IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATED REVISION NO. 137 & 151 OF 2017

BETWEEN

MANTRA TANZANIA LTD..... APPLICANT

VERSUS

JOAQUIM P. BONAVENTURE..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

This judgment is in compliance with the order of the Court of Appeal dated 15th July, 2020 in Civil Appeal No. 145 of 2018 emanating from these Consolidated Revisions No. 137 & 151 of 2017. At page 12 of its decision, the Court of Appeal made the following observation:

> *"The High Court did not consider the respondent's prayer for reinstatement which was one of the reliefs sought in CMA Form No. 1. Under s. 40 (1) of the ELRA, reinstatement to employment is one of the remedies which an employee may be granted when it is found that he was unfairly terminated from his employment. Since the respondent had prayed for that relief, it is imperative that, after*

having found that his termination was substantially and procedurally unfair, the High Court ought to have considered whether or not to grant that relief. In our considered view therefore, by omitting to do so, the High Court strayed into an error.

Having made that observation, the Court of Appeal directed us on the way forward when it said:

"On the way forward, it is trite principle that when an issue which is relevant in resolving the parties' dispute is not decided, an appellate court cannot step into the shoes of the lower court and assume that duty. The remedy is to remit the case to that court for it to consider and determine the matter.

In the final verdict, the Court so ordered:

"In the circumstances, having found that the omission vitiated the impugned decision, ***we hereby quash that judgment and remit the case to the High Court for it to render a decision*** *after having considered the reliefs sought by the respondent."*

The judgment of this court having been quashed, my task is therefore to construct another judgment and render a decision after considering the reliefs sought by the employee in his CMA Form No. 1. But

before going there, since this is a new judgment, the previous one having been quashed, I find it prudent that I recap the brief background that led to the initial dispute lodged at the Commission for Mediation and Arbitration for Ilala ("the CMA") in Labor Dispute No. **CMA/DSM/ILALA/R. 860/13/1081** ("the Dispute") and the subsequent Revision herein. For ease of refence and convenience, the parties to the dispute shall be referred as Mantra Tanzania Ltd or Employer or Company (interchangeably) and Joaquim Bonaventure or Employee (interchangeably).

On the 14th May, 2007, the employer and employee herein signed a contract of employment which commenced on 15th June, 2007 (EXP1) whereby the employee was employed as a Finance and Administration Manager. He worked for the Company until the 12th November, 2013 when he was terminated following allegations of misappropriation of Company's fund (EXP3 & EXD1) in which he was found guilty and eventually terminated. Aggrieved by the termination, he unsuccessfully appealed to the Company's appellate body and eventually lodged the abovementioned dispute at the CMA.

In his award, the Arbitrator did not fault the fairness of the substantive part of the termination, he only found that the termination of the appellant was procedurally unfair and ordered several compensation payments according to the Employment and Labor Relations Act. Both the employer and the employee were aggrieved by the award and subsequently lodged the current Consolidated Revisions No. 137 and 151 of 2017. The Revisions were lodged under the provisions of Section 91 (1) (a) and 91 (2) (c) of the Employment and Labour Relations Act of 2004 ("ELRA") and Rule 28 (1) (c) 28 (1) (d), 28(1) (e), 24(1), 24(2) (a), 24 (2) (b), 24 (2) (c), 24 (2) (d), 24 (2) (e), 24 (2) (f), 24 (3) (a) 24 (3) (b), 24 (3) (c) and 24 (3) (d) of the Labour Court Rules, 2007, G.N. No. 106 of 2007("the Rules") . While the employee was the first to approach this court by filing Revision No. 137/2017 challenging the CMA's findings that the termination of the employee was procedurally unfair and the subsequent orders of compensation therein; the employee eventually lodged a Revision No. 151/2017 challenging the finding of the arbitrator that his termination was substantively fair and ordering the compensation to the tune of six month's salary which he alleges to be contrary to Section 40(1)(c) of the ELRA.

Hearing of the application was by way of written submissions. The submissions filed prior to the appeal are adopted for the determination of this application since the Court of Appeal's order was to just construct another judgment which shall consider the prayers of the parties as filled in the CMA Form No. 1. The employer's submissions were drawn and filed by Mr. Audax Kahendaguza Vedasto, learned Advocate while the employee's submissions were drawn and filed by Mr. Meshack Lyabonga, learned advocate. Having considered the submissions of the parties for and against this application, I find that my task is to first determine whether the termination of the respondent was both procedurally and substantively fair. The parties' submissions will be considered in constructing this judgment.

I wil start with the fairness of the reason (substantive fairness). Article 9(2) of the **ILO Termination of Employment Convention, 1982 (No. 158)** provides:

> *"2. In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:*

(a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer"

This Article if reflected under Section 39 of the ELRA which imposes a duty on the employer to prove that the termination was fair. On that note, it is pertinent to see what evidence was adduced during arbitration and whether it established, on balance of probabilities, that the termination was substantively fair. DW1 was a Senior Manager, Administration Systems and he testified that the employee was terminated for reason of paying insurance premium to his private vehicle Subaru out of company funds. The payments were done for import duties through National Freight Forwarders (NFF) to an insurance broker called AON. The company became aware because Mantra did not have such a car. The payments were done in March, 2018 while the disciplinary hearing was in November, 2013 and until that time the employee had not refunded the money. DW2 was the Vice President of the employee company and also confirmed that the employee was terminated due to misappropriation of company funds.

I have noted that the evidence of the employer was not shaken by that of the applicant, neither in cross examination nor in the applicant's

testimony. Actually looking at the applicant's testimony, the employee admitted to have made the authorization, only on defence that the practice was normal at the workplace. Apart from that, his remaining evidence was more based on the procedural irregularities of his termination but it did not talk much of the substance.

I have also scrutinized the EXD3, employee's defence on the use of funds. He admitted to have issued the email to instruct NFF to clear his vehicle using company money. His defence was that he was to settle the amount with the office. But there is no evidence that he actually settled the amount, he however clarified that he was not informed when the accountant was processing the documents. It is pertinent to note that the unauthorized payments were done in March 2013 and it was not until November, 2013 that the employee was charged, it is also on record that the employee was sick and admitted to the hospital for a remarkable period of time. In order to prove his sickness, the respondent tendered EXP4, a discharge sheet and EXP5 the excuse from duty. It cannot therefore be said that the respondent had ill intention to misappropriate the funds and according to PW2, evidence which was not shaken in cross examination, the practice was common at the office of the respondent.

It is trite principle that the yardstick in deciding labor issue is fairness. Although there are no hard and fast rules that define fairness, it may simply be defined as impartial and just treatment or behavior without favoritism or discrimination. Rule 12(1) of the Code provides:

12.-(1) Any employer, arbitrator or judge who is required to decide as to terminate misconduct is unfair shall consider-

(a) whether or not the employee contravened a rule or standard regulating conduct relating to employment;

(b) if the rule or standard was contravened, whether or not-

(i) it is reasonable;

(ii) it is clear and unambiguous;

(iii) the employee was aware of it, or could reasonably be expected to have been aware of it;

(iv) it has been consistently applied by the employer; an t is clear and unambiguous; and

(v) termination is an appropriate sanction for contravening it.

Although the employer alleged the misappropriation, but fairness would have called for her to accord the employee a benefit of doubt given the fact that in his defence, he admitted to have issued an email and had a reason that he was to have the payment deducted from his salary, only that was not done therefore much as there was a wrong done, the fact that the employee admitted and had a reason for doing so because it will be deducted from his salary would have constituted a defence. Furthermore, according to PW2, it was the practice of the employees to do so hence the termination contravened Rule 12(1)(iv) above because if others did it and were not terminated, then the employee should have been given a chance to rectify the mistake.

Again, the employer should have also considered the admission of the applicant and the willingness to rectify the problem in line with Rule 12(1)(v) of the Code in order to determine whether termination was an appropriate sanction under the circumstances.

The employer should have also considered the fact the employee had just been discharged from the hospital from serous disease hence he could have been human and accord him time to rectify the problem and the fact that it was a first mistake the employee had conducted. Rule 12(2) of the

Code is clear that first offence of an employee shall not justify termination unless it is proved that the misconduct is so serious that it makes a continued employment relationship intolerable. This was not proved during arbitration hence in the absence of employers document specifying that such an offence called for termination even in first instance and the absence of convincing evidence that the misconduct is so serious making continued employment intolerable, coupled with the fact that it was a common practice and the employee was willing to make good the loss; I am going to make a conclusive finding that the termination of the respondent was substantively unfair.

The next issue is the procedural fairness of the termination. Article 7 of the **ILO Termination of Employment Convention, 1982 (No. 158)** provides that:

> *"**The employment of a worker shall not be terminated** for reasons related to the worker's conduct or performance **before he is provided an opportunity to defend himself against the allegations** made, unless the employer cannot reasonably be expected to provide this opportunity."*

The Article requires termination of employment to follow the procedures that will accord the employee an opportunity to be heard before his right to work is terminated. In our ELRA, the requirements for procedural fairness is provided for under Section 37(1)&(2)(c) which provides:

"37.-(1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(c) that the employment was terminated in accordance with a fair procedure."

One of the complaint by the employee is that he was not afforded reasonable time to prepare for his case. This evidence is undisputed and according to EXD2, notice to attend a hearing dated 06/11/2013 and EXD4 hearing proceedings dated 07/11/2013, the respondent was given a twenty four hours' notice of hearing. But what does the law say about the time to issue notice? Article 11 of the Convention No. 158 of 1982 provides:

"A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof,

unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period."

In our laws, Rule 13(2) requires the employer to issue a hearing notice prior to a disciplinary hearing. Then Rule 13(3) of the same Code provides:

"(3) The employee ***shall be entitled to a reasonable time to prepare*** *for the hearing and to be assisted in the hearing by a trade union representative or fellow employee. What constitutes a reasonable time shall depend on the circumstances and the complexity of the case. But* ***it shall not normally be less than 48 hrs****."*

At this point, given what I have pointed out on the EXD2 and EXD4, it is safe to conclude that given the time that was afforded to the employee, the procedures for termination of employment under Rule 13(3) of the Code were contravened. The reason why the notice is supposed to be given within a reasonable time of not less than 48 is to accord the employee ample time to prepare his case properly and to procure representation if he so needed. These are all issues which fall under the

fundamental right to be heard and defend your case hence contravention of the Rule is fatal to the employee's right to be heard. Therefore termination of the employee was also procedurally unfair.

Having made those findings, I now turn to the reliefs that the parties are entitled to. Bearing in mind that the Court of Appeal emphasized that I should consider all the reliefs sought by the employee in CMA Form No. 1 including the issue of reinstatement, I will start with that issue. Before ordering reinstatement, I have considered the time that had lapsed from when the applicant was terminated to now and also expectations that the position will still be open are thin. On that basis, I find that reinstatement may not be the appropriate remedy under these circumstances. That said, I order that the employee be compensated pursuant to Section 40(1)(c) of the ELRA for unfair termination, I shall expound the amount of compensation later in this judgment.

The employee is also entitled to and shall be paid repatriation and subsistence allowances from the date of termination 30.11.2013 to the day that he will be paid the whole amount. The subsistence allowance shall be calculated under Regulation 16 (1)&(2) of the Employment and Labor Relations (General Regulations) GN NO. 47/2017 which quantifies the

amount in terms of daily basic wage or as may be determined by the wage board. I have no reference whether the wage board has determined the allowance hence I will stick to the daily basic wage which given the fact that the applicant's last salary was Tshs. 11,311,359/- then it Tshs. 377,045.30 per day. Taking into consideration Section 37(d)(i) of LIA and Section 3(a) of the ELRA plus other economic factors including the hardship period of pandemic Covid 19 which has affected all businesses in the world, and the time that has lapsed at the instance of both the employer and employee, the flat rate of subsistence allowance to be paid will be Tshs. 200,000/- per day.

As for the repatriation expenses, it is undisputed that the respondent was hired from Mwanza and transported to Dar-es-salaam, he shall be paid his repatriation allowance pursuant to Section 43(1) of the ELRA. The transportation in 2007 when he was hired was USD 9,000/- but given the number of years that had lapsed, he shall be paid USD 9,500/- as repatriation allowance. The amount of TShs 48.6000,000/- awarded by the arbitrator is hereby revised to USD 9,500/-. Housing allowance shall not be paid for reason that it was part of salary as defined under the ELRA and if the respondent had any arrears therein, he could not come and claim them

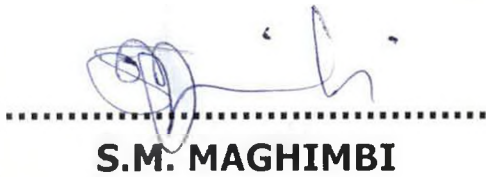
two years later because he was barred by time limitation. The award of housing allowance is therefore set aside.

Coming back to the relief of compensation due to unfair termination u/s 40(1)(c) of the ELRA, given the circumstances, the unfairness of the substance of termination and the fact that the employee was willing to make good the loss, termination should not have been the appropriate measure. The employee did not also follow procedures for termination as determined above. To this end, the employee is awarded a compensation equivalent to 36 months' salary because the termination was unfair both procedurally and substantively. His salary being Tshs. 11,311,359/- X 36 equal to Tshs. 407,208,924/-. He is also entitled to a month's salary in lieu of notice which is Tshs . 11,311,359/-. The subsistence allowance shall be calculated at the time when the repatriation allowance is paid. If the subsistence allowance and the repatriation allowances were already paid, then the applicant is not entitled to them.

On the order of payment of Tshs 64,800,0000/- as share option payment, I find that the arbitrator fell into error in awarding the payment. This is because there was no evidence adduced during arbitration to justify such a compensation.

In total therefore the employee shall be entitled to the following payments, Tshs. 407,208,924/- + Tshs . 11,311,359/- which is Total of Tshs. **418,520,283/-.** Further **USD 9,500** as repatriation allowance plus the amount of subsistence which shall be subjective to the time of payment of repatriation allowance and shall be accordingly calculated then (if not already paid). On those findings and orders, the award of the CMA is revised and set aside to the extent explained.

Dated at Dar-es-salaam this 24th day of March, 2022.



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S.M. MAGHIMBI
JUDGE