IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 536 OF 2020

HOSEA MPAMBIJE AND 6 OTHERS ..... APPLICANTS

VERSUS

SHELYS PHARMACEUTICALS LIMITED ..... RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J:

At the Commission for Mediation and Arbitration (CMA) the applicants herein were the complainants in Labour Dispute No. CMA/DSM/KIN/744/19/310 ("the Dispute") which was decided by Hon. Lyimo Joyce Christopher, Arbitrator on 30th November, 2020. Dissatisfied by the said decision, the applicants have moved this court under the provisions Section 91(1)(a)(b), 91(2)(a)(b) and Section 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004, R.E 2019 ("the Act") and Rule 24 (1),24(2)(a)(b)(c)(d)(e)(f), 24(3)(a)(b)(c)(d), 28(1)(a)(b)(c)(d)(e) of the Labour Court Rules G.N. No. 106 of 2007. They seeking for the following:

a) That this Honourable Court be pleased to call for and examine the proceedings and its arbitral award of the Commission for Mediation and Arbitration of Dar es salaam Zone in Labour Dispute No. CMA/DSM/KIN/744/19/310 delivered on 30th November, 2020 by Hon. Lyimo Joyce Christopher Arbitrator and be satisfied as to the legality, correctness and appropriateness of its decision and orders made therein, and in those respects, to revise the said proceedings.

b) That the Honourable Court be pleased to make any appropriate orders as it may deem fit, including quashing the arbitral award of the Labour Dispute No. CMA/DSM/KIN/744/19/310 delivered on 30th November, 2020 by Hon. Lyimo Joyce Christopher Arbitrator.

c) Any other order(s) as the Honourable Court deems fit and just to grant.

The brief background of the matter is that the applicants were employed by the Respondent as marketing officers on permanent basis. Sometimes on 19th July, 2019, the applicants received an email from the Respondent directing them that on 23rd July, 2019 they should all come to Dar es salaam headquarter office to sign new marketing policy and promotion material. Upon arriving at Dar-es-salaam, the Respondent

informed the applicants on a discovered collusion between the applicants and the respondent's accountant by depositing excess money in the applicants' personal bank accounts and later on shared the said money between them. The respondent compelled them to write the letter of apology if at all they want to proceed with the work otherwise they would be terminated from employment. On 31st day of July, 2019 the Respondent informed the applicants that basing on the aforesaid allegations, they were required to write resignation letter. The applicants refused to write the letter of resignation and sometimes on 1st August, 2019, the applicants were served with the charge sheet from the Respondent directing them to appear on 6th day of August 2019 for the disciplinary inquiry and fronted allegation that the applicants committed fraud. Although in the affidavit the applicants allege that no decision was delivered, the records show that the applicants were eventually terminated as a result of the disciplinary hearing.

Aggrieved by the termination, the applicants lodged the dispute at the CMA. The Commission made a finding that the termination of the applicants was procedurally fair but substantively unfair and subsequently awarded the applicants a compensation equivalent to 6 months' salary on unfair termination, allowances for July and August and

salaries for the days worked from 1st to 5th September, 2019. Unsatisfied by the amount awarded, the applicants have lodged the current application raising the following legal issues:

a) Whether the trial commission directed itself properly to order 6 months remuneration as compensation despite the fact that the Applicants sought reinstatement without loss of remuneration.

b) Even if the trial commission could have decided to order compensation, whether it is proper for the trial commission order compensation for unfair termination of 6 months instead of 12 months.

c) Whether the trial commission directed itself properly to give an order on the relief which was not sought by the Applicants.

d) Whether it was proper to deny the Applicants with severance pay on the bases that the Applicants committed misconduct, while in fact the trial commission itself held that the Applicants were unfairly terminated as there were no fair reasons.

e) Whether the trial commission directed itself properly in holding that the Applicants were entitled to per diem and allowance of July and August, 2019 only without considering that the Applicants stayed in Dar es salaam from 23rd July, 2019 to 30th November,

2020 hence they were entitled the allowance from 23rd July, 2019 to 30th November, 2020.

On those issued the applicant sought for the following reliefs:

i. That this honourable Court revise the award of CMA/DSM/KIN/744/19/310 delivered on 30th November, 2020 by Hon. Lyimo Joyce Christopher Arbitrator.
ii. After revising this Court order reinstatement of the Applicants without loss of their remuneration and other entitlements.
iii. This Honourable Court order that the Applicants are entitled to the allowance from 23rd July, 2019 to 30th November, 2020.
iv. The Court order that the Applicants are entitled for severance pay.
v. Costs to follow the event.
vi. Any other relief this Court may deem fit to grant to the Applicants.

The application was disposed by way of written submissions. The applicants' submissions were drawn and filed by Mr. Dickson Sanga, learned advocate while the respondent's submissions were drawn and filed by Ms. Hamisa Nkya, learned advocate.

In his submission to support the application, Mr. Sanga consolidated the first and third issues. He submitted that the applicants are dissatisfied with the CMA's decision because they sought for reinstatement without loss of remuneration however; the Arbitrator awarded them 6 months remuneration as compensation. He argued that parties are bound by their pleadings and the court cannot grant the parties the relief not sought. To support his submission, he cited the case of **Linus Chengula v. Frank Nyika**, Civil Appeal No. 131 of 2018.

He further submitted that in their CMA F1 the applicants categorically sought for reinstatement without loss of remuneration however the Arbitrator awarded them beyond their scope. He therefore urged the court to award the prayers sought in CMA F1.

As to the second issue Mr. Sanga submitted that upon findings of unfair termination the remedies available are provided under section 40 of the Employment and Labour Relations Act [CAP 366 RE 2019] (ELRA). He added that as per section 40 (1) (c) of the ELRA the Arbitrator is not supposed to award less than 12 months as compensation for unfair termination.

Regarding the fourth issue Mr. Sanga submitted that following the findings that the applicants were unfairly terminated as stated at page 11 of the impugned decision, the applicants are entitled to severance pay pursuant to section 42 (3) of the ELRA.

Turning to the last issue Mr. Sanga submitted that the applicants were supposed to be paid allowances from 23rd July, 2019 until the date of referring the matter to the CMA because they were summoned to Dar es Salaam from other regions. Conclusively, the Learned Counsel urged the court to allow the application and award the applicants as prayed in CMA F1.

Responding to the first and third issues Ms. Nkya argued that the CMA after considering the reliefs sought by the complainants in CMA F1 it has the powers and discretion to award any of the remedies stipulated under section 40 (1) of the ELRA depending on the circumstances of each particular case. She added that in the situation when the employer and employee relationship has worsened an order of reinstatement is usually not awarded. To support her submission, Ms. Nkya referred the court to the case of **Nolasco Kalongola v. Promasidor (T) Pty Limited**, Revision No. 354 of 2019, High Court Labour Division Dar es salaam.

As to the second issue Ms. Nkya argued that for termination to be treated as unfair, the court looks at the substantive fairness and procedural fairness. She stated that when the reason of termination is unfair but all the termination procedures have been followed, the employer is not condemned to full payment of 12 months compensation. She submitted further that in this case though the respondent failed to prove gross misconduct committed by the applicants, the termination procedures were followed hence 6 month's compensation ordered by the Arbitrator is appropriate. To support her submission, she cited the case of **Azizi Ally Aidha Adam v. Chai Bora Ltd, Labour Division Iringa, Labor Revision No. 04 of 2011.**

Replying the fourth issue, Ms. Nkya submitted that the applicants were properly denied severance pay because they were terminated on the ground of misconduct. Therefore, they are exempted by the law as in accordance with section 42 (3) (a) of the ELRA, Ms. Nkya said.

Responding to the last issue, Ms. Nkya submitted that the applicant's employment was terminated on 05th September, 2019, however they had travelled from upcountry to Dar es salaam for official duties on 23rd July, 2019. That the applicants stayed in Dar es salaam until when their employment contracts were terminated thus, the

Arbitrator properly awarded them allowance from the date of arrival to Dar es salaam to the date of termination on 05th September, 2019. Ms. Nkya denied the applicants' allegation of per diem from the date of arrival to Dar es salaam to the date of the award. She added that such claim is not substantiated. On the basis of the above submissions, Ms. Nkya asked the court to upheld CMA's decision.

In rejoinder, Mr. Sanga submitted that though the Arbitrator has discretion in the award of remedies for unfair termination, such discretion has to be exercised judiciously. That the court must give reasons for refusing reinstatement. To support his submission, he cited the case of **Yusuph Mpini & Others Vs. Juma Y. Mkinga & Others, Civil Appeal No. 01 of 2017 (Civil Appeal 1 of 2017) [2019] TZHC 51 (31 October 2019).** On the cited case of **Nolasco Kalongola v. Promasidor (T) Pty Limited** (supra), Mr. Sanga argued that the case is distinguishable to the case at hand because in that case, the CMA stated the reasons for not ordering reinstatement, which was not done in the present case. Mr. Sanga then reiterated his submissions in chief. He urged the court to allow the application.

I have considered the submissions by both parties and have thoroughly gone through the award of the CMA. Indeed in all their CMA Form No. 1, the applicant's first outcome sought was reinstatement. Reinstatement is provided for under Section 40(1)(a) which reads:

(1) Where an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer –

(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination;

Reinstatement is therefore one of the remedies that an unfairly terminated employee may be entitled to and in this case, is what the applicants prayed before the CMA. That being the case, had the arbitrator decided not to award the remedy, the reasons for his decision must have been adduced before he opted the other remedies available. In the case of **Tanzania Air Services Limited vs Minister for Labour, Attorney General & The Commissioner for Labour,1996 TLR 217 (TZHC),** his Lordship Samatta J.K (as he then was) cited a well-known book, The Road to Justice by Sir Alfred Denning where he

discussed the importance of a judge giving reasons for his decision when he stated as follows, at 29: B:

> *`The judge must give reasons for his decision: for by so doing, he gives proof that he has heard and considered the evidence and arguments that have been produced before him on each side: and also that he has not taken extraneous considerations into account. It is of course true that his decision C may be correct even though he should give no reasons for it or even give a wrong reason: but, in order that a trial should be fair, it is necessary, not only that a correct decision should be reached, but also that it should be seen to be based on reasons; and that can only be seen if the judge himself states his reasons. Furthermore if his reasons are at fault, then they afford a basis on which the party D aggrieved by his decision can appeal to a higher court. No judge is infallible, and every system of justice must provide for an appeal to a higher court to correct the errors of the judge below. The cry of Paul "I appeal unto Caesar" represents a deep-seated human response. But no appeal can properly be determined unless the appellate court knows the reasons for the*

decision of the lower court. For E that purpose, if for no other, the judge who tries the case must give his reasons.'

I am further guided by the holding of the Court of Appeal in the case of **Mantra Tanzania Ltd vs Joaquim Bonaventure (Civil Appeal 145 of 2018) [2020] TZCA 356 (17 July 2020);** whereby the Court of Appeal set aside the judgment of this court and ordered us to re-write the judgment on the ground that the issue of reinstatement was never addressed, so held the Court:

".....the High Court found also that the termination was substantially unfair because the CMA erred in finding him guilty of the disciplinary charges levelled against him. Despite that finding, 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.

The Court went on emphasizing that:

"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. The argument by Mr. Vedasto that the learned High Court Judge properly exercised her discretion in granting compensation to the respondent instead of ordering his reinstatement is with respect, incorrect. This is because of the obvious reason that the learned Judge did not at all consider that crucial issue and therefore, the question of exercise of discretion does not arise."

As for the case at hand, the CMA made a conclusive finding that the termination of the applicants was substantively unfair and one of the remedies sought was reinstement. But on page 11of his award he did not touch the issue of reinstatement apart from mentioning it, neither did he give the reason for his omission to determine the issue. As held by the Court of Appeal in the cited case above, the CMA fell into error by the omission. The next thing for me to determine is the remedial measures for the error committed. In the case of Matra Tanzania (Supra) the Court made the following findings:

"That said and done, ***our next task is to consider the effect of the irregularity and make a decision on the way***

forward. *In our considered view, the omission to consider whether or not to grant the relief sought by the respondent vitiated the impugned decision because it left that crucial issue undetermined. It is for this reason that, as stated above, the need for considering the grounds of appeal and the other grounds of the cross appeal does not arise.*

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."***

As for me, since the issue was not considered by the arbitrator who heard the evidence, I cannot step into his shoes at this stage of Revision; neither can I proceed to determine the other grounds of Revision. However, before I make conclusive orders, I must remind the arbitrator that while awarding compensation **particularly on substantive unfairness**, he needs to stick to the law and if there is a minimum amount of compensation to be calculated, that should be the minimum that should be awarded as per the law.

That said, I now make conclusive finding that the omission to determine the issue of reinstatement by the arbitrator vitiates the impugned award because it left that crucial issue un-determined. The remedy as cited above, which I hereby do order, is that the impugned award is hereby set aside and the dispute is remitted back to the CMA for it to consider and render a decision after having considered the reliefs sought by the respondent including the issue of reinstatement of the applicants by giving reasons for granting or not granting it.

Dated at Dar es Salaam this 21st February, 2021.

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S.M. MAGHIMBI
JUDGE