

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION APPLICATION NO. 99 OF 2022

*(Arising from an Award issued on 10/2/2022 by Hon. Mkombozi, Z.B, Arbitrator in Labour dispute No.
CMA/DSM/ILA/R.181/14/167 at Ilala)*

TPB BANK PLC APPLICANT

VERSUS

NEEMA CHRISTIAN JOHN..... 1ST RESPONDENT

**ERASTO SABAS MHULE (as Administrators of the
Estate of the late MAURO SABAS MHULE) 2ND RESPONDENT**

RULING

Date of last Order: 02/12/2022
Date of Ruling: 12/12/2022

B. E. K. Mganga, J.

In 1995, TPB Bank PLC the herein applicant employed one Mauro Sabas Mhule for unspecified period of contract of employment as Internal Auditor. But, on 28th August 2009 applicant entered three years fixed term contract with the said Mauro Sabas Mhule whereby the latter was employed as Director of Finance and Control. The said three years fixed term contract of employment was renewed several times. In 2013, the said Mauro Sabas Mhule's position changed from Director of Finance and Control into Director of compliance after approval of the Bank of Tanzania. It is said that on 29th November 2013, applicant received a letter from the

Bank of Tanzania requesting information in relation to integrity and performance of the said Mauro Sabas Mhule because he was considered to be appointed as the Managing Director of one of the Banks in Tanzania. It is said further that, applicant sent a positive recommendation to the Bank of Tanzania. On 23rd December 2013 Mauro Sabas Mhule took his annual leave up to 5th January 2014. While on annual leave, on 2nd January 2014, Mauro Sabas Mhule, issued a resignation notice terminating his employment with the applicant. It is said that, initially applicant did not accept resignation of the said Mauro Sabas Mhule but after several correspondences, on 16th January 2014 parties agreed that the said Mauro Sabas Mhule will terminate his employment by resignation on 2nd February 2014.

On 18th February 2014 he filed dispute at CMA that he was forced to resign hence constructive termination. It is said further that after termination of his employment, Mauro Sabas Mhule filed Labour dispute No. CMA/DSM/ILA/R.181/14/167 before the Commission for Mediation and Arbitration (CMA) at Ilala. Having heard evidence and submissions of the parties, on 10th February 2022 Mkombozi arbitrator, issued an award that the said Mauro Sabas Mhule was unfairly terminated and ordered applicant to Pay the said Mauro Sabas Mhule TZS 236,369,230/=.

Applicant was aggrieved by the said award hence this application. In the affidavit of Innocent Mhina, principal officer of the applicant raised six grounds as hereunder

- (a) The Honourable Arbitrator erred in law and fact by determining complainant dispute basing on the respondent's permanent contract which ended in 2009 and which was time barred.*
- (b) That the Honourable Arbitrator erred in law and fact by deciding that there was constructive termination on the respondent's fixed term contract while the respondent voluntarily resigned from his employment after being employed by another Commercial Bank.*
- (c) The Honourable Arbitrator erred in law and fact in determining the disputed highly relying on hearsay evidence as adduced by the respondent.*
- (d) That the Honourable Arbitrator erred in law in failing to order that the notice of termination by the respondent was contrary to the law after the same being issued during the leave period.*
- (e) That the Honourable Arbitrator erred in law and fact by awarding some amount of money as compensation and terminal benefits contrary to the law.*
- (f) That the Honourable Arbitrator erred in law and fact by failing to analyze the evidence and applicable law thereby reaching to an erroneous decision.*

When the application was called on for hearing, Mr. Richard Madibi, Advocate appeared for and on behalf of the applicant while Mr. Mpwaga Bernard, Advocate appeared for and on behalf of the respondent.

Before the parties have conversed the grounds advanced by the applicant, I drew their attention to what I have discovered in the CMA

record. I informed the parties that, in perusing the CMA record, I have not managed to find the CMA award. I informed them further that, I have discovered that when Mauro Sabas Mhule (PW1), respondent was testifying under cross examination, Mr. Mpwaga, Advocate for the herein respondent, prayed to tender exhibit but the herein applicant objected. The arbitrator made a ruling dismissing the preliminary objection raised by the herein applicant and granted the application. The arbitrator expunged evidence adduced under cross examination and re-opened examination in chief. During the re-opened examination in chief, PW1 tendered some exhibits including exhibit P12 and thereafter cross examination continued. After cross examination, arbitrator asked questions, thereafter counsel for the respondent continued with re-examination. I noted further that, in CMA F1, respondent indicated in Part A that the dispute arose in January 2014 without mentioning the date, but in Part B he indicated that the dispute arose on 2nd February 2014. With those observations, I asked the parties to address the Court whether, proceedings at CMA were properly recorded, if not, what is the effect thereof, and whether, the Court can proceed with hearing in absence of the original award, and whether the dispute was properly filed at CMA.

Responding to the issues raised by the court, Mr. Madibi, learned advocate for the applicant conceded that they have also perused the CMA record and find that there is no original award and submitted that in the absence of the original award, the court cannot proceed with hearing of this application. Madibi added that an original award is part of the proceedings hence its absence makes proceedings to be incomplete hence the Court cannot proceed to determine issues raised until the original award is obtained. He went on that parties have copies of the award but that in the CMA record there is neither original nor copy of the award. He strongly submitted that in the absence of the original or copy of the award in CMA record, the Court cannot determine this matter and prayed that proceedings be nullified.

On whether proceedings were properly recorded or not, Madibi submitted that they were not. He submitted that some dates in which the matter was scheduled to be heard are missing from the CMA record. He submitted further that CMA proceedings do not show what transpired on those dates. He went on that procedures for admission of exhibits were violated including reopening examination in chief while the witness was in the middle of cross examination and tendering exhibits and continuing with cross examination. He submitted further that Rule 25(3) of the Labour

Institutions(mediation and Arbitration Guideline) Rules, GN. No. 67 of 2007 was violated by the arbitrator for not giving the applicant chance to ask questions after arbitrator has asked question and allowed examination in chief to proceed hence denying the applicant right to be heard at the time PW1 was testifying. He strongly submitted that the irregularity is fatal and prayed CMA proceedings be nullified, the award arising therefrom be quashed and set aside and order trial de novo.

Madibi conceded further that applicant indicated that the dispute arose in January 2014 and in Part B he indicated that the dispute arose on 02nd February 2014. He added that the effect thereof is that it was not well known as to when the dispute arose. He submitted further that by stating that the dispute arose in January 2014 it is not clear as whether the dispute was filed within time or not. Madibi added that if the dispute occurred on 01st January 2014 by filing it on 18th February 2014 it was out of time since it was filed on 18th February 2014. He further submitted that CMA F1 was defective liable to be struck out. He cited the case of ***Barclays Bank (T) Ltd V. Jacob Muro***, Civil Appeal No. 357 of 2019, to the position that respondent was supposed to indicate the exact date of termination or the exact date the employer made a final decision to terminate the employee. In the CMA F1, the employee indicated two dates.

Responding to the issues raised by the court, Mr. Mpwaga submitted that proceedings were not properly recorded as submitted by Counsel for the applicant. On whether the Court can determine this application in absence of the award in the record, counsel for the respondent submitted that Court could use copies filed by the parties. But upon reflection, he conceded that since proceedings were improperly recorded, copies of the award in possession of the parties cannot help the Court. He conceded further that respondent indicated two dates as dates the dispute arose hence CMA F1 was defective. He concluded that the dispute was therefore improperly heard and finally determined by CMA and prayed that CMA proceedings be nullified.

It is undisputed as submitted by both counsels CMA F1 was defective making the dispute incompetent for failure to state the exact date the dispute Arose and that and proceedings arising therefrom are a nullity. Again, as correctly submitted by counsel for the applicant, arbitrator violated the provisions of Rule 25(3) of GN. No. 67 of 2007 by denying the applicant right to cross examine the respondent after the arbitrator has asked respondent questions for clarification before allowing counsel for the respondent to continue with re-examination. That amount to denial of right to be heard fairly.

It was further conceded by the parties that proceedings were improperly conducted because when respondent was being cross examined by counsel for the applicant, arbitrator allowed the application by counsel for the respondent, stopped cross examination and re-opened examination in chief to allow the respondent to tender some exhibits and thereafter proceed with cross examination. That procedure was not proper because it was intended to fill in the gaps that counsel for the respondent noted while his client namely was being cross examined. In stopping cross examination that was in middle way and re-open examination in chief to allow respondent to tender some exhibits to fill in the gaps, in my view, was a clear exhibition of bias on the side of the arbitrator. It is my view that, if at all the respondent, upon reflection found that there was a need to adduce more evidence in chief, he was supposed to call another witness to testify on his behalf and not to stop cross examination and reopen examination in chief. In view, the said purported award issued in favour of the respondent cannot stand where there is likelihood of bias and where proceedings were improperly recorded.

Not only that but also, as conceded by the parties there is neither an original nor a copy of the award in this CMA record, as such, it is difficult for the court to rely on the copies in possession of the parties. Though

there is no dispute between the parties on authenticity of the copy of the award they are in possession, I feel unsafe to rely on to make findings. Reasons for that hesitant are (i) there is no reason on record as to why the said award is missing, (ii) some pages of the proceedings are also missing as submitted by counsel for the applicant, as such, it is difficult to appreciate exactly what transpired on each day the parties appeared before the arbitrator, (iii) proceedings were improperly recorded and (iv) there is exhibition of biasness on part of the arbitrator. For all these, I am inclined to agree with submissions by both counsels that irregularities committed by the arbitrator vitiated the whole CMA proceedings. I therefore nullify CMA proceedings, quash, and set aside the award arising therefrom.

It was brought to my attention by the parties that Mauro Sabas Mhule has died but they did not disclose the date of his death which is why, the application is against the administratrix and administrator of his estate. But whatever the case, I have no choice other than to order the parties to go back to CMA for the matter to be heard de novo. One of the hurdles both the administratrix and administrator will face is whether, they can competently testify issues of termination of employment of Mauro Sabas Mhule. I will not answer that issue for now. The least can say is that

poor handling of the dispute by the arbitrator allowing the prayer by respondent to stop cross examination and re-open examination in chief and tender some new exhibits and poor handling of the dispute by counsel for the respondent who did not prepare his witness properly and improper recording of proceedings, has led the parties to this situation. Whatever the case, sympathy has no room where the law is violated.

That said and done, having nullified the whole CMA proceedings, quashed, and set aside the award arising therefrom, I hereby return the file to CMA so that the dispute can be heard de novo before a different arbitrator.

Dated in Dar es Salaam on this 12th December 2022.



B. E. K. Mganga
JUDGE

Judgment delivered on this 12th December 2022 in chambers in the presence of Mpwaga Bernard, Advocate for the Respondent but in the absence of the Applicant.



B. E. K. Mganga
JUDGE