IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATED REVISION NO 318 OF 2020 & 83 OF 2021

PREVENTION AND COMBATING

OF CORRUPTION BUREAU.....APPLICANT

versus

AWADHI MOHAMED .....RESPONDENT

(From the decision of the Commission for Mediation and Arbitration of DSM at Ilala)

(Mpulla: Arbitrator)

dated 30th March, 2020

in

REF: CMA/DSM/ILA/R.660/17

JUDGEMENT

1st March & 27th April 2022

Rwizile, J

This court is tasked to determine two questions; *whether the respondent was entitled to payment of special operation fund allowance and if there was any valid reason for condonation.* The issues of course were framed based

on an agreement between the parties on 30th November 2021, when their applications were consolidated.

Facts, the culmination of which is this matter, can be gathered as following; that before he was appointed a judge of the High Court in August 2014, the respondent worked with the applicant for a good number of years. His employment, that commenced on 1st June 1998 was joyous and progressive. Having started as an investigator, when he rose to a rank of the head of the secretariat in 2006, and following confirmation in the post in 2007, bad blood took up the office. The respondent was not in good terms with the Director General of the Bureau. He was demoted, allowances stopped and sometimes reduced and was subjected to the disciplinary charges, which was blocked by judicial process.

Later he was appointed a judge and his claims allowances due were made to the Chief Secretary who on consultation with the Bureau, it was stated that the respondent had no claims against the applicant. The applicant was not happy with this decision. He filed a dispute with the Commission for Mediation and Arbitration claiming for a total of unpaid allowances amounting to TZS 90,700,000.00, covering the period between January 2007 to 2014. The Commission upon hearing, found that the responded was

entitled to TZS 26,550,000.00. The award did not please either party, who all filed applications (now consolidated) challenging the same. As intimated before, each party filed affidavits in support of the application and raised different issues for determination by this court.

Before this court, the matter was heard by written submissions. Mr. Imani Nitume stood for the applicant while, Mr. Makaki Masatu of MM Attorneys was for the respondent.

Arguing the first issue, it was stated that the record indicates that in between February, 2005 and November, 2006 the respondent was paid an investigation allowance between TZS. 1,200,000.00 and TZS 1,320,000.00. It was further stated that the Director General (DG) is empowered under the law to determine and pay allowances to employees as he wishes. He argued, he is not subjected to any consultation and that his decision in this respect cannot be subjected to questions. To support this point, he referred to Regulation 51 (1)(a) of the Prevention and Combating of Corruption GN No. 300 of 2009, which only provides for payment of allowances without specifying the amount to be paid.

It was Mr. Nitume's submission further that since 2007, the applicant paid a reduced sum of allowances to the respondent at the tune of TZS 450,000.00, 470,000.00, 500,000.00 and 600,000.00 to all officers with a Basic Salary of ABS1 including the respondent. No one, he added, was paid an amount of TZS 1,375,000.00 per month in the period under consideration. He argued that, the respondent knows that and admitted the same during cross-examination. His evidence, he argued, is supported by Pw2, Pw3, Dw1 and Dw3 in that the allowances were paid at the discretion of the DG.

Mr. Imani went on submitting that the allowances as testified by the applicant's witness were not paid to the employees absent from duty or those under investigation for misconducts. He said, this applied to the respondent in 2007 to 2009. According to Dw2, it was further reiterated that in March, 2013 to July, 2014, the respondent could not be paid allowances because he was absent from duty. He said, he was processing his transfer to the Ministry of Tourism and Natural Resources.

He said, exhibits D2, D6, D7, D10 and D11 as approved by Dw3 are clear to that effect. He said, Dw3 also confirmed that the transfer was initiated by the respondent himself and he was instructed to handover the office to another person. It was further argued that the respondent was absent from

office in the given period as testified by Pw1 and in support are exhibits D8 and D9.

In the view of Mr. Nitume, it was the duty of the respondent to prove that he was entitled to the claimed allowances. He said, not even by evidence of Pw2 and Pw3 and exhibits MA-1 to MA 10 as tendered. Concluding this point, it was submitted, the commission was enjoined to believe the evidence given by the applicant. The application, he argued be allowed.

Dealing with the second point, it was argued that there was no sufficient reason to warrant grant of the application for condonation. It was said, delay was caused by lack of diligence on the part of the respondent. Mr. Nitume was clear that delay of 34 month's was inordinate and was not accounted for.

It was further argued that the application for condonation was filed in contravention of the law. The respondent, it was added, did not file a notice of application before the Commission and serve the applicant. Further he said, the affidavit supporting the application was violative of Rule 29 (4)(d) for containing no proper grounds for condonation. Here, he asked this court to take reference in the case of **Tanga Cement Company Limited vs.**

Jumanne D. Massanga and Amos A. Mwalwanda, Civil Application No. 06 of 2001, where it was held that;

> *"what amounts to sufficient cause has not been defined. From decided cases, a number of factors have to be taken into account including whether or not the application has been brought promptly, the absence of any valid explanation for delay and lack of diligence on the part of the applicant"*

The applicant therefore asked this court to revise the decision of the commission.

On party of the respondent, it was said that the argument that officers of the respondent's rank were paid allowances between TZS 450,000.00, 470,000.00, 500,000.00 and 600,000.00 at the discretion of the Director General is not supported by any evidence on record. Mr. Masatu was clear that the applicant's evidence in support was not supported and in actual fact was discredited by Dw1 and Dw3. It was his view, that such discretion was not there and when exercised, it was unlawful and discriminatory. The learned counsel held the view that the Arbitrator erred in holding that it was by practice that the Director General determined the amount of allowances

payable to the employees at will, and to further hold that the Commission had no jurisdiction to challenge such powers.

Mr. Masatu submitted further that Pw1, Pw2 and Pw3 were clear in their evidence that the funds paid to the applicant's employees were public funds approved by the parliament. He said, the same were not to be reduced but were increasing from time to time. It was their evidence, he added, that the DG was the approving officer. He therefore had no discretion to pay the same at his own wish

It was as well submitted that, payment of allowances is governed by Regulation 51(1) of the Prevention and Combating of Corruption Regulations, G.N. 300 of 2009, which include hardship and investigation allowances, among others. He said the same are set up by the government in terms of sub regulation 4 of regulation 51 and section 47(1) of the Prevention and Combating of Corruption Act, Act No 11 of 2007

The learned counsel was vehement that, the Oversight Committee chaired by the Chief Secretary with other members, including the Permanent Secretary of the State House and Personal Secretary to the President in accordance with Regulation 4(1) Of GN 300 of 2009 approves the reviewed

allowance submitted to it by the Remuneration Committee in terms of Regulation, 7(3) (a) (b). It was further submitted that, in terms of Regulation 7(1), it can be gathered, is an internal committee chaired by the DG. The learned counsel was of the view that based on the provisions of the law, the DG had no desecration to pay allowances at his own pleasure. He added, section 28 of the Employment and Labour Relations Act, prevents deduction of remuneration of the employee without any agreement.

It was submitted that the respondent has never been interdicted or issued with any valid charge, but yet the applicant unilaterally and without affording the respondent a hearing, stopped and/or reduced his allowances due. It was said, this was in contravention of Regulation 37 of the Public Services Regulations, GN 168 of 2003 and Rule 27(1) of the Employment and Labour Relations (Code of Good Practice) GN 42 of 2007, which are clear that in the event the employee is interdicted, he should be in full remuneration for whole period of interdiction.

In terms of the evidence of Pw2, Pw3 and Dw1, it was argued, the respondent was never interdicted. He said, the proceedings initiated by the

applicant against the respondent were declared null and void for being instituted by an incompetent person as per Aboud J in the case, **Awadh Mohamed & Another vs The Inquiry Committee & 3 Others,** Misc. Civil Cause No. 70 of 2008. It was therefore submitted that failure to pay the respondent his allowance of March, 2013 to July, 2014, has not legal backing and that exhibit D7 proves so. The evidence of the applicant's witnesses, the learned counsel argued, were married by inconsistences, unreliability and conflict, it should be rejected as held in the case of **Emmanuel Abrahamu Nanyaro v Peniel Ole Saitabau (**1987) TLR 47.

The learned counsel was clear that there is no proof that the respondent was not in officer by reason of transfer to another Ministry. He said, the respondent indeed applied for transfer which was not effective. He was in officer and was not assigned any duty for that period. It is from the foregoing, the learned counsel argued, reduction and or stoppage of his allowances was unjustified and unlawful as held by the Arbitrator. It was further argued that evidence of Pw3 and Dw2 who worked in the Finance Department and proved that indeed the respondent was entitled to payment of TZS 1,375,000.00. or TZS 1,320,000.00 which was last paid before it was

unlawfully reduced and stopped at some point as admitted by both Dw3 and Dw2.

The learned counsel argued, despite change of scheme, the respondent was entitled to his allowance at the rate of TZS 1,320,000.00 to TZS 1,375,000.00. This is because, he added, the respondent had the same rank as Departmental Heads and Area Heads. This category of officials, he argued were paid on the same rates. The applicant he said, has no evidence to show that payment of allowances had changed to all employees of his rank. The learned counsel went on submitting that the evidence of Dw2 proved that allowances were paid to every employee of his rank. He said this evidence was not controverted by the applicant.

It was stated that the duty to prove the terms of the agreement is cast on the employer and it is the same person required to keep the records of employees, as per section, 15 and 96(1) (a) and (b) of the Employment and Labour Relations Act, and section 60(1) of the Labour Institutions Act. The applicant, it was submitted has failed to do so. To conclude this point, the learned counsel invited this court to hold that based on the law and evidence on record, the respondent was entitled to the allowances claimed.

Arguing the last issue, the learned counsel submitted that the applicant, did not resist the application for Condonation. In fact, he said, the applicant supported it. Mr. Masatu argued, the applicant should be estopped from challenging grant of condonation at this stage.

He said, it is against section 123 of the Evidence Act and the cases of **Republic vs Damas Cosmas Nilahi** [1992] TLR 194 and **Ramesh Rajput v Mrs. Sunanda Rajput** [1988] TLR 96.

In conclusion, the learned counsel asked this court to consider the issue of condonation as baseless. He therefore asked this court to quash the award and order payment of 90,700,000.00 and not 26,550,000.00. as held by the commission.

Based on the nature of this application, I think I have to start with the second issue. The same runs as to whether there was any valid reason for the commission to condone delay of filing the impugned application. According to Rule 29 of the Labour Institution (Mediation and Arbitration) Rules, GN 64 of 2007, disputes referred after time set cannot be processed unless

the CMA condones the delay. Therefore, an application for condonation is matter to be determined first before a late referral is entertained. Condonation is not a matter of formality. The applicant is required by the Act to show good cause. In deciding whether good cause has been shown, it iscustomary to have regard to a number of factors that have been identified as being relevant to the application. These include the period of the delay, the explanation for the late referral, the pro spect of success and sometimestheimportance of the case. Another factor to be considered is whether any prejudice has resulted from the delay. Ultimately it is a matter of fairness to both parties. In the instant matter, the applicant citing the case of **Tanga Cement Company Limited (supra)** was of the view that the application was granted without valid reasons for so doing.

At law, it is the case that a point raised before the CMA and not disputed or resisted is taken as admitted. This is true of the respondent's submission that the applicant supported the application for condonation before the CMA. The record of the CMA has it that when the application was brought before it, the applicant did not resist it. Under section 123 of the Evidence Act and the cases of **Republic vs Damas Cosmas Nilahi** [1992] TLR 194 and

Ramesh Rajput v Mrs. Sunanda Rajput [1988] TLR 96, as submitted by the respondent, the applicant is indeed estopped from challenging the same. Without being so detained, this point has no merit, it is dismissed.

Turning to the first issue, *whether the respondent was entitled to payment of special operation fund allowance in the disputed period.* It is in record, that this point has tasked the parties and the CMA a great deal. This is because the whole dispute centres on payment of the handsome amount of TZS 90,700,000.00. The respondent having testified and tendered exhibits, believed the commission was not justified to reduce the same to TZS 26,550,000.00. On the other hand, the applicant having tendered witnesses and exhibits, was convinced that the respondent was not entitled to the allowances claimed.

To start with, the record shows the respondent was on 20th November 2006 appointed to head the secretariat with effect from 1st June 2006. His confirmation was done on 1st August 2007, according to exhibit MA-1. It can be recalled, since February 2005, the respondent was paid the allowance in question at the tune of TZS 1,200,000.00. Before his allowances were stopped in December 2006, he was last paid the allowance of TZS

1,320,000.00 as per exhibit D1. Perhaps this was done following a transfer to Temeke District as a Municipal Bureau Chief as per exhibit D3.

Not until March 2007, from December 2006, his allowances were paid at a reduced rate of TZS 450,000.00 and was last paid the amount of TZS 470,000.00 in October 2007. In November 2007 to December 2009, the allowances were again stopped, exhibit D1. On recollection, at this time, the respondent worked in Dar es salaam and Sumbawanga respectively. His allowances were also paid since January 2010 to February 2013 at a relatively increased amount of 600,000.00, exhibit D1.

It is clear as well that in 26th February 2009, the respondent was appointed to a post of NACSAPII for Kigoma and Rukwa regions. But in September 2009, these duties were taken away and told to wait for other duties, exhibit MA-10. Again, from March 2013 to February 2014, when he was appointed a Judge, no allowance was paid to him.It is recalled that from this period of time the respondent worked at Tabora as Bureau Chief and unsuccessfully applied for transfer to the Ministry of Natural resources and Tourism.

It is therefore categorical that the applicant, from the period between 2006 to 2014 was involved in a tag-of war with the DG of the Bureau. He was

interdicted and investigated, however, the legal battled thwarted the process, it was terminated by the High Court order.

The commission bought the applicant's view that the allowances in dispute were approved and paid at the absolute discretion of the Director General. It was the view, of the applicant, which I do not share, that the DG was empowered by law to pay or abstain from paying allowances as he wishes and was not subject to question at all. This means, it is the view of the applicant that there was justification for none payment and or reduction of the payable allowances to the employees without notice. The respondent being fortified by section 28 of the Employment and Labour Relations Act, was of the view that the applicant's act was in such contravention. There was no agreement between the two parties.

Having read section 28 of the Act, I am firm that it does not apply in the situation at hand. My construction of the provision is that it straightly prevents one to deduct any amount of money from remuneration of the employee other than those allowed by law. This is what requires an agreement between the parties. The act by the applicant under discussion goes far beyond that. Here the applicant stopped paying and or reduced the amount to be paid to the respondent.

As submitted, payment of allowances within the Bureau is governed by Regulations. The Prevention and Combating of Corruption Regulations, Regulation 3(d) of GN 300 of 2009 establishes Remuneration Committee. Under Regulation 7(3) (a) and (b), the committee is charged with the function of periodically reviewing the rates of remuneration package and submit the same for approval to the Oversight Committee. While the Remuneration Committee is chaired by the DG in terms of regulation 7(1), the Oversight Committee is chaired by the Chief Secretary.

It follows therefore that allowances payable to the staff of the Bureau are subjected to a legal mechanism through which the same are governed. No doubt, all allowances payable to the staff of the Bureau are public funds. They are allocated to the same by the Government and approved by the Parliament as per the Prevention and Combating of Corruption Act, Act No 11 of 2007 which under section 47(1) of the Act, states; *The funds and resources of the bureau shall consist of the sum of money as may be appropriated by parliament and shall be applied for purposes for which the bureau is established.*

It is therefore safe to hold that, allowances of the bureau, cannot in the absence of any law, rule or regulation, be paid at the whims of the DG. I therefore agree with the respondent that the Commission was not justified to hold that the DG had absolute powers to pay the same in a manner he or she wished. There is no record, showing as to how funds were applied before the coming into force of the GN. 300 of 2009. This is important because the allowances in dispute between the parties traces its way back in 2005. I am in doubt as to how the same were to be applied.

In law, it is the duty of employer to prove existence of the disputed terms of the agreement. It has been submitted so by the respondent. In view of the applicant, there enough evidence proving so. I have revisited the evidence of both parties before the commission. There is no law cited to show that the DG was allowed by low to do so. What is apparent is that, the DG, was approving payment to all eligible staff. Given that fact, there is an admission that all staff of the Bureau were entitled to such allowances, his duty was not select who should be paid and the amount to be paid. He was approving the same to those who were eligible. The respondent, I do not hesitate to hold, was entitled to the allowances as other employees. As the commission

held, the DG was not entitled by law or practice to stop or reduce the respondent's allowances.

It has been submitted that the respondent was appointed by the president and so the DG had no powers to demote him. I take note that there were many conflicts between the respondent and the DG. But I do think, this court is required by law to venture into that point. That would be reserved in the other fora.

To answer, the issue, based on the evidence of witnesses and the provisions of the law cited. It is clear to me, that the respondent was entitled to the allowances. Lastly, the commission reduced the same to the tune shown above. The reasons for doing so were apparent. In my view, this court is required to find out if that was correct. First, based on exhibit D4, the applicant by his letter dated 22nd December 2006, told the respondent that he was merely transferred to Temeke not a demoted. Under paragraph 4 of the same, it was stated;

> *... matumaini yangu unaelewa kuwa nafasi ya Mkuu wa TAKURU Kanda ilihuishwa na kuwa Mkuu wa TAKURU Mkoa, pia Mkoa wa Dar-es salaam ulipewa hadhi kiutendaji kuwa kanda maalum (jiji) na Wilaya zake tatu nakuwa hadhi ya mikoa (Manispaa). Muundo wa utumishi wa*

maafisa Uchinguzi Kipengele Na.2 kimeweka wazi kuwa Mkuu was Kanda/Kitengo/Sehemu ngazi yao ya Mshahara ni ABS1. Hivyo ni vema ukaelewa kuwa nafasi uliyohamishiwa ya Mkuu wa TAKURU Manispaa ni saw ana nafasi ya Mkuu wa TAKURU Mkoa, Mkuu wa sehemu na Mkuu wa kitengo... yakupasa uelewe kuwa barua uliyopatiwa inhusiana uhamisho kama ilivyojieleza na si utenguzi wa cheo au wdhifa wako...

From the plain wording of the letter, the respondent was informed that he was not demoted. He was merely transferred to serve in another post. This in my view speaks volumes. It is apparent that when one is transferred without demotion from one post to another, if done with good intensions and with no aim of punishing the responsible officer, it is done without loss of benefits. Since there is no evidence that applicant did so with such ill-intensions, the respondent was transferred without loss of benefits. Had that been the case, exhibit D4 would have been exegetical. This means, the respondent was entitled to his allowances as he was usually paid. There is no evidence showing, he was demoted. It was not also proved either that the applicant reduced his allowances to the tune paid. Therefore, the

commission was not right to award the lesser amount of allowances. This means therefore, the respondent is entitled to the following reliefs;

i. To allowances not paid in between December 2006 to February 2007 at the tune of TZS 1,320,000.00 =TZS 3,960,000.00

ii. Further, the respondent received the reduced amount of TZS 450,000.00. In the absence of evidence that he was demoted from his former position as per exhibit D4, to the Municipal Bureau Chief, which title carries the reduced allowance he was paid.

And in the absence of evidence that such officers were all paid the same allowance and consistently so. The respondent should be paid the difference not paid equal to TZS 6,900,000.00

iii. Likewise, it was not legal for the respondent to stopped paying allowances of November 2007 to December 2009 at the tune similar to item (i) above. The claimed amount here is TZS 33,000,000.00

iv. Further, the allowances paid in between January 2010 to February 2013, were reduced, the respondent has to be paid the difference which amounts to TZS 28,800,000.00

v. Lastly the respondent should also be paid the similar allowance between march to February 2014 when he officially vacated the office. This makes the amount of TZS 15,840,000.00

The respondent did not prove, that at any point in time, he was paid the allowance of 1,375,000.00. He was therefore at the highest paid at the rate of 1,320,000.00. Therefore, the applicant is to pay the respondent the allowance at the tune of 88,500,000.00 TZS. This means, the application is dismissed. The award is set aside to the extent explained. I make no order as to costs.

A.K. Rwizile

JUDGE

27.04.2022