IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 477 OF 2020

(Originating from the award issued by Hon. Mzee, F and Kiwelu, L, arbitrators issued on 19th July 2013 in Labour dispute No CMA/DSM/523/11/563 and CMA/DSM/ILA/488/11/587 at Ilala)

BETWEEN

LEONARD MHILU & HARIDI RAJABU & 177 OTHERS ..... APPLICANTS

AND

JAMBO PLASTIC LIMITED ..... RESPONDENT

JUDGMENT

Date of last order: 20/04/2022
Date of judgment: 13/5/2022

B. E. K. Mganga, J.

Brief historical background of this application is that, in 2009, the Secretary General of TUICO on behalf of the applicants filed Labour dispute No. CMA/DSM/ILALA/681/2009 against the respondent before CMA, relating to application/interpretation and implementation of law and agreement of employment. On 28th January 2010, before A. Msuri, Mediator, the parties agreed and resolved the dispute that (i) monthly salary for the employee shall be increased to TZS 90,000/= per month, (ii) they will be paid TZS 5,000/= as transport allowance, (iii) they will be paid TZS 5,000/= as rent allowance, (iv) employees will be issue

letters transferring them from Suchak to Jambo plastic (the respondent), (v) employees will be issued with contracts of employment by February 2010.

It happened that the respondent did not give applicants letters showing commencement of their contracts. It is said further that, applicants who had worked with the respondent ranging from one year to more than five years, demanded the respondent to issue them letters of employment and allow then to join and become members of NSSF and make contributions. It was alleged by the respondent that, on 15th June 2011 applicants participated in illegal strike because they stopped working and stormed in the office of Manoj R. Suchak, the Managing Director of the respondent. On the other hand, it was alleged by the applicants that on the material day, there was power cut hence unable to produce. That due to power cut, they were outside their offices and that when the said Manoj R. Suchak arrived, they asked him on implementation of the CMA order and their rights. It is said further that this led respondent to order closure of the plant and thereafter termination of the respondents, allegedly, that they participated in illegal strike.

On 14th July 2011, Leonard Mhilu and 63 others filed Labour dispute No. CMA/DSM/ILALA/ 488/11/587 claiming to be reinstated and

be paid compensation. On the other hand, Adriana Mushi and 282 others filed Labour dispute No. CMA/DSM/ILALA/523/11/563 claiming *inter-alia* to be paid 30 months' salary compensation. The two disputes were filed before the Commission for Mediation and Arbitration henceforth CMA at Ilala complaining that the respondent terminated their employment unfairly. In the referral Form (CMA F1), applicants showed that respondent had no valid reasons for termination and further that, they were not consulted. It was alleged by the respondent that applicants were terminated on 20th June 2011 because they were involvement in illegal strike and that on 17th June 2011, they refused to receive suspension letters. At CMA, the two disputes were consolidated and heard by two arbitrators namely, Muzee, F and kiwelu, L. The award that was issued by the two arbitrators is the subject of this revision.

On 19th June 2013, the two arbitrators having heard evidence and submissions of both sides, delivered an award that applicants participated in illegal strike and that, procedures for termination were adhered to by the respondent. The arbitrators dismissed the claims of reinstatement and or 30 months' salary compensation as they found that termination of the applicants was fair both substantively and procedurally. Arbitrators further held that applicants were not employed on permanent terms but were daily workers who worked for a long

period. Despite of holding that termination was both substantively and procedurally fair, the two arbitrators awarded each applicant be paid TZS 96,936/=being 28 days leave pay, TZS 13,846/= being four days' notice pay. In short, the two arbitrators ordered the respondent to pay TZS 38,442,048/= to all applicants.

Applicants were aggrieved by the said CMA award and timely filed Miscellaneous application No. 70 of 2014 seeking leave of the court to appoint two of them to represent others in the intended revision application. Unfortunately, the said miscellaneous application was struck out as it was found to be incompetent. They, thereafter, filed three Miscellaneous Applications namely, (i) No. 277 of 2014, (ii) No. 167 of 2016, and (iv) No. 374 of 2017 but all were found to be incompetent. Untiredly, they filed Miscellaneous Application No. 63 of 2018 that was granted on 19th June 2019 whereby Leonard Mhilu and Harid Rajabu were appointed to represent 177 others. Knowing that they were already out of time, applicants through Leonard Mhilu and Harid Rajabu filed Miscellaneous Application No. 394 of 2019 seeking extension of time within which to file revision application. The said application for extension of time was granted on 3rd November 2020 whereas, they were granted 21 days within which to file Revision application. Applicants complied with the court order hence this application.

In the joint affidavit of Leonard Mhilu and Harid Rajabu, the deponents raised five grounds namely: -

1. *That, the arbitrators erred in law in terming the Applicants who had served the respondent for over two to Seven years as casual employees.*
2. *That, the arbitrators erred in law in holding that Applicants waived their right of a hearing before termination.*
3. *That, the arbitrators erred in law and fact in holding that termination of the applicants was both substantively and procedurally fair contrary to the evidence in record.*
4. *That, the arbitrators erred in law in failing to hold that applicants were terminated without being afforded right to be heard.*
5. *That, the arbitrators' decision is not supported by the evidence on record.*

In resisting the application, respondent filed the counter affidavit affirmed by Manoj K. Suchak, the Managing Director of the respondent.

When the application was called for hearing, Mr. Moses Gumba, learned counsel, appeared, and argued for and on behalf of the applicants while Mr. Hassan Mwemba, learned counsel, appeared for and on behalf of the respondent.

Arguing the application in favour of the applicants, Mr. Gumbah, advocate submitted that the two arbitrators erred in law to hold that applicants are casual employees while they worked for 11 years. He went on that; Black's law dictionary defines casual labour as securing without regularity or occasionally. He cited the case of ***Omary Mkele &***

20 Others v. M/S Shipping Consultant, Labour Dispute No. 6 of 2008 to support his arguments that applicants were not daily workers. He argued that applicants were not because applicants were employed by respondent and worked with the respondent from the range of One year to Eleven years as it was testified by Evidence of PW1, PW2 and PW3. Counsel for the applicants submitted further that, Exhibit D1 shows names of the applicants and departments they were working. He argued that applicants were paid on monthly basis i.e., TZS 90,000/= per month, TZS 5,000/= as house allowance and TZS 5,000/= as transport allowance. He went on that; this was also confirmed by DW2 for the respondent. During his submissions, counsel for the applicants conceded that there are no written contracts between applicants and respondent. Counsel for the applicants submitted further that, in the settlement agreement (exhibit D5) that was signed on 28th January 2010 at CMA, applicants and the respondent agreed the amount payable monthly.

Counsel for the applicants went on that, casual labourers are paid salary on the same date and there is no permanence of working place. He argued that in the application at hand, applicants had permanent places of work and were paid on monthly basis. When asked by the court as for how long a person can remain as casual labourer, counsel

for the applicants conceded that he has not come across any provision prescribing time within which an employee can work as Casual labour to the same employer doing the same duties. He went on that it is injustice to employ an employee as Casual labour indefinitely. He argued further that it is contrary to section 15 of Cap. 366 RE. 2019 (supra) for an employee to work without contract.

In the 2nd ground of revision, counsel for the applicants submitted that the two arbitrators erred in law in holding that applicants waived their right of hearing before termination and further that erred in failure to hold that applicants were terminated without being afforded right to be heard. He submitted further that at page 72 of the award, the two arbitrators held that applicants failed to attend the disciplinary hearing, but at page 75 of the award, they held that circumstances in the respondent's industry were not conducive for disciplinary hearing to be conducted. He also submitted that, DW2 and DW1 testified through Exhibit D10 and D11 i.e., notice for disciplinary hearing, that applicants were invited to the disciplinary hearing, but they did not attend. He argued that dates communicated for disciplinary hearing was after termination of employment of the applicants as per termination letter (Exhibit D13). Therefore, it is not true that applicants waived their rights to attend the disciplinary hearing. Counsel for the applicants submitted

further that, in his evidence, DW1 contradicted evidence of DW2 because, DW1 testified that applicants were served with disciplinary hearing notices, but refused service as a result, he wrote new letters to TUICO whereby the letter was received by DW2. But DW2 testified that, he received a copy and not a letter addressed to him. Counsel for the applicants went on that, PW1 and PW3 who were TUICO leaders during the period of dispute, denied having received the alleged notice for disciplinary hearing.

Counsel for the applicants submitted further that, in termination letter (Exhibit D13), it was alleged that applicants participated in illegal strike, but there was no illegal strike, rather, there was power cut off that affected operation of the industry of the respondent as evidenced by a letter from TANESCO (Exhibit A4). He went on that, DW4 and DW6 the police officers, testified that there was peace at respondent's place of work. Counsel for the applicants submitted further that, evidence of DW4 and DW6 discredited evidence of DW1, DW2, DW3 and DW5. Counsel added that, DW5 did not identify a person who assaulted him and that there is contradiction in evidence of DW5 and DW1 on the issue of assault. Counsel for the applicants went on that, DW1, DW2, DW3 and DW5 testified that all employees participated in illegal strike. He argued that not all employees were terminated. Counsel for the

applicants submitted that, there are contradictions in evidence of the respondent and cited the case of ***Goodluck Kyando V. Republic [2006] TLR 363*** to support his submission that every witness is entitled to credence and must be believed, and his testimony accepted unless there are good and cogent reason for not believing a witness. He went on that; evidence of respondent has discrepancies hence not worth to be relied on. He concluded that Applicants were not heard prior termination and cited the case of ***Abbas Sherally and Another V. Abdul Sultan Haji Mohamed Fazalboy, Civil Application No. 133 of 2002***, CAT (unreported) to support his submission that a decision reached in violation of right to be heard should be nullified.

In the 3rd ground, counsel for the applicants submitted that the two arbitrators erred in holding that termination was substantively and procedurally fair. He submitted that the two arbitrators erred to hold that applicants participated in illegal strike hence respondent had valid reason for termination. He submitted that, PW3 testified that there was power cut as evidenced by exhibit D4, as a result, applicants did not work but remained at their place of work. Counsel for the applicants submitted further that, DW4 and DW6 testified that there was no breach of peace. Mr. Gumbah submitted further that section 37(1) and (2) of the Employment and Labour Relations Act [Cap. 366 RE. 2019] read

together with Rule 8(1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007, provides that it is unlawful to terminate employment of an employee without valid reason as respondent did. He insisted that applicants did not go strike and that reasons for termination that applicants participated in illegal strike is not valid.

On procedure of termination, counsel for the applicants submitted that, PW1 testified that the procedure was not complied with. He submitted further that, the two Arbitrators relied on Rule 14(6) of GN. No. 42 of 2007 (supra) and held that the respondent was not compelled to follow procedures. Counsel for the applicants submitted further that, that was an error in the circumstances of the application at hand because applicants did not refuse notice of hearing at the disciplinary hearing committee. Counsel for the applicants concluded his submissions that termination of employment of the applicants was both substantively and procedurally unfair. He therefore prayed the application be allowed by quashing and setting aside the CMA award and order applicants be paid 30 months' salary compensation and other reliefs they prayed at CMA. He submitted further that; there was no fair procedure of termination because applicants were supposed to attend the disciplinary hearing on 23rd June 2011 but were terminated on 20th

June 2011. He went on that; names of all applicants were recorded in a single termination letter (Exhibit D14).

Mr. Hassan Mwemba, counsel for the respondent submitted that Applicants were terminated due to participation in illegal strike and that this was a valid reason for termination because Applicants violated Rule 13(1), (2) and (3) of GN. No. 42 of 2007(supra). Counsel for the respondent submitted further that respondent complied with these provisions. He went on that, Procedure for termination was partly followed. He conceded that respondent was supposed to convene meetings to discuss the matter, but this was not done. Counsel for the respondent also conceded that reasons behind the said strike was that applicants were demanding to be issued with contracts of employment which is their right. He conceded further that, respondent failed to implement what was agreed at CMA in 2009 relating to contracts and salary. He conceded also that Applicants worked for a period of one to five years as Casual labour. Joined with counsel for the applicants that he was not aware whether the law puts limit of time within which an employee can work as casual or daily worker. In another turn, counsel for the respondent submitted that Applicants were employed under fixed term contracts and not casual labour.

I have examined evidence in the CMA record and considered submissions of the parties in this application. I have noted that, at CMA the issues that were drafted are (i) whether complainants were terminated on 14/06/2011 or 20/06/2011, (ii) whether complainants went on strike, (iii) whether the respondent had valid reasons and followed procedures for termination, and (v) reliefs the parties were entitled to. The first issue is not an area of contention in this application because the arbitrator held that applicants were terminated on 20th June 2011.

The two arbitrators who issued the award are being criticized by counsel for the applicants that they erred in holding that applicants were casual employees or daily workers. I have examined evidence in the CMA record and find that all witnesses both for the applicants and the respondent testified that applicants worked for the period ranging from one year to Eleven years. In his submission, Mr. Mwemba, learned counsel for the respondent submitted that applicants worked with the respondent for the period ranging from one year to five years as casual labour. But in a U-turn, he submitted that applicants were employed at fixed term contracts. With due respect to counsel for the respondent, there is no evidence in CMA record showing that applicants had fixed term contracts because the same were not tendered. PW2 in his

evidence testified that he was employed at unspecified terms. It is my opinion that, applicants were employed for unspecified period. All witnesses including that of the respondent, testified that applicants were paid transport allowance and house allowance. Point of departure between the two sets of witnesses is the amount payable. It is my considered opinion, in the circumstances of this application, that applicants were not daily worker, which is why, they were paid rent and transport allowances every month.

My above position is supported by evidence by the respondent. In his evidence, DW1 tendered a letter with Ref. No. UN. U.10/4/05/2022 (exhibit D18) being feedback of the labour officer following inspection the later conducted at the workplace of the respondent. In the said letter (exh. D18), the author wrote: -

> *"3. EMPLOYMENT STANDARDS*
>
> *...that during inspection it was observed your employees work under two types of contracts which is* ***contract for specified period of time and contract for unspecified period of time****... But not all employees has been issued with the written statement of particulars as required under section 15(1) of the ELRA Law or* ***Employment Contract which the required*** *written particulars are stated therein...*
>
> *7. LEAVE*
>
> *That all employees are granted with 28 days annual leave with pay, 3 days paternity leave, ...*
>
> *8. REMUNERATION*

That it was observed the employees are paid the wage starting from 90,000/= - 1,500,000/= per month and are signing in the payroll...

9. *PAYMENT OF FRINGE BENEFITS OR ALLOWANCES*

It also (sic) observed that employees are paid fringe benefit by agreement and allowances as follows: -

a) transport allowance 5,000/= per month,

b) Meal allowance 700 per day

c) House allowance 5,000/=

d) leave allowance 12,480/= per year

e) Night allowance 5% of the hourly wage paid per hour for the hours worked at night as provided under section 20(4) of the Employment and Labour Relations Act of the Laws

10. FREEDOM OF ASSOCIATION

That it was observed employees has freedom to form and join Trade and some are member of TUICO Trade Union

...

sgd B.J. ushi

REGIONAL LABOUR OFFICER

DAR ES SALAAM.

From what I have quoted hereinabove and what I have pointed out, I hold that applicants were not daily workers rather, they were employed under unspecified terms.

In the award, the two arbitrators held that applicants participated in illegal strike and that respondent had valid reason for termination and further that, procedures for termination were followed. Applicants were aggrieved by that holding. It was submitted by counsel for the

applicants that there was no strike but that applicants stopped working due to power cut off. This caused me to carefully scrutinized evidence of the parties in the CMA record.

In his evidence, **Manoj R. Suchak** (DW1) the Managing Director of the respondent, testified that on 1st June 2011, employees refused to sign contracts of employment in the presence of some Members of Parliament. That, on 15th June 2011, employees switched off machines, refused to work and went on strike. He testified further that, they did not allow supplier trucks to come in the industry, refused company trucks to go out and gathered in front of his office. That, he gave them ultimatum, but they did not stop strike. He also testified that, some employees who opted to sign the said contracts were beaten by fellow employees after signing the contracts and that, the assault occurred while outside the factory. I should point briefly that events relating to assault allegedly done to some employees while out of work is hearsay because DW1 was not there and there is no supportive evidence to that. In his evidence, DW1 did not state that he witnessed the said assault.

While under cross examination, DW1 maintained that the said strike led to violence as a result, police officers were called to rescue the situation. On the reason behind the strike, DW1 admitted that on 1st June 2011, employees refused to sign contracts because the Trade

Union did not agree with the terms of the said contracts. He admitted further that, he did not write to TUICO to seat and discuss on how to deal with the said strike. He also that it was difficult for him to point out who participated in strike out of about 400 employees.

In re-examination, DW1 testified that due to the nature of employment, if there was no power, no supply of raw material or if there is no order or demand, the company could lay some of the workers. He went on that, some employees who accepted payment and signed the contracts, were assaulted and their money stolen. He added that, those who were assaulted were rescued by police officers who came in and escorted them outside.

In her evidence, Juliana Mwingama (DW2), the TUICO branch Secretary, testified that on 14th June 2011, employees switched off machines and went on strike. While under cross examination, she testified that she did not manage to come closer to the employees who were on strike because there was violence and that for her safety, she took hide at the reception as she was against them. She testified further that, the acting TUICO chairperson was with employees who were on strike. In her evidence, DW2 testified further that, it is a Trade Union that can declare strike lawful or not.

In his evidence, Ally Idd Said (DW5) who was an employee of the respondent testified that on the fateful date, he was assaulted by his fellow employees, as a result, DW1 took him to his office and called Police officers for rescue. He testified further that he was escorted to police station after his TZS 200,000/= was stolen by his co-employees who were on strike. He went on that; at police he was issued with a PF3.

Evidence of DW1, DW2 and DW3 as correctly submitted by counsel for the applicants contradicts evidence of Erasto Anosisye Malipa (DW4) and Seleman haruna Kanyama (DW6), the police officers who visited the scene and stayed there for three days. Both DW4 and DW6 testified that there was no violence because they found employees in separate groups discussing. Both DW4 and DW6 said nothing in relation to rescuing some employee or to have found some employees assaulted. Nothing was stated by either DW4 or DW5 that escorted some employees from the place of work either to police to be issued PF3 as alleged by DW5 or outside the respondent's compound.

On the hand, Damaris Mosha (PW1) testified that on the fateful date, there was no strike, rather, there was power cut off. She testified further that, they worked up to 09:00hrs when power was cut off, as a result, they went to the office DW1 for discussions relating to their

rights. She recounted that DW1 came at office at 10:00hrs but upon seeing them at his office, he reacted by calling Police Officers. That, when police officers came, applicants informed them that they need to have discussions with DW1 but the later left. PW1 also testified that, on 16th June 2011, employees in both shifts continued to work as they used to do. This evidence is supported by evidence of Leonard Clement (PW4) who was a TUICO branch member committee.

It is undisputed that applicants were terminated on ground that they participated in illegal strike. In my view, whether there was a strike or not, the first issue that need to be answered is whether; the said strike was illegal or a protected strike. I am of that view because in terms of section 75(1)(a) of Cap. 366 R.E. 2019 (supra), employees have right to participate in strikes in respect of dispute of interest. In addition to that section, Rule 41(1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 provides that the subject of the lawful strike is limited to the dispute of interest.

The phrase "*dispute of interest*" is defined under section 4 of Cap. 366 R.E 2019 (supra) to mean any dispute except a complaint. The same section defines the word "complaint" as follows: -

> *"complaint" means any dispute arising from the application, interpretation or implementation of-*

(a) An agreement or contract with the employee;

(b) A collective agreement;

(c) This Act or any other written law administered by the Minister;

(d) Part VII of the Merchant Shipping Act"

On the other hand, Rule 41(2) of GN. 42 of 2007 (supra) define dispute of interest as: -

"Is ***a dispute over a labour matter in respect of which am employee does not have an enforceable legal right and the employee is trying to establish that right by getting agreement from the employer***".

On the other hand, Rule 41(3) defined complaint as: -

"a dispute arising from the application, interpretation or implementation of an agreement or contract with an employee, collective agreement, a provision of the Act or any other Act administered by the Minister of which a dispute of right or a complaint concerns those labour matters that shall be decided by arbitration or the Labour Court:

Provided that where the employer refuses to give the wage increase demand by the employee, a dispute over that refusal is a dispute of interest and may only be resolved by an agreement that may be induced by the resort to industrial action".

As to what may be dispute of interest is elaborated under Rule 41(4) that provides as follows: -

"41(4) Dispute of interest may be:

(a) A dispute over a new collective agreement or the renewal of an agreement;

(b) A dispute over what next year's wages are going to be;

(c) A dispute over short working hours or higher overtime rates; or

(d) A dispute over a new retrenchment procedure or recruitment policy."

In addition to the above, Rule 41(5) of GN. No. 42 of 2007 (supra) clarifies further as follows:-

"41(5) Dispute of right or a complaint may be the

(a) Failure to pay an agreed wage;
(b) To failure to comply with the provision of an employment contract;
(c) Breach of a collective agreement ; or
(d) Contravention of the Act."

From the facts of this application, it is my view that applicants did not participate in unprotected strike or a strike that is contrary to the law. In other words, applicants are not falling in the restrictions provided for under section 76 of Cap. 366 R.E 2019 (supra). It was testified by DW1, DW2 and DW3 on one hand, and PW1, PW2 and PW3 on the other, that applicants were demanding to be issued with contracts of employment and NSSF membership. In my view, the strike was not illegal even if we take it that applicants were on strike. In my view, it was a strike based on dispute of right protected under the law.

It also is undisputed that on 28th January 2010, respondent entered settlement agreement at CMA in dispute No. CMA/DSM/ILALA/681/2009 that was filed by the General Secretary TUICO on behalf of the employees of the respondents before Hon. A.

Msuri, mediator. The said agreement was tendered as exhibit D5. In the said agreement, the parties agreed inter-alia that with effect from 1st November 2009, employees will be paid TZS 90,00/= as monthly salary, they will be paid TZS 5,000 as rent allowance and TZS 5,000/= as transport allowance. It was agreed further that by February 2010, employees will be issued with contacts. In his evidence, DW1 admitted that he implemented all what was agreed in exhibit D5 except issuing contracts of employment to the applicants and the NSSF issue. It is my opinion therefore that, there was justification for the employees to question the employer on these issues. In fact, PW2 testified that, employees were demanding to be issued with letters showing the date they commenced employment with the respondent and that others who were transferred from Suchak to the respondent, wanted their records to be clear. The evidence of PW2 was neither contradicted by evidence of the respondent nor shaken during cross examination. With that evidence, it is my opinion that, whatever happened cannot be termed as illegal strike. Applicants participated in strike in respect of dispute of interest as pointed out hereinabove. On the contrary, it is the respondent, who, without justification, failed to issue applicants contracts and allow them NSSF membership, contrary to what was

agreed during mediation at CMA on 28th January 2010. In short, respondent was in defiance of the CMA order.

It was testified by DW1 that applicants were terminated due to their participation in illegal strike as reflected in termination letter (exh. D13) dated 20th June 2011. The issue that this court is confronted with, is whether, there was valid reason for termination of employment of the applicants. In the application at hand, respondent is required to prove that termination of the applicants was due to participation in unprotected or illegal strike and that termination was fair. As I have held hereinabove, the strike was protected under the law as it was on dispute of right hence not illegal strike. It is my considered opinion that respondent had no valid reason for termination of employment of the applicants. I am of that strong opinion because, I have found that, even if we accept that applicants participated in strike, it was a lawful strike. More so, section 83(2) of Cap. 366 R. E. 2019 (supra) prohibits employers to terminates employees who participates in lawful strike. This does not apply where employee involve themselves in misconduct such as violence and malicious damage to property as provided for under Rule 45(1) of GN. No. 42 of 2007 (supra). It was proved by Erasto Anosisye Malipa (DW4) and Seleman Haruna Kanyama (DW6), both being Police Officers who testified on behalf of the respondent, that

there was no breach of peace. The two witnesses testified further that, there was no violence or damage of property. On my part, I have no reason for not believing their evidence.

From the CMA record, I have found that both the two arbitrators and the respondent were of the view that once an employee participates in a strike, is a justification for the employer to terminate employment of the employees. That view is wrong because, termination based on strike, it must be proved whether the strike was a protected one i.e, a lawful one or illegal. Even if the strike was illegal one, it must be established that termination was the appropriate sanction in the circumstance of the application and that the employer followed fair procedure of termination of employees.

When I was composing this judgment, I did not manage to come across with any precedent over the subject matter within local jurisdiction, as a result, I sought inspirational from our learned brothers and sisters from the Republic of South Africa. In the case of ***Transport and Allied Workers Union of South Africa Obo Mw Ngedle and 93 others v Unitrans Fuel and Chemical (pty) limited, CCT 131/15*** it was held that participation in an unprotected strike does not automatically render dismissal substantively fair. The substantive fairness of the dismissal must be measured against *inter-alia* (i) serious

of the contravention of the law, (ii) the attempt made to comply with the law and (iii) whether the strike was in response to unjustified conduct by the employer. In the case of ***NUMSA and Others v. CBI Electric African Cable [2014]1 BLLR 31*** (LAC) it was held that a judge who is called upon to determine fairness of a dismissal flowing from participation in an unprotected strike should consider the code which regulates dismissal for misconduct more generally, and determine *inter-alia* whether, the dismissal was an appropriate sanction or not. The court went on that, the illegality of the strike is not "a magic wand which when raised renders the dismissal of strike fair" (*National Union of Workers of SA v. VRN Steel* (1991) 12 ILJ 577 (LAC) the employer still bears the onus of prove that the dismissal is fair".

With inspirational from the above cited cases and guided by the law and evidence of the parties at CMA as held herein above, I hold that termination of employment of the applicants were substantively unfair.

The two arbitrators thought that, since applicants were give ultimatum, then, the procedure was complied with. In my view, that assumption is also wrong. In the case of ***Mndebele & Others v Xstrata South Africa (Pty) Ltd T/a Xstrata Alloys (Rustenburg Plant) [2016]37 ILJ 2610*** (LAC) it was held that: -

"... purpose of the ultimatum is not to elicit any information or expectations from the employees but to give them an opportunity to reflect on their conduct, digest issues and, if need be, seek advice before making the decision whether to heed the ultimatum or not. The ultimatum must be issued with the sole purpose of enticing the employees to return at work, and should in clear terms warn the employees of the folly of their conduct and that should they not desist from their conduct they face dismissal. Because an ultimatum is akin to a final warning, the purpose of which is to provide for a cooling-off period before a final decision to dismiss is taken, the audi rule must be observed both before an ultimatum is issued and after it has expired. In each instance, the hearing may be collective in nature and need not be formal".

In my view, it was not enough for the respondent to give ultimatum to the applicants. It was testified on behalf of the respondent that copies of the ultimatum were served to the Trade Union. I have passionately examined evidence of DW1 and find that during cross examination, he admitted that he did not write to TUICO to seat and discuss the strike. On the other hand, evidence of Juliana Mwingama (DW2) the TUICO branch secretary, need to be considered with caution because she had an interest to serve and her evidence is contradicted by evidence of DW1 and that of Leonard Clement (PW3), the TUICO Branch committee member. DW1 testified that a copy of the ultimatum was sent to TUICO branch. In my view, the requirement in Rule 42(1) of GN. No. 42 of 2007 (supra) is to ensure that employees who are in strike are heard hence the principle of *Audi alteram paterm*. In the case

of ***Professional Transport Workers Union and Another v Fidelity Security Service (2009) 30 ILJ 1129 (LC)*** it was held that: -

> *"... merely notification of the Union is not enough, its officials must be given a reasonable opportunity to persuade the workers to abandon the strike".*

In the application at hand, both the employees (applicants) and the employer (the respondent) were supposed to comply with the provisions of section 80 and 82 of Cap. 366 R.E. 2019 (supra) and Rule 42 of GN. No. 42 of 2007 (supra) but it was partly complied with. I have read the evidence of both sides and find that on 17th June 2011, respondent issued a suspension letter to all employees, applicants inclusive. In the suspension letter (exh. D9 and D11) that was tendered by DW1, applicants were informed that they were required to attend the disciplinary hearing on 23rd June 2011 at 09:00hrs. As pointed herein above, applicants were terminated on 20th June 2011, as shown in the termination letter (exh. D13) prior the date respondent invited them to attend the disciplinary hearing. In short, applicants were terminated without being heard. The principle of *audi alteram partem* was breached by the respondent. without ado, I hold that termination procedures were flawed hence applicants were procedurally unfairly terminated.

To sum up, I have found that termination of employment of the applicants was both substantively and procedurally unfair. Having held

that applicants were employed for unspecified period and that termination of their employment was both substantively and procedurally unfair, they are therefore entitled to the reliefs for unfair termination. It was established by evidence that applicants were paid TZS 900,000/= as monthly salary, TZS 5,000/=as transport allowance and TZS 5,000/= as monthly rent. Respondent is hereby ordered to pay (i) each applicant TZS 1,200,000/= being 12 months' salary compensation. Since applicants are 179, respondent will pay TZS 1,200,000/ x 179 = TZS 214,800,000/=, (ii) respondent shall pay each applicant TZS 90,000/= being one monthly salary in lieu of notice all amounting to TZS 16,110,000/= and (iii) respondent shall pay each applicant TZS 90,000/= being annual leave pay. Respondent will therefore pay TZS 16,110,000/= being annual leave pay for all applicants. In short, each applicant will be entitled to paid TZS 1,380,000/=. In total respondent is hereby ordered to pay TZS 247,020,000/= to all 179 applicants.

Dated at Dar es Salaam this 13th May 2022.

B. E. K. Mganga

JUDGE

Judgment delivered on this 13th May 2022 in the presence of Moses Gumbah, Advocate for the applicants and Shepo John, Advocate for the respondent.

B. E. K. Mganga
JUDGE