IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 208 OF 2021

(*From the decision of the Commission for Mediation and Arbitration of DSM at Kinondoni* **(Willam: Arbitrator)** *dated 18th May 2021 in Labour Dispute No. CMA/DSM/KIN/813/18/275*

OPPORTUNITY TANZANIA LIMITED..... APPLICANT

VERSUS

ZACHARIA LUHWANI..... RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J

30th June 2022 & 16th August 2022

Aggrieved with the award of the Commission for Mediation and Arbitration of Kinondoni Dar es Salaam Zone [herein after to be referred to as CMA], the applicant has filed this application under Sections **91(l)(a)(b), (2)(a)(b)(c), (4)(a)(b) and 94(l)(b)(i) of the Employment and Labour Relations Act No. 6 [CAP 366 RE 2019]** and **Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and 28(l)(c)(d) and (2) of the Labour Court Rules, GN No. 106 of 2017** and any other enabling provisions of the law, praying for this Court to be pleased to revise and set aside the whole award of the

arbitrator in the delivered by Hon. William, R- Arbitrator on 18th day of May 2021 and any other relief (s) the Court deems fit to grant.

The facts leading to this Application according to the CMA record, affidavit and counter affidavit filed by the parties are as follows:- The respondent was employed by the applicant as Sales Manager for payroll loans since 06th April 2018 commencing with a probation period of 3 months. On 9th July 2018 while under probation the Respondent's service was terminated when the Applicant decided not to issue confirmation letter on the reason of poor performance. Aggrieved by the decision, the Respondent filed the aforesaid Labour Dispute in the CMA. The arbitrator found that there were unfair labour practices and awarded the Respondent 3 months remuneration as compensation. The applicant herein was aggrieved by the award and lodged this application seeking for revision.

Along with the Chamber summons, the applicant filed an affidavit sworn by Mr. Richard Matekele, applicant's Collection Manager, in which after expounding the chronological events leading to this application, challenged the decision of the arbitrator on the ground that it was not properly procured by disregarding the evidence adduced at the Commission.

In the affidavit, the respondent raised the following grounds of revision.

1. That, the honorable arbitrator erred in law and fact for holding that there was unfair labour practices by the Applicant herein.

2. That, the honorable arbitrator erred in law and fact for failure to analyze, evaluate and interpret the evidence tendered during the hearing

3. That the Honorable Arbitrator erred in law and fact by holding that the Respondent was supposed to be given more time to perform

4. That, the Honorable Arbitrator erred law and fact in deciding the on the basis of perceived weaknesses of the defense case and not the strength pf the prosecution case

The application was challenged through a counter affidavit sworn by Mr. Kelivin Kennedy Bakebula respondent's Counsel. The deponent in the counter affidavit vehemently and strongly disputed applicant's allegation regarding non consideration of evidence.

The application was disposed of by a way of written submissions. The Applicant was represented by Mr. Yuda Dominic Advocate, from Ebon Advocates whereas the Respondent was represented by Mr. Kelvin K. Bakebule Advocate, from a firm styled as Steward & Shitong Attorneys.

Arguing in support of the application regarding 1st ground which is challenging the arbitrator's finding of existence of unfair labour practices, Mr. Dominic the submitted that the Complainant was provided with all working tools and financial support for his day-to-day operations (he referred to **Exhibit D4)**, but still his performance was under standard. He stated that in the process, the complainant was assessed time after time, and he admitted having been assessed.

Mr. Dominic argued that at the end of probation period, the respondent was called for a final assessment, and it was observed that he could not perform as per the standards which led to his non confirmation as per Exhibit D7 (termination letter). He added that the respondent admitted that his assessment was fair as per Exhibit D6. On such basis he is of the view that the applicant's decision of not confirming the Respondent was fair and the reason was stated under **Exhibit D7** (termination letter).

On second ground which is alleging arbitrator's failure to analyse, evaluate and interpret the evidence, Mr. Dominic submitted that the arbitrator failed to analyze the evidence before him regarding the issue of performance appraisal. He averred that the evidence shows that the Respondent was assessed three times as per Exhibit D6. He challenged

the finding of the arbitrator that the respondent was assessed only once and issued with non-confirmation letter on the same date.

Regarding the third ground on time to improve Mr. Dominic submitted that the respondent asked for no more time to showcase his ability. He is of the view that if there was such a need the respondent herein should have raised it during his appraisal evidenced by **Exhibit D6** (performance appraisal form).

On last ground Mr. Dominic submitted that the complainant had a duty to prove the case on balance of probability as was held in the case of **Konrad Kambona v. Tanga Cement Co. Limited, Revision No. 9 of 2013, LCD1**. He faulted the arbitrator's holding that the respondent could not bring evidence to prove that all challenges faced by the complainant at work were actually solved. He referred to page 13 of the award. In his view, this entails that the arbitrator decided the matter based on perceived weakness of defense case. He is of further view that the arbitrator used nonexistent discretion to shift the burden of prove.

Opposing the application Mr. Babekula reminded that the law under **Section 35 of the Employment and Labour Relations Act, Cap 366 RE 2019** precludes employees who worked for less than six months to claim for unfair termination but they can sue for unfair labour

practices under **Rule 10(1)-(9) of the Employment and Labour Relation (Code of Good Practices) G.N No. 42 of 2007** as it was held in the case of **Agness B. Buhere v. UTT Micro Finance PLC,** Labour Revision No. 459 of 2015.

Mr. Bakebula argued that since the applicant's termination resulted from poor performance as per Exhibit A3 (termination letter), the respondent ought to have complied with **Rule 10 of G.N No. 42 of 2007** not in isolation, which provides for a procedure on how to terminate a probationary employee. Supporting this position, he cited the case of **Tanpack Tissues Limited v. Batuli Juma Shabani, Revision Application No. 45 of 2021[2022] TZHCLD 159.**

Mr. Bakebula on the second ground stated that the arbitrator was right in his award in holding that it was improper for the appraisal performance to be prepared on 9th July 2019 and on the same date was given to the respondent. Making it a worse scenario, Mr. Bakebula stated that the applicant served the respondent with non-confirmation letter on the same date after being evaluated.

On fourth ground regarding the allegation that the arbitrator erred in law by deciding the matter relying on weakness of the defense case and not prosecution case Mr. Bakebula submitted that this argument is

baseless as the arbitrator stipulated that the applicant herein didn't comply with **Rule 10 G.N No. 42 of 2007**.

Having gone through the parties' submissions and their sworn statements together with the record of the CMA, I am inclined to address two issues. The first issue **is whether the applicant has adduced sufficient grounds for this Court to revise the CMA award in Labour Dispute No. CMA/DSM/KIN/748/20/366** and secondly, **to what reliefs are parties are entitled?**

To start with the first issues, I will first find out as to whether the arbitrator was right in finding that there were unfair labour practices. It is not disputed that the Respondent's contract ended with probation period where the Applicant opted not to confirm the employment after probation on reasons of nonperformance. It is as well not disputed that the assessment of the Respondent confirmed nonperformance in not meeting the agreed target. What I noted to be a Centre of dispute is the propriety of the procedure followed prior to issuance of no confirmation letter.

The arbitrator found that there were unfair labour practices, and held the termination unfair on the reason that, the respondent was not afforded with enough time to improve his performance. This is

vehemently challenged by the Applicant who argued that all the procedures were duly followed prior to the issuance of the confirmation letter.

The arbitrator was guided by the procedure to end the employment of a probationary employee as stipulated under Rule 10 (5) to (9) of the **Employment and Labour Relations (Code of Good Practice) Rules, GN 42 of 2007**. I quote the Rules hereunder: -

> *"(5) An employer may after consultation with the employee extend the probationary period for a further reasonable period if the employer has not yet been able to properly assess whether the employee is competent to do the job or suitable for employment*
>
> *(6) During the period of probation, the employer shall-*
>
> > *(a) monitor and evaluate the employee's performance and suitability from time to time*
> >
> > *(b) If the Employee meet the employee at a regular intervals in order to discuss the Employee's evaluation and provide guidance if necessary. The Guidance may entail instruction, training and counseling to the employee during probation.*

(7) Where at any stage during the pronation period the employer is concerned that the employee is not performing to the standard or may not be suitable for the position, the employer shall notify the employee of that concern and give the employee an opportunity to respond or an opportunity to improve.

(8)Subject to sub-rule (1) the employment of a probationary employee shall be terminated if:-

(a) The employee has been informed of the employer's concerns

(b) The employee has been given an opportunity to respond to those concerns.

(c) The employee has given a reasonable time to improve performance or correct behavior and has failed to do so.

9. A probationary employee shall be entitled to be represented in the process referred to in sub rule (7) by a fellow employee or Union Representative.

Guided by the above Rules, the Arbitrator found that the respondent was not given a chance to improve and faulted the procedure used and as a result the Respondent was awarded 3 months compensation.

In this matter it is undisputed that the respondent was employed as Sales Manager as per Exhibit A1 (employment contract) and that on 5th June 2018. It is on evidence according to DW1 that the Applicant was assessed three times consecutively where sales were found not to be within the required target in all the time (See performance appraisal form (Exhibit A3) with the graph showing that the respondent's performance was falling down and not raising). According to DW1, the poor performance was followed by a verbal warning which was communicated to the Respondent by a way of an email. The appraisal form and warning communication were both tendered and admitted as exhibits. (See Exhibit D-5 (verbal warning) which showed 3 days with no reported sales.)

The warning and the performance appraisal form are considered by the Applicant to be in line with the requirement of Rule 10 (5) to (9) of GN 42 of 2007 to indicate that there was monitoring of performance and that the Respondent was duly informed.

Having thought of the performance appraisal form and the evidence of DW1 to the effect that assessment used to be done monthly as indicated in the assessment form and the warning given to the Respondent for non performance, I am inclined to agree with the Applicant's counsel could the arbitrator took a more careful note of the evidence he would

have been found a diligent compliance with Rule 10 (5) to (9) of GN 42 of 2007. I can see that there was a monitoring of performance with appraisals and warnings which were officially communicated to the Respondent.

As to the Respondent argument that the Applicant ought to have given him more time to improve, I have carefully read the relevant provision of Rule 10 (8) of GN 42 of 2007. For ease of reference, I reproduce the provision hereunder:

> *"(8)Subject to sub-rule (1) the employment of a probationary employee shall be terminated if:-*
>
> > *(a) The employee has been informed of the employer's concerns*
> >
> > *(b) The employee has been given an opportunity to respond to those concerns.*
> >
> > *(c) The employee has given a reasonable time to improve performance or correct behavior and has failed to do so."*

From the above provision, in my view, the warning was a time to improve. The warning was given on 5th June 2018. The probation ended on 9th July 2018. This means, there was more than one month period

which could be used by the Respondent to correct his behaviour. In my view, this period is reasonable taking into account that there were only 3 months of probation. In my view, the applicant was given enough time to correct his performance. I have view that the arbitrator misconstrued what constitute reasonable time to correct. It appears that the Arbitrator understood that the time need to be used to extend the probation period. I do not share the same view with the arbitrator. In my view, the warning was a good alert offering the Respondent an opportunity to improve her performance before the end of the probation period.

I would like to remind the parties on the rationale of probation period as already expounded in our case law. In **Mwaitenda Ahobokile Michael v. Interchick Co. Ltd,** Labour Revision No. 30 of 2010, High Court of Tanzania, at Dar es salaam(unreported) it was held that;-

> *"This Court has firm view that the purpose of probationary period is to provide the parties with an opportunity to test one another and to find whether they can continue working with each other for a long period in healthy employment relationship."*

In my view, the Applicant has a right to make a decision fair to both the respondent and the Company. The law does not force an employer to stay with a nonperforming employee to the detriment of his business. In this respect, I hold that the Respondent was given reasonable time to

improve his performance and I differ with the arbitrator on his findings on this aspect.

Apart from the above holding, Rule 6(4) of Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures of Employment and Labour Relations (Code of Good Practice) G.N No. 42 of 2007 provides that an employee with a senior position should not be afforded with an opportunity to improve. The Respondent being in managerial position, he was in a senior position.

It is on this reason I fault the arbitrator's findings which confirmed noncompliance with the procedure in ending the employment relationship between the Applicant and the Respondent. This answers all the grounds of Revision that there were fair labour practices which were followed by the applicant and that the arbitrator errored in considering and analyzing the evidence on record.

From the foregoing, the first issue as to whether there are sufficient reasons to revise the decision of the CMA is answered affirmatively.

Having found that the first issue is answered affirmatively then the available remedy is to grant the reliefs sought in the Chamber summons allowing the application. It is my view that the Respondent was not entitled to be awarded any compensation.

I therefore hold that; the application has merit, and it is accordingly allowed. The CMA award is hereby quashed and set aside. Each party to take care of its own cost.

It is so ordered.

Dated at Dar es Salaam this 16th August 2022

KATARINA REVOCATI MTEULE
JUDGE
16/08/2022