IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

APPLICATION FOR REVISION NO. 125 OF 2022

(From the award of Commission for Mediation & Arbitration at Kinondoni in Labour Dispute No. CMA/DSM/KIN/560/2020/244

PENINA SEVERIN MASWAT.....APPLICANT

VERSUS

WHITE SANDS HOTEL LTD.....RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J.

03rd November 2022 & 11th November 2022

The applicant filed the present application for revision challenging the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Kinondoni (CMA) which was decided in favour of the respondent.

The dispute arose out of the following context. The applicant was employed by the respondent from 11th April 2013 until on 20th April 2020 when his employment was terminated due to sickness. (See termination letter in the CMA record – Kielelezo D6). Being not satisfied with the termination, the applicant filed a complaint in the Commission for Mediation and Arbitration at Dar es Salaam, vide **Labour Dispute No. CMA/DSM/KIN/560/2020/244** against the respondent. At the CMA the arbitrator found that the reason and

procedure for the applicant's termination was fair, hence awarded TSZ 500,000/= as entitlement remained in their agreed contract.

Aggrieved by the CMA's award the applicant filed the present application. The applicant in her affidavit is challenging the CMA award basing on the following issues: -

a) Whether the respondent adhered to the contract agreed with Trade Union known as CHODAWU.

b) Whether it was right for the arbitrator to make an order of payment of TZS 500000.00 only.

c) Whether it was proper for the respondent to make another contract other than what was signed by the Trade Union namely CHODAWU.

Parties argued the application by way of oral submissions. The applicant was represented by Mr. Madaraka Ngwije from CHODAWU whereas Mr. Mussa Rashid, Company Secretary stood for the respondent.

On the **first** issue as to whether the respondent adhered to the contract agreed with Trade Union known as CHODAWU, Mr. Madaraka Ngwije submitted that since the respondent entered an agreement with CHODAWU and applicant being a member, he is of the view that all the issues concerning employees rights ought to

have been done with the representation of CHODAWU. He stated that on 29th August 2019 while on working place the applicant felt dizzy and suddenly felt down and rushed to the hospital, after medical investigation, it was discovered that her back born was injured and she was pregnant. In such circumstances as the applicant was sick, he is of the view that the respondent and CMA did not consider the agreement between CHODAWU and employer in terminating the employment contrary to Clause 20,21.1,11.0 and 9.1 of the Collective Bargaining Agreement.

Regarding the **second** issue as to whether it was right for the arbitrator to make an order of TZS 500,000 only, Mr. Madaraka Ngwije cited Clause 21.0 of the Collective Bargaining Agreement and submitted that, an employee shall be entitled to sick leave when encounters sickness while in service and upon doctor's certification where the employee will be entitled to 4 months full paid leave and next three months paid half salaries. According to Mr. Madaraka, the clause provides that after payment of half salary for 3 months, the employer shall pay a token of TZS 1,000,000 as appreciation.

Referring to clause 9.1 of the Collective Bargaining Agreement, Mr. Madaraka submitted that both sides are required to allow early retirement upon sickness upon the certification by the doctor but in

this case, the employer terminated the applicant without any doctors' recommendation.

On the **third** issue as to whether it was proper for the respondent to make another contract other than what was signed by the Trade Union namely CHODAWU, Mr. Madaraka referred to clause 11. 1 of the contracts, and stated that according to it, in case of dispute, it is the trade union which deals with such dispute and not the employee by him/herself. On such basis he is of the view that the act of the employer to create another forged contract which was never signed by the applicant and submit the said contract to the CMA does not constitute a good act. He further added that the alleged contract to be signed by the applicant was forged because the employee has never entered into any contract and while preparing the contract the employer knew that the applicant was sick and had an infant baby., He Further submitted that the employer was required to have a medical report in terminating applicant's employment.

Mr. Madaraka challenged the arbitrator's justification in admitting the termination contract. The ground is that the applicant had many signatures hence even that one could be her signature. MR, madaraa referred to the applicant's signature on annexure K8 to the affidavit and which is voter's identity card and in the employee's work

signature and in the CMA Form No 1, the letter of termination and in the salary slip annexed which he considered to be true signatures of the applicant.

Submitting on the procedure used to terminate the applicant, Mr. Madaraka is of the view that the said procedure was not proper because the respondent knew that the applicant was sick and that the Collective Bargaining Agreement between him and CHODAWU did exist and that's why she paid 4 months salaries and 3 months half salary. In his view, by knowing this, the employer was required to go back to CHODAWU with whom she entered contract with. He referred to the letter of termination, (Exhibit K5) in the affidavit which stated that the applicant was terminated under clause 21 (1) of the agreement between CHODAWU and White sands. Mr. Madaraka wondered, with that knowledge, why did the respondent not consult the other party of the contract. In his view, the contract does not give a room for a new side contract with the applicant.

Mr. Madaraka questioned why the respondent did not consult the officials of CHODAWU in the branch in his workplace. In his view, the employer did not follow the procedure.

Submitting on the payments of terminal benefits, Mr. Madaraka stated that the applicant was paid TZS 745,855.00 without being paid

other benefits while in the Collective Bargaining Agreement at clause 21.0, the applicant is to be paid 1,000,000 as a token of appreciation and farewell. (mkono wa kwa heri). What was paid was not even sufficient to cover that "mkono wa kwa heri".

In this respect, the applicant is praying to be paid Tshs 254,145 which is an amount remaining from "mkono wa heri", Notice which is TZS 300,000, severance allowance for 7 years which is TZS 565,384, maternity leave which is 100 days, payment of salary for the the month of May 2020 which she was supposed to be paid when she was sick and issuance of certificate of service. According to Mr. Madaraka, the applicant is entitled to these payments as per the contract of Collective Bargaining Agreement.

In reply to the applicant's submissions, Mr. Mussa Rashid Lilombo the respondent's company secretary having adopted the counter affidavit as part of the respondent's submission, emphasized that this revision application is intended to looks at the errors contained in the CMA award and not a forum to raise new issues which were not part of proceedings in the CMA.

Referring to clauses 9.1 of the contract alleged to have been contravened (Annex WWW to the counter affidavit and Exhibit D 2 in the CMA), Mr. Mussa submitted that the contract provides for the

need for the employee to resign on sickness ground. In his view, the resignation concerns an agreement between the applicant and the company and that agreement was done in writing and tendered and admitted in the CMA as Exhibit D4. He stated that the agreement was due to the applicant's stay at home while sick for more than 10 months from 29 August 2019 to May 2020. He refuted any contravention to the contractual terms with the applicant.

Mr. Mussa acknowledged that clause No 11 of the Collective Bargaining Agreement provides for a procedure of resolving a dispute but contended that in this case, there was no dispute and therefore the clause could not apply. He insisted that this fact was not challenged neither in the CMA nor when the dispute arose. He remarked that since the argument is raised at the revisional stage, the court should be guided on what to do by the case of **Hotel Travertine Limited and Two Others versus National Bank of Commerce Limited, 2006 (TLR), 133** where the court of Appeal emphasized on not to consider a new issue raised at the appeal stage.

It is the submission of Mr. Mussa that clause 21 of the Collective Bargaining Agreement was not contravened by the respondent because the applicant stayed home for more than 10 month and the

hotel was closed by that time due to Covid 19 pandemic, but it used other sources of fund to pay the applicant for all these months.

Refuting to have forged that resignation contract between the applicant and the respondent, Mr. Mussa submitted that CMA admitted it as **Exhibit D4** with the applicant's signature on it because the applicant did not have a common signature in various documents received in the CMA. According to Mr. Mussa , the contract of employment had it's own signature, the agreement to end the employment had its own signature, a letter requesting leave had its own signature as well as the CMA Form No. 1 had a different signature.

Citing Section 69 and 75 of the Evidence Act, Mr. Mussa submitted that where the documents contain varied signatures, then the court can compare with other documents and therefore the arbitrator was correct in comparing the signature with the other documents.

Mr. Mussa submitted further that the conduct of the applicant after the agreement where she came to take the money resulting from what they agreed confirms that she actually signed the contract. She referred to Exhibit D6 in the CMA which is the payment sheet where she received TZS 1,793,578.00 beginning with an instalment of TZS 745,855.00 since the hotel was closed. According to Mr. Mussa, it

was agreed that the applicant was later to receive the balance of TZS 500,000 after one month and this was the amount CMA ordered to be paid as a balance from the previous payment, she was supposed to receive which is TZS 1,793,578.00.

Concerning the Collective Bargaining Agreement, (CBA) Mr. Mussa submitted that there is no any clause which requires the respondent to involve CHODAWU even in situation when a normal contract like the instant one which ended the employment relationship. He referred to **Section 4 (1) of the Employment and Labour Relations Act**, which defines the word dispute and submitted an agreement between two parties is not a dispute and therefore the employer was not required mandatorily to involve CHODAWU.

According to Mr. Mussa, the application deserves a dismissal because the decision of the CMA to end the contract was according to the agreement with the parties and that the payment made thereafter was equivalent to what she was supposed to be paid according to her salary.

Mr. Musa urged the court to ignore the issue of pregnancy because it was never raised before. He prayed for the application for revision to be dismissed.

Mr. Madaraka made a rejoinder. He refuted to have invented a new issue in this revision. He emphasized that Clause 9.1 of Collective Bargaining Agreement, obviously addressed resignation and not termination and that was the essence of the contract. He reiterated that resignation was supposed to be supported by doctor's report which was not the case in this matter.

He submitted that the employee was paying CHODAWU so that she can be represented in every aspect, and therefore she had a right to be represented.

He further refuted the assertion that the applicant had many different signatures and if that was the case, the employer had a duty to report such conduct to the police.

He added that taking the payment was not done by the applicant because she was sick and the signature is not hers, it is her husband's. In his view, that the applicant was denied right to representation.

Having considered parties pleadings, submissions and the CMA record, I find two issues for determination. The first issue is **whether the applicant adduced good grounds for this Court to exercise its revisional power,** and the second issue is **what reliefs are parties entitled to.**

In addressing the **first** issue, all the three grounds of revision listed in the affidavit will be addressed together in determining whether the arbitrator properly analyzed the two common aspects of termination. The **first** aspect is reason for termination; the **second** aspect is the procedures used in terminating applicant's employment as a member of Trade Union namely CHODAWU. It is an established principle of law that for the termination to be fair, the one who makes decision must comply with **Section 37 of the Employment and Labour Relation Act, Cap 366 R.E 2019** which directs that for the termination to be fair, one has to observe validity and fairness of reason and procedure for termination.

In determining the fairness of the reasons, the applicant challenged the CMA award in holding that she was terminated for sickness. According to Mr. Madaraka, resignation without a medical report from a doctor to justify reason for termination amounted to contravention with clause 91 of the Collective Bargaining Agreement. On the other side the respondent maintained that, Clauses 9.1 recognizes resignation of an employee on sickness ground.

It is not disputed that the applicant encountered sickness which absented her from work for more than seven months. With or without a doctor's report, this is an obvious fact in the CMA and in this

revision. It is not further disputed that during this time, the applicant was getting paid salaries. A tolerance of 7 months absence from work is a reasonable period under which the employment contract can be ended. I share views with the arbitrator that sickness which prevailed for more than seven months constitute sufficient reasons for termination. This confirms the aspect of reason that there was fairness in the reasons of terminating the applicant's contract.

What follows now is whether there was a fair procedure. When it comes to termination of an employment on grounds of sickness, **Rule 7(1) of the (Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures) of the Employment and Labour Relations (Code of Good Practice) Rule G.N. No. 42 of 2007** comes into application. The rule provides that there must be a consultation to an employee of alleged incapacity due to ill or injury by considering the opinion of registered medical practitioner in determining whether incapacity is temporary or permanent.

Further to Rule 7(i) cited supra, parties are debating on the compliance with Clause 9.1 of the Collective Bargaining Agreement which provides that; -

9.1 "Pande zote mbili zimekubaliana kwamba mfanyakazi ataruhusiwa kustaafu mapema

endapo afya yake kwa kuthibitishwa na Daktari itaonekana haimwezeshi kuendelea na kazi yoyote."

From the above clause the catch words state clearly that the resignation of the applicant is subject to medical report confirmed by the doctor.

It is not disputed that the doctor's report was not procured. The respondent avers that, that Doctor's report was not necessary because the applicant resigned voluntarily. In my view, whether the applicant resigned voluntarily or by force, doctor's report was a thing to be obtained in effecting such applicant's exit.

In comparison, **Clause 9.1 of the Collective Bargaining Agreement** is not distinguishable from **Rule 7 (1) of G.N No. 42 of 2007.** They both stipulate that before termination of an employment on sickness ground, getting a medical report is a mandatory procedure to be considered in establishing as to whether the alleged sickness is permanent or temporary. In this matter, neither consultation nor medical report was considered by the respondent in terminating applicant's employment or allowing her resignation.

In the case of **Tanzania Revenue Authority V. Andrew**

Mapunda, Labour Rev. No. 104 of 2014 it was held that: -

> *"(i) It is the established principle that for the termination of employment to be considered fair it should be based on valid reasons and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment, Section 37(2) of the Act.*
>
> *(ii) I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims."*

From the above legal findings, the respondent's allegation that the applicant consented to the termination of her employment is immaterial so long as the doctor's report was not obtained. This justifies the applicant's allegation that the respondent issued a new contract tainted with illegalities with intention to terminate the applicant's employment.

Basing on the above discussion, it is my holding that the applicant's termination was procedurally unfair. It is therefore my finding that the main issue as to **whether the applicant has adduced**

sufficient grounds for this Court to exercise its revisional power in Labour Dispute No. CMA/DSM/KIN/560/2020/244 is answered affirmatively.

Lastly, what are the **reliefs** entitled to parties? Unlike CMA I have found that, although there has been fair reason, the applicant was unfairly terminated in terms of procedure. At the CMA the applicant claimed to be paid TZS 8,719,529/= as compensation for unfair termination. Since the unfairness is only on procedure, I will be guided by the case of **Felician Rutwaza v. World Vision Tanzania,** Civil Appeal No. 213 of 2019, CAT at Bukoba (unreported). In this case, in a situation where the unfairness was only on procedure, the court found the award of less that 12 moths remuneration to be appropriate. Equally, since in this matter the only aspect which was not fair is noncompliance with the procedure I will award less than 12 months remuneration for unfair procedure in terminating the applicant's employment.

From the above reasons the application for revision is partially allowed. I hereby revise and vary the CMA award by awarding the applicant 6 months remuneration as compensation for the unfairness of procedure in terminating her employment. Since the reasons for termination is remaining to be sickness, the balance of her farewell

handshake should be paid. All other statutory allowances and terminal benefits provided under **Section 44 of the Cap 366 of 2019 R.E**, should be paid if not yet paid. Each party to take care of its own cost. It is so ordered.

Dated at Dar es Salaam this 11th day of November 2022.

KATARINA REVOCATI MTEULE

JUDGE

11/11/2022