

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION NO. 260 OF 2021

SHADRACK BERICK APPLICANT

VERSUS

WELLWORTH HOTELS/

KUNDUCHI BEACH HOTEL RESPONDENT

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

(Igogo : Arbitrator)

Dated 30th June 2021

in

REF: CMA/DSM/KIN/R.846/17/857

JUDGEMENT

26th May & 15th July 2022

Rwizile, J

This application emanates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/KIN/R.846/17/857. This Court has been asked to call for records of the CMA for the purpose of revising the award and the proceeding.

It has been alleged the applicant was employed by the respondent as a Human Resource Manager and was accountable only to the general Manager of the respondent.

While working, the applicant was charged with misconduct of insubordination done to one Erica du Toit, who supervised the applicant. The alleged insubordination based on evidence of e-mail communication. The applicant was henceforth terminated. Not satisfied with termination, the applicant filed a dispute with the CMA, where he was not successful, hence this application.

The application is supported by the affidavit of Isaac Nassor Tasinga, the advocate for the applicant but opposed by Saimon Nguka, respondent's administrative officer. The applicant set the grounds for revision as hereunder: -

- i. Whether it was proper in law for the arbitrator to hold that the applicant insubordinated one Erica du Toit who was acting as a general manager illegally contrary to the condition of working permit, the work permit which was admitted as exhibit D2 is attached hereto marked REV-1 and who was principally a subordinate of the applicant.*

- ii. *Whether it was proper for the arbitrator to hold that the procedure was followed, while there was evidence that there was no proper constituted disciplinary committee except the said Erica du Toit who was the complainant and only two other persons whose role was not known as well for the applicant to be terminated by the so-called committee.*
- iii. *Whether the so-called disciplinary committee which had no member and which was convened by Erica du Toit was competent to determine applicant's case as well to terminate his employment.*
- iv. *Whether it was proper for the learned arbitrator to hold that the applicant is not entitled to any relief.*

The applicant was represented by Isaac Nassor Tasinga, learned Advocate whereas the respondent was represented by Arnord Arnord Luoga, learned Advocate.

On 24th March, 2022, it was agreed that the application be argued by written submissions. The applicant filed his submission on 06th April, 2022 as scheduled. The respondent defaulted. This judgement therefore, is based on submissions of the applicant only.

Mr. Tasinga for the applicant argued the first ground that the reason for termination was insubordination of one Erica Du Toit. The said, insubordinated officer is a foreigner with residential permit admitted as exhibit A2, who worked as the front Office Manager. He continued to argue that the said Erica was not supposed to work or act in any other position than the one indicated in her residential permit. In his view, the evidence of Dw1 that Erica was an Acting General Manager is not supported by any evidence. It was clearly stated in Mr. Tasinga's opinion the applicant worked as a Human Resource Manager reporting to the General Manager. He argued that based on evidence, AW1 disputed to be subordinate to Erica. That being the case, he added, there was no insubordination.

On the second ground, he submitted that the procedure to be followed, for termination to merit is Rule 13(1) of G.N. No. 42 of 2007. In support, the learned counsel referred to the cases of **Bank of Africa (T)Ltd v Bruce E. Massawe**, Revision No. 760 of 2019, High Court at Dar es Salaam and **Jimson Security Service v Joseph Mdegela**, Civil Appeal No. 152 of 2019, Court of Appeal of Tanzania.

He submitted further that the applicant is disputing the capacity of the disciplinary committee and legality of the same. He stated that the notice

of hearing was signed by the chairperson of the committee and Erica also constituted the committee. Further, he said, the positions of other members were not known, in order to show, if they were not subordinate to the applicant. For him, all of these were irregularities. The procedure, he stated with vehemence, was not followed.

On ground three, Mr. Tasinga submitted that the committee was not duly constituted, it made illegal decisions therefore.

Submitting on the fourth, it was argued that the applicant was unfairly terminated procedurally and substantively. In his view, the applicant is entitled to compensation of 36 months remuneration TZS. 79,200,000.00 salaries from the date of termination to the time of the conclusion of the dispute at CMA TZS 52,800,000.00, severance pay TZS. 2,369,230.00, payment for leave TZS 1,861,533.00, leave for 2016/2017 amounting to TZS. 2,200,000.00 which gives a total of TZS. 136,429,330.00.

After going through the pleadings, the applicant's submission, CMA records and exhibits, I think, I have to determine, two cardinal issues based on the nature of the grounds raised and argued;

whether the respondent had valid reason to terminate the applicant, whether there was procedural fairness in terminating the applicant.

It is in record that the applicant was terminated for incompetency and insubordination as per exhibit D3.

Going through the CMA records, Dw2 testified that Erica was the Acting Manager, as at page 26 of the typed CMA proceeding, which reads as follows: -

"S. is this, Erica?"

J. Yes

S. he was a front desk officer? As per working permit?"

J. yes

S. how did she raised to position of DGM?"

J. I don't know, she was acting"

From the foregoing, it is apparent that Erica, though was not with a residential permit that allowed her to work as such but she was proved was an acting Manager. She was therefore had capacity to act as such.

Basing on the case of **Sylvania Metals (Pty) Ltd v Mello N.O and**

others (JA83/2015) [2016] ZALAC 52 as was cited in the case of **Tatu S. Mohamed & another v A3 Institute of Professional Studies**, Revision No. 308 of 2019, High Court at Dar es Salaam at page 7-8 which stated: -

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

From the above authority, since Erica was an employee by virtual of her lawfully contract and was directed to act on behalf of the Manager, then what she directed was the Manager's instruction. Acting did not take away the power she had when working for and on behalf of the employer. By acting as Manager, she had full authority to perform duties of her

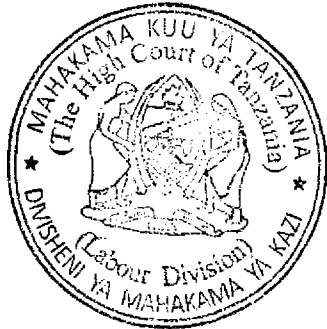
employer in her acting capacity. This, I think, has nothing to do with residential permit. Therefore, wilfully refusal from such authority amounts to insubordination. For that matter there was a reason for the applicant's termination.

On the issue of procedure, the applicant stated that procedures were not followed in terminating the applicant. He stated that the reason to it was the applicant was not served with a charge and there was no investigation report, the position of the chairperson was not known, the roles of the persons present in the committee was not known, the finding was not provided by the committee and that the committee was the one which declared the outcome of enquiry.

The procedure for termination is clearly stated under Rule 13 of G.N. No. 42 of 2007. In going through the CMA proceedings and records, it is proved that the procedure was followed.

Exhibit D1 which is a notice to attend inquiry hearing, exhibit D2, a hearing form, proved with certainty that the disciplinary hearing took place. Also, the applicant alleged that one Ally Kachra's position was not known, but exhibit D2 proves a different thing, that he was the Director and therefore senior to the applicant. For that matter, it is proved that the procedure

for terminating the applicant was followed. Therefore, this application has no merit. It is dismissed with no order as to costs.



A.K. Rwizile

JUDGE

15.07.2022

Labour Court TZ.