IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 463 OF 2020

BETWEEN

NAS HAULIERS LTD.....APPLICANT

VERSUS

MAHMOUD B. MOHAMED .....RESPONDENT

(From the decision of the Commission for Mediation & Arbitration of DSM at Temeke Dated 26th November 2018 in Labour Dispute No. CMA/DSM/ILA/R.1085/16)

JUDGEMENT

K. T. R. MTEULE, J.

24th February, 2022 & 2nd March, 2022

The Applicants **NAS HAULIERS LTD.** has filed the present application against the decision of the **Commission for Mediation and Arbitration (CMA)** in **Labour Dispute No. CMA/DSM/ILA/R.1085/16**. The Applicant is praying for the orders of the Court in the following terms:-

1. That the Honorable Court be pleased to call for the records of the proceedings in the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/ILA/R.1085/16, revise and set aside the decision of the Commission for Mediation and Arbitration dated 26th November 2018 delivered by Hon. Ng'washi, Y., Arbitrator.
2. That the Honorable Court be pleased to make such any other orders as it may deem fit.

From the parties' sworn statements in the affidavit and counter affidavit, and the contents of the record of the CMA, I have gathered the following background of the matter. The applicant was employed by the respondent as an accountant with permanent employment contract. The employment started in December 2003. By a letter with reference number NAS/MBM/01/2016 dated on 29th July 2016 served to the Respondent on 5th August, 2016 the applicant decided to transfer the respondent to Kahama working station. In response to his transfer, the respondent requested adjustment of his remuneration to meet life expenses at Kahama. The applicant's management offered to increase addition of Tanzania shillings 100,000.00 for the coming months, (see exhibit NH-2) and on 18th August 2016 through a letter with reference No. NAS/MBM/02/2016 the respondent was given 10 days to prepare for the transfer.

On 05th September 2016 the management wrote a letter with reference no. NAS/MBM/01/2016 reminding the respondent the decision of the company to transfer him to Kahama and gave him seven (7) days to report in his new station failure of which would amount to insubordination and gross misconduct as per **exhibit NH-3**. After all these communications, the Respondent did not go to Kahama.

On such refusal the respondent was charged with misconduct contrary to **Rule 12 (3) (f) item 2 and Rule 9 (4)(a) item 1 of the offences set out in the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures**, forming part of the schedule to the **Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007.** The Disciplinary Committee found the respondent guilty of the offences as charged, hence he was

terminated on 26th October 2016 on the reasons of misconduct (absenteeism and gross insubordination). Dissatisfied with the decision the respondent filed the matter in CMA claiming that his termination was substantially and procedurally unfair hence seeking the redress to the tune of **TZS 92,552,500.** After the determination of the matter, the commission decided in favor of the Applicant who is the instant respondent by awarding him the sum of **TZS 27,530,000/=.** Aggrieved by the award the applicant filed the present application.

The Application is supported by the affidavit of Muumini Rajabu, the Applicant's Principal Officer consisting of five legal issues arising from material facts. The respective legal issues are as follows:-

i. That, the Honourable Arbitrator erred in law and fact for holding that the reason for termination was unfair.
ii. That, the trial Arbitrator erred in law and fact in holding that the respondent was not afforded right to be heard.
iii. That the Honourable Arbitrator erred in law and fact by holding that the procedures to terminate the respondent were unfair.
iv. The arbitrator erred in law and fact by granting compensation for unfair termination for 24 months without providing reason to exceed the minimum statutory compensation of 12 months.
v. The trial arbitrator erred in law by granting sum of Tanzania shillings 5,005,000 as leave not taken.

Both parties to the application were represented. The Applicant was represented by **Ms. Gema Mrina, Advocate**, whereas the Respondent was represented by **Dr. Mussa Muhoja, Advocate.** The Court ordered

for the hearing of the matter to proceed by a way of written submissions following the parties' prayer.

Submitting on the **first** legal issue that, the Honourable Arbitrator erred in law and fact for holding that the reason for termination was unfair, **Ms. Gema Mrina** submitted that in terminating respondent's employment on the ground of gross insubordination, the applicant complied with **Section 37 (2) (b) of the Employment and Labour Relations Act, Cap 366 R.E. 2019,** and **Rule 12 (3) (f) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007.** In her view, the offence constitutes serious misconduct and leads to termination of employment. Supporting her stand she cited the case of **Vedastus S. Ntulanyenka & 6 Others Vs. Mohamed Trans Ltd.**, Rev. No. 4 of 2014, HC of Tanzania Labour Div. at Shinyanga (unreported) which held that gross misconduct is among offences that may justify termination.

On the **second** issue as to **whether the respondent was afforded with the right to be heard, Ms Gema Mrina** made a submission which contained similar arguments with the **third** legal issue. What she gather from her submissions in both legal issues is her view that proper procedure for termination was appropriately observed including right to be heard which was afforded to the respondent. She stated that the respondent was given notice and charge sheet on 4th October 2016 (As per Exhibit 4 and 5), and that the respondent responded to the charge sheet on 12th October 2016 **(See Exhibit MB.2),** and on 13th October he was informed about the hearing. According to **Ms. Gema Mrina**, on 18th October 2016 the disciplinary committee was convened to hear the dispute of the Respondent and defended himself against the charges

before the disciplinary committee where he was found guilty of the misconduct charged (as per exhibit NH-6) resulting to termination on 26th October 2016 as per **exhibit NH-7.** In her view, the termination was in compliance with **Section 37 (2) (c) of the Employment and Labour Relations Cap 366 R.E. 2019**, which directs employee to be terminated in accordance with a fair procedure. With these events Ms Gema considered the process as a fair hearing were right to be heard was afforded.

Regarding the **third** issue on compliance with the procedure for termination, **Ms. Gema Mrina** submitted that the procedure was adhered to.

On **fourth** issue relating to compensation the counsel submitted that the arbitrator acted contrary to Section 40 (1) (c) of the Employment and Labour Relations Act, Cap. 366 RE. 2019 by awarding 24 months without adducing the reason of exceeding the minimum statutory compensation of 12 months. Supporting her submissions, she cited the case of **Tanzania Ports Authority vs. Tumaini Massaro,** Rev. No. 177 of 2016, HC of Tanzania Labour Div. at Dar es Salaam (unreported).

On **last** issue whether the trial arbitrator was right to grant TZS 5,005,000 as leave not taken, **Ms. Gema Mrina** submitted that no evidence was ever adduced by the respondent to show the exact period which he did not take his leave. She stated that once leave is not taken, it expires automatically unless there is a proof showing that the parties agreed otherwise. She averred that the respondent had waived demanding his leave and hence he is not entitled for the leave which he had waived.

Disputing the application, starting with the first issue as to whether the reason for termination was fair, **Dr. Mussa Muhoja, Advocate** for the Respondent submitted that the reason for termination was unfair because of the nature of the contract between respondent and the applicant. **Dr. Muhoja** submitted further that as stated by the Hon. Arbitrator at page 6 and 12 of the impugned judgment, it is not disputed that the respondent entered into an oral contract/agreement with the applicant, the working station being Dar es Salaam and not otherwise. In his view, in that context, all the terms and conditions contained in that agreement including remuneration and working modality were reflected and greatly determined by the working station which is Dar es Salaam.

Dr. Muhoja averred that in absence of applicant's policy on how to transfer employees, then he is of the view that imposing the transfer is contrary to the parties' agreement. He added that, page 7 of the award justifies that the respondent did not refuse to go to Kahama but he asked for an opportunity to discuss new terms that reflect the new working environment at Kahama as per **Exhibit MB1,** but the management refused to do offer such an opportunity and instead, chose to offer the respondent an additional of TZS. 100,000/= without any discussion.

Dr. Muhoja submitted that charging and convicting the respondent with insubordination and absenteeism was unfair, because as it was confirmed at page 10, 11 and 12 of the awards, it was not disputed that when the respondent was called before the disciplinary committee, he was still attending and assigned duties at the applicant's office at Dar es Salaam. He asserted further that while waiting for the management to

call him for discussion the Respondent was caught by a surprise to be supplied with the charge sheet and then dragged before the committee for the said above offences. It was further submission by **Dr. Muhoja** that the **Vedatus' case (supra)** is irrelevant in this application, as it talks about insubordination, but its ingredients is quite different from the present case and cannot apply.

On issues number 2 and 3, the **Dr. Muhoja** supported the findings of the trial arbitrator in holding that the respondent was not afforded fair avenue in defending his case and that the procedures was not fair. He stated that the respondent was subjected to unfair disciplinary hearing committee, against the principles of natural justice as the disciplinary committee was chaired by the Human Resources Officer of the respondent while the Prosecutor of the case was the Human Resource Manager of the respondent from the same office. On that basis he is of the view that this is against the principles of natural justice (*Nemo Judex in Causa Sua)* and Rule 9 (1) of the **Employment and Labour Relations (Code of Conduct and Good Practice), GN. No. 42 of 2007**, which demands Chairperson's impartiality in conducting disciplinary hearing.

On the **fourth** issue as to whether the arbitrator was correct to grant compensation for 24 months without providing reasons in exceed minimum statutory requirements of 12 months, **Dr. Muhoja** submitted that the arbitrator was correct since she was satisfied that the termination was both substantively and procedurally unfair.

On last issue regarding the amount of Tshs. 5,005,000/= which was granted as a leave payment, it was argued by **Dr. Muhoja** that the respondent proved that he did not take leave for five and a half year as

the applicant wanted him to stay in the office, as he was the only accountant.

The applicant filed a rejoinder which will as well be considered in determining issues of this matter substantively.

Having cautiously gone through the CMA records, the facts deponed in the affidavit and counter affidavit and the submissions of the parties this Court finds that the issues for determination are:-

i) Whether the Applicant has established sufficient grounds to warrant revising and setting aside of the decision of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/ILA/R.1085/16.
ii) To what reliefs parties are entitled to?

I address the two issues seriatim starting with the first one as to whether the Applicant has established sufficient grounds to warrant revising and setting aside of the decision of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/ILA/R.1085/16. To answer this issue, legal issues raised in the affidavit are hereunder expounded to find out whether the CMA properly addressed them and arrived at an appropriate finding. I will start with first issue that the Honourable Arbitrator erred in law and fact in holding that the reason for termination was unfair. I have gone through the decision of the CMA. The arbitrator found that, the applicant had no valid and fair reason to terminate the respondent herein. The **first** reasons on which the holding of the Arbitrator was based is the fact that the applicant had no policy of transferring employees and even their oral contract of employment did not have an issue of transfer. It was her

finding that although the respondent insisted on the existence of the policy, the same was not reflected either in the evidence or in the contract of employment. It was further opinion of the arbitrator that it was necessary for the employer to negotiate with the applicant on the issue of transfer. The **second** reasoning was based on the evidence adduced to show that the applicant was still attending the office in Dar es Salaam. It was the opinion of the Arbitrator that absenteeism could not arise in a situation where the complainant was attending his working place and being assigned with duties.

The Arbitrator supported her decision by citing Section 37 (2) of Employment and Labour Relations Act, No. 6 of 2004. This section provides:-

> *"A termination of employment by an employer is unfair if the employer fails to prove:-*
>
> *(a) that the reason for the termination is valid;*
>
> *(b) that the reason is a fair reason;*
>
> *(i) related to the employee's conduct, capacity or compatibility; or*
>
> *(ii) based on the operational requirements of the employer, and*
>
> *(c) that the employment was terminated in accordance with a fair procedure.*

I incline to agree with the finding of the arbitrator on this issue. Much as I agree with **Ms. Gema Mrina** on the principle enshrined in the case of **Vedastus S. Ntulanyenka & 6 Others Vs. Mohamed Trans Ltd.** that gross misconduct is one of offences to justify termination, I have not seen an issue of gross misconduct or insubordination in this matter.

Insubordination as a misconduct have been well defined in the case of **Sylvania Metals (Pty) Ltd. V. Mello N.O. and Others** (JA83/2015) [2016] ZALAC 52 where it was held that:-

> *"Insubordination in the workplace context, generally refers to the disregard of an employer's authority or lawful and reasonable instructions. It occurs when an employee refuses to accept the authority of a person in a position of authority over him or her and, as such, is misconduct because it assumes a calculated breach by the employee of the obligation to adhere to and comply with the employer's lawful authority. It includes a wilful and serious refusal by an employee to adhere to a lawful and reasonable instructions of the employer, as well as conduct which poses a deliberate and serious challenge to the employer's authority even where an instruction has not been given."*

From the above decision, insubordination involve disregard to a lawful and reasonable instructions of an employer. I see no reasonable instruction in this matter rather a contractual misunderstanding between the instant applicant and the respondent. The issue of transfer being neither in any written policy in the Applicant's office nor in their employment contract, I share opinion with the trial Arbitrator as I could not see why the applicant herein never negotiated with the respondent herein to have his consent to the intended transfer. Since the Respondent attended the workplace in which he was placed by his employment contract, I see no absenteeism as alleged. From the foregoing, I find the decision of the arbitrator on this issue to be well reasoned and arrived at.

The **second** and the **third** legal arguments in the affidavit are jointly addressed due to their similarities. The third one is whether the trial Arbitrator erred in law and fact in holding that the respondent was not afforded right to be heard and the fourth is whether the Arbitrator erred in law and fact by holding that the procedures to terminate the respondent were unfair.

In the respondent's submissions, **Ms. Gema Mrina** for the applicant considered the acts of serving the respondent with the disciplinary notice, the convening of the committee and the respondent's attendance therein as constituting compliance to the procedures of termination and affording of the right to be heard. On the other hand, the respondent is claiming that in the disciplinary committee, there was no impartiality because the Chairperson was from the same office with the person who initiated the complaint.

The counsel for the respondent submitted that the chairperson was the Human Resource Officer while the prosecutor was the human Resource Manager. The respondent described this as senior officer prosecuting a matter before a committee chaired by a junior officer from Human resource office. In his view, this is against the principle of *Nemo Judex causa sua*.

I have gone through the decision of the Arbitrator. The arbitrator, having considered **Rule 9 (1) of the Code**, which requires the chairperson of a disciplinary committee to be impartial, held that there was no compliance with procedure for termination of the employment of the respondent. The reasons she advanced for this holding were, **firstly,** the fact that the chairperson of the committee which sat for the

respondent's disciplinary hearing was the human resource officer of the respondent therein, who communicated to the complainant vide Exhibit NH4 which was a letter stating the intention to institute the disciplinary proceedings, the same person was not an umpire from the beginning. **Secondly,** the arbitrator based his decision on the reason that the decision of the committee was not communicated to the respondent timely in accordance with the Code. In this kind of a situation where the chairperson was not impartial and a delayed communication of the termination decision, the arbitrator concluded that there was no compliance with the procedure for termination.

At this juncture, I am inspired by the case of **Justa Kyaruzi V. NBC Ltd.** Rev. No. 79 of 2009 Labour Division at Mwanza, where a fair process of employment termination was described. It was held thus:-

> *"What is important is not application of the code in the checklist fashion, rather to ensure the process used adhere to the basics of fair hearing in the labour context depending on the circumstances of the parties, so as to ensure the act to terminate is not reached arbitrarily. Admittedly, the procedure may be dispensed with as per Rule 13 (12) of the Code."*

What I note from the above jurisprudence, fair hearing does not mean a mere formality but should constitute fairness in real sense to deter arbitrariness. In the instant matter, having Human resource officers chairing a meeting where the Manager of the Human Resource officer is the prosecutor create a situation of lack of impartiality. I don't see any fault in the finding of the arbitrator on the issue of fairness in the disciplinary committee.

The **fourth** legal issue raised in the affidavit is whether the arbitrator erred in law and fact in granting compensation for unfair termination for 24 months without providing reason to exceed the minimum statutory compensation of 12 months. The applicant is challenging the quantum in the payment of 24 months salary as compensation instead of the minimum of 12 months without assigning reasons for doing so.

The complainant in the CMA sought for the compensation of TZS 92,552,500 which included one month's salary in lieu of notice TZS 910,000/=, leave TZS 5,005,000, severance allowance of TZS 2,957,500, forty-eight months compensation in lieu of reinstatement TZS 43,680,000/= and general damages of **TZS 40,000,000**.

In her decision the arbitrator was guided by Section 40 (1) of the Employment and Labour Relations Act, Cap. 366 RE. 2019 and Rule 32 (1) of the Labour Institution (Mediation and Arbitration Guidelines) GN. 67 of 2007. Consequently, she found that the appropriate remedy in the circumstance is compensation in lieu of reinstatement. And basing on Rule 32 (5) of GN. 67 and the case of **Branch Director CRDB Bank Vs. Titoh Kwareh, Revision** No. 14 of 2011 at page 3 & 4, the arbitrator awarded a sum of TZS 810,000/= as one month's salary in lieu of notice on the reason that, until termination of his employment the applicant was being paid the salary to that tune of TZS 910,000/= and this could have been paid if the complainant could have moved to Kahama. The sum of TZS 5,005,000/= for the leave not taken, TZS 2,275,000/= being the severance pay for 10 years which the complainant served the Respondent and lastly compensation of 24 months salaries, 810,000 x 24 =19,440,000/=. She dismissed the claims for general damages as the same was not substantiated before the

Commission. In total the Respondent was ordered to pay the sum of TZS 27,530,000/=.

I share views with the arbitrator on the position of the law that where the Arbitrator finds the termination to be unfair, an order of reinstatement can be made. However, Rule 32 (2) (b) & (c) of the Rules provides that, the Arbitrator shall not give orders for reinstatement or re engagement in the circumstances where the employee does not wish to be reinstated, and where the circumstance of termination is such that continued employment relationship would be intolerable and that is not reasonably practical for the employer to reinstate or re-engage the employee. In assessing the number of months to be awarded as compensation, the arbitrator was guided by the legal position which gives her discretion. In exercising the discretion, she took into account the nature of termination which was coupled with unfairness. Awarding 12 months in my view is a reasonable consideration which I don't find appropriate to interfere.

With regards to the **fifth** legal issue from the affidavit, awarding leave without a prove, I have gone through the proceedings of the CMA. It appears that claim of leave was not one of the disputed matters. In that case, it was not necessary for the arbitrator to demand evidence to prove undisputed fact. As such, I as well find no sufficient ground to interfere with the decision of the CMA.

From the above analysis, it is apparent that the arbitrator was right in her finding to hold that the termination of the Respondent was not fair in terms of procedure and substance and that what she awarded was properly guided by rules and procedure. In this respect the issue as to whether the Applicant has established sufficient grounds to warrant

revising and setting aside the decision of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/ILA/R.1085/16 is answered in the negative.

The second issue is on remedy. Having found no sufficient ground established to warrant revising of the decision the CMA, the remedy available is to dismiss this application and uphold the decision of the CMA. The application is therefore dismissed. It is so ordered.

Dated at Dar es Salaam this 2nd Day of March, 2022.

KATARINA T. REVOCATI MTEULE

JUDGE

02/03/2022