IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 4 OF 2021

BETWEEN

REIME (T) LTD. ..... APPLICANT

AND

SAMWEL MWAKATOBE ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The Applicant herein is aggrieved by the whole of the Award of the Commission for Mediation and Arbitration for Ilala ("the CMA") in Labour Dispute No. CMA/DSM/ILA/R.1440/17/112 ("the Dispute") issued on 25th November, 2020. She has filed this application for revision by a notice of application and Chamber Summons pursuant to Section 91(1)(a), Section 91(2)(c) and 94(1)(b)(i) of the Employment and Labour Relations Act, [Cap 366 R.E. 2019] and Rule 24(1),(2)(a),(b),(c),(d),(e) & (f), Rule 24 (3)(a),(b)(c) & (d) and Rule 28(1)(b),(c),(d) & (e) of the Labour Court Rules, 2007, G.N. No. 106 of 2007. The Chamber Summons is supported by an affidavit of Mr. Ramesha Raju dated 30th December, 2020. In the Chamber Summons, the applicant is moving the court for the following orders:

1. This Court be pleased to call for the records of proceedings and Arbitration Award of the CMA at Dar-es-salaam in Labour Dispute No. CMA/DSM/ILA/R.1440/17/112, revise them in their entirety and set aside the decision thereof on the ground that:
    a. There has been material irregularity and errors on the face of records involving injustice to the Applicant herein, and
    b. The Award is illogical and irrational.
2. The Honorable Court be pleased to find that no sufficient reasons were advanced by the respondent to satisfy the CMA to grant the application for condonation and hence extend the time to refer the dispute.
3. That this Honorable Court be pleased to make a finding that the Complainant in Labor Dispute No. CMA/DSM/ILA/R.1440/17/112 was never terminated from employment by the applicant herein and that the Complainant indeed absconded from work for without justification or authorization for the same.
4. Any other orders this Honorable Court may deem fit to grant in the circumstances.

The respondent opposed the application by filing a notice of opposition pursuant to Rule 29(5)(a)&(b) of the Rules. The application was disposed by way

of written submissions, the applicant's submissions were drawn and filed by Mr. Gerald Shita Nangi, learned advocate while the respondent's submission were drawn and filed by Mr. Nashon Nkungu, learned advocate.

Before going into the merits or otherwise of this revision, brief background of the matter is narrated from what is gathered on the records. The respondent was employed by the applicant on the 05th December, 2012 in a position of Security Officer. On the 01st July, 2015 the respondent was promoted to the position of Head of Operations. It would appear that sometimes in July 2017, the applicant's operations with a project titled "passive maintenance project" was terminated by their client. As such; the circumstances necessitated the applicant to retrench some junior staffs in the operations department. In the process, the respondent attended the consultative meeting as Head of the Department. The process of retrenchment was concluded in August, 2017 and the respondent was not amongst those retrenched, but allegedly, all his team was retrenched. According to the applicant, the respondent was supposed to continue with his duties but he absconded from work from 15th August 2017, the applicant tried to contact him in vain. Sometimes in October, 2017 the respondent wrote an email to the applicant inquiring about his September salary and subsequently on 21st December, 2017 the respondent filed the current dispute at the CMA on

allegations that his contract of employment was terminated on 30th September, 2017. The CMA decided in favour of the respondent, ordering the applicant to pay the respondent a sum of Tshs 48,000,000 being compensation of 12 months' remuneration for unfair termination. In addition, the Applicant was ordered to pay to the Respondent Tshs. 4,000,000/= as a notice pay, Tshs 4,000,000 as leave pay and Tshs 4,666,666.7/= as severance pay and a certificate of service. Aggrieved by the award of the CMA, the applicant has lodged the current application raising the following legal issues:

(1) Whether it was right and if there were sufficient reasons advanced by the Respondent to warrant the grant of condonation application for filing of the Complaint?

(2) Whether there was sufficient material evidence to persuade the Commission for Mediation and Arbitration to reach a decision that there was termination of employment?

(3) Whether the Commission for Mediation and Arbitration (the CMA) followed and properly applied the provisions of the law

With reservations that what I will determine on the first issue should not be applied in general terms, I will not be detained much by the first issue raised. It is trite law that the court's (in this case the CMA") powers to determine whether

or not to grant condonation are discretionary. The discretion must however be exercised judiciously taking into account all the factors and circumstances of each case before arriving to a decision. Interference to the discretionary power is supposed to be minimal and in few circumstances. These circumstances were well elaborated by the Court of Appeal in the case of **Veneranda Maro & Another vs Arusha International Conference Center (Civil Appeal 322 of 2020) [2022] TZCA 37 (18 February 2022)** where the Court had this to say:

*"The circumstances upon which an appellate court can interfere with the exercise of discretion of an inferior court or tribunal are: **one,** if the inferior Court misdirected itself; or **two,** it has acted on matters it should not have acted; or **three,** it has failed to take into consideration matters which it should have taken into consideration and **four,** in so doing, arrived at wrong conclusion."*

On the circumstances prescribed above, interference to orders granting extension of time, being discretionary, should only be on issues of law as stated in the cited case above and not that of evidence or reasoning of CMA. Looking at the arguments that was raised by the applicant, Mr. Nangi wishes for the court to re-open the submissions and see whether there were sufficient grounds for extension of time adduced, something which I cannot proceed to do as the CMA

has already used its discretion. My interference is only allowed to the extent shown in the cited case of Vernanda Maro (Supra). Since the applicant has not established the existence of any of those circumstances and he is just attacking the reasoning of the CMA, I cannot interfere with the CMA findings.

Coming to the second issue, it is whether there was sufficient material evidence to persuade the CMA to reach a decision that there was termination of employment. Mr. Nangi alleges that the respondent was never terminated; he absconded from work and eventually lodged a dispute at the CMA. On his part, the respondent lodged a dispute for unfair termination and in his CMA Form No.1, his nature of dispute was termination of employment. It is undisputed that under Section 39 of the ELRA, the duty to prove that termination was fair lies on the employer. However, in the circumstances like the one in question, where the employer claims not to have terminated the employee, the burden shifts to the employee to prove that there was actual termination before one can enjoy the protection under sub part E of Part III of the ELRA. The question is did the respondent manage to do so at the CMA?

In his submissions, Mr. Nangi submitted that the CMA erred in holding that there was termination of employment. That the CMA was bound to order the Respondent to return to work without loss of benefits rather than entertaining

the issue of existence or non-existence of the termination and ultimately ordering severance pay and compensation. Mr. Nangi substantiated his submission on the ground that at the CMA, the Applicant lead evidence that no termination of the Respondent ever happened. Further that it was the case even in the Respondent's own admission as the CMA had the following to hold on this issue at page 16 and 17 of the Award:

"The commission accepts the complainant's evidence under oath that his ***service was not immediately terminated*** *following termination of other employee as he was required by the employer to wind up pending activities in relation to Nokia Passive Project. The Commission further reject the respondent's evidence that the complainant was retained because he was manager. Evidence show that the whole team of the complainant was retrenched which suggest that the complainant it could not make any or logic for the complaint to remain as manager as he did not have any staff to manage. As correctly stated by the complainant following termination of other staff in his department he was terminated after completing Airtel project. Therefore, the first issue is answered in the affirmative that the complainant was terminated from the service."*

Mr. Nangi then pointed out that the holding above speaks for itself that the issue of existence or non-existence of termination was out of context following the Applicant leading evidence that there was no termination but rather the Respondent had absconded. He then submitted that it was also wrong and illogical for the CMA to hold that the Respondent was unfairly terminated because the Applicant did not take disciplinary actions against the Respondent following his abscondment and because all the Respondent's subordinates were retrenched. That the Award is flawed since the CMA blatantly ignored evidence on record (tendered for the Applicant) which showed that the Respondent was not terminated but it was the Respondent who absconded from work for more than five consecutive days without justification. He thence prayed for this Court to revise and set aside the Award.

In reply, Mr. Nkungu submitted that Mr. Nangi's submissions are quite self-defeating. On Mr. Nangi's submission that what the right thing for the Commission to do was to order the respondent to return to work without loss of benefits, his reply was that in labor law, what the applicant terms as to be "return to work" is simply re- instatement as can be found in section 40(1)(a) of ELRA which is among the remedies for unfair termination provided under the Act.

That upon finding that there is unfair termination, the court may among other remedies, order for a re- instatement of the employee from the date the employment was terminated without loss of remuneration. He argued that Mr. Nangi's advocating for this remedy is a confirmation that there is a confirmed unfair termination, as rightly found by the CMA hence the applicant's submission contradicting and self-defeating. That the quoted extract from the decision only establishes as to when the respondent was terminated.

He went on submitting that at the CMA, the applicant's evidence was lacking as he failed to establish that the termination of the respondent was fair when he tried to state that the respondent had absconded from work thus automatically his employment was terminated. That this card fell short as he failed to establish steps taken during / after such abscondment and that at some point, the applicant has found himself confessing to have fired the respondent and this is in court records. He emphasized that Mr. Nangi continues to use court machinery to circumvent and exchange words for it and at some point even deny its own documents claiming to have been forged. Mr. Nkungu concluded by praying that this honorable court find this as court process abuse on the part of applicant at the expense of the respondent's justice who has been in court corridors since the year 2017. There was no rejoinder by the applicant.

As I have stated earlier, since the issue on whether or not, the respondent was terminated by the applicant was in dispute, the termination ought to have been proved first before the CMA could proceed to determine any claim for unfair termination. Having gone through the records of the CMA, I am having a difficult time to see how the Arbitrator made a finding that there was unfair termination despite the overwhelming evidence of the applicant that the respondent was never terminated. The arbitrator ran into error by questioning as to why the applicant did not terminate the respondent on abseentism after finding that the applicant was absent from work. It is obvious that the applicant denied to have terminated the respondent while the respondent alleged to have been unfairly terminated, then how would the CMA question the applicant on why they did not terminate the respondent after being absent from work? This being the case, the arbitrator went on to determine an issue that was not even tabled before him for determination and decide it in adverse of the applicant. As a matter of fact, the decision whether or not to terminate an employee was on the applicant and not for the CMA to use it to draw adverse inference against the employer.

Going to the applicant's evidence adduced during arbitration by DW1, the evidence was clear that there were some employees who were to be terminated and the respondent, as the Head of Operations, attended the meeting. The

existence of the meeting was proved by EXR4, minutes of the retrenchment meeting. The DW1 also tendered EXR3, a retrenchment notice ad more important so EXR2, a list of those employees who were to be retrenched. In the list and by his own admission, the respondent was not amongst those who were listed for termination. At least this fact and evidence should have been a wakeup call for the arbitrator to make a further finding on whether the respondent was eventually retrenched by the applicant. Instead, conclusions were made on issues not framed, leading to going against facts and evidence that was adduced and tendered.

I have noted that in his evidence as PW1, the respondent also attempted to convince the court that he wrote an email asking about his benefits in vain. It is unfortunate that the alleged email was not tendered in court, another flaw in the evidence of the respondent. He also claimed that after being terminated; (by letters which were filed at the CMA but could not be tendered as exhibits after the applicant brought to the attention of the court that they were forged). Further that he was asked to work until December so that he could hand over office and tender company assets in October. In all that testimony however, the applicant could not bring any document to prove the existence of those facts. His only reason for not tendering them was that all these were orally instructed to

him. The evidence had no corroboration. One may wonder how a terminated employee in August would receive instructions orally in September to continue with work? I have also noted a crucial fact that was established during cross examination of the PW1, the respondent herein. He was asked, if in the list of additional documents (that were not tendered after allegation of forgery) there was a certificate of service, why was he claiming for one? There was no tangible answer as even the certificate was not tendered.

Coming to the award of the CMA, I have noted that on page 16 of the award the CMA arbitrator noted:

> *"The Commission accepts the complainant's evidence under oath that his service was not terminated immediately following termination of other employees as he was required by the employer to wind up pending activities in relation to Nokia Passive Project. The Commission further reject the respondent evidence that the complainant was retained because he was a manager.* ***Evidence show that the whole team of the Complainant was retrenched which suggest that the complainant could not make any sense or logic for the complainant to remain as a manager as he did not have any staff to manage.*** *As correctly stated by the complainant, following termination*

of other staff in his department he was terminated after completing Airtel project."(Emphasis is mine)

At this point, I have also failed to comprehend how the arbitrator could agree with the respondent's oral testimony that following termination of other staff in his department he was to be terminated after completing Airtel project while the respondent tendered EXR2, EXR3, EXR4 and EXR6 which successfully proved that the respondent was not one of the employees up for retrenchment. Furthermore, his alleged letters of termination were never admitted as exhibits following allegations of forgery.

At this point, I am in agreement with the submission of Mr. Nangi that the issue of existence or non-existence of termination was in context determined following the Applicant leading evidence that there was no termination but rather the Respondent had absconded. The arbitrator based his findings on mere assumptions that the whole team of the Complainant was retrenched which suggest that the complainant could not make any sense or logic for the complainant to remain as a manager as he did not have any staff to manage. This is a pure assumption by the arbitrator making findings on what he thought would be given the circumstances and not basing on the evidence that under EXR2 and the PW1's testimony, the respondent was not among those to be

terminated. Further to that the assertion that the respondent's service was not terminated immediately following termination of other employees as he was required by the employer to wind up pending activities in relation to Nokia Passive Project should have been proved by documentary evidence because such issues are kept in records in writing and not by mere assertions.

Having made those findings, I see no reason to dwell on the last issue because since there was no termination of employment proved by the respondent, and the applicant having established that the respondent was not amongst the employees for retrenchment under EXR2, then the CMA had no jurisdiction to entertain the dispute of unfair termination of employee under sub Part E of Part III of the Act because the dispute was pre-maturely filed before the existence of the cause of action-termination. Consequently, this application is allowed by revising the proceedings of the CMA, quash them and set aside the award passed thereon.

Dated at Dar es Salaam this 25th day of April, 2022.

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S.M. MAGHIMBI
JUDGE