating the Respondent would not be a practicable option. The respondent denied this fact arguing that in their opening statement at the CMA, the applicant never said that the relationship between the two had broken down irreparably. She emphasized that she was still interested in resuming back to work.

On this point Dr. Onesmo's argument may make sense given the current situation and the time lapsed. But the question is, would the same have made sense during the time when the respondent initially filed a dispute at the CMA. Indeed six years down the line, the situation as it stands, does not call for reinstatement of the respondent, time has lapsed, the way the termination was carried on was too unfriendly hence ordering

reinstatement might not be the best option under the circumstances. The best option here is to order compensation of the employee (respondent) by the employer (the applicant). In awarding this compensation, I have considered the fact that the applicant defaulted appearance at the CMA and the matter was heard ex-parte. The same applicant had the ex-parte award set aside and then there was inter-parties hearing which was decided in favour of the respondent. At all these times the applicant remained unemployed hence unpaid. Under Section 40(3) of ELRA, the applicant is ordered to pay the respondent compensation to the employee of an equivalent to 12 months' remuneration.

I have noted a dispute in which salary was to be used in awarding compensation to the respondent. Dr. Onesmo argued that the 2,626,400/- million used by the arbitrator was wrong. According to the definition of the word remuneration u/s 4 of ELRA, it means the total value of all payments, in money or in kind, made or owing to an employee arising from the employment of that employee. Looking at EXSM8, the respondent's salary was Tshs. 2,626,400/-, therefore the employee's remuneration for the purpose of Section 40(3) is Tshs. 2,626,400/-.

Section 40(3) of the ELRA provides:

*"Where **an order of reinstatement** or re engagement **is made** by an arbitrator or Court and **the employer decides not to reinstate** or re-engage the employee, the employer shall pay compensation of twelve months wages **in addition to wages due** and other benefits **from the date of unfair termination to the date of final payment."***

From the above cited provision, the applicant/employer shall pay the applicant Tshs. 2,626,400/- X 12 months = **Tshs. 31,516,800/-.** In addition to that, the applicant/employer shall pay the respondent/employee wages due from the date of unfair termination as such, 2,626,400/- X 59 months making a total of **Tshs. 154,957,600/-.** The applicant shall further pay the respondent severance pay under Section 42(2) of the ELRA. The severance pay shall be 7 days' basic wage for each completed year of continuous service. According to the records, by the time the respondent was terminated by the applicant, she had served there for 15 years therefore an amount of Tshs. Which is 626,737/30X7X10 which is equal to **Tshs. 1,462,386.33.** The employee is not entitled to repatriation costs because her place of employment was in Dar-es-salaam.

The total amount to be paid Tshs. 31,516,800/- + Tshs. 154,957,600/- + Tshs. 1,462,386.33. Therefore the total amount that the applicant shall pay the respondent is **Tshs. 187,936,786/-** which shall be subject to statutory deductions if any. The Revision is allowed to the extent explained.

Dated at Dar-es-salaam this 05th day of October, 2021.

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S.M. MAGHIMBI.

JUDGE