IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 53 OF 2022

NAS TYRE SERVICES LIMITED ..... APPLICANT

VERSUS

SHABAN MOHAMED MALINDA..... RESPONDENT

JUDGMENT

Date of last Order: 01/08/2022
Date of Judgment: 18/08/2022

B. E. K. Mganga, J.

The respondent was employed by the applicant as Tyre Fitter for unspecified period contract effectively from 1st February 2017 at monthly salary of TZS 480,000/=. On 29th October 2019, applicant terminated employment of the respondent based on reasons that respondent breached trust and further that he was incompatible to the employment. Respondent was aggrieved by the said termination, as a result, on 26th November 2018 he filed labour dispute No. CMA/DSM/ILA/1204/18/07 before the Commission for Mediation and Arbitration henceforth CMA at Ilala claiming to be paid 24 months' salary as compensation for unfair termination. It was alleged that applicant being duly served, failed to enter appearance, as a result, the dispute was heard exparte. On 12th

September 2019, Hon. Igogo. M, Arbitrator, issued an exparte award that respondent was unfairly terminated and ordered the applicant to pay (i) TZS 5,760,000/= being 12 months' salary compensation and (ii) TZS 129,230/= being severance pay all amounting to TZS 5,889,230/=.

The said exparte award was served to the respondent on 16th September 2019 and on 23rd September 2019 it was served to the applicant. On 4th October 2019, Gilbert Mushi, counsel for the applicant signed both the Notice of Application and the Affidavit praying to set aside the said exparte award and filed it at CMA on the same date. On 10th October 2019, the respondent filed the counter affidavit together with the notice of preliminary objection that the application was time barred. On 29th May 2020, Hon. Igogo, M, arbitrator delivered a ruling dismissing the preliminary objection. On 29th January 2021, Hon. Igogo. M, Arbitrator, having heard submissions of the parties, delivered a ruling dismissing applicant's application to set aside the aforementioned exparte award. The CMA record shows that the ruling dismissing applicant's application to set aside the exparte award was served to Emily Laus, advocate for the respondent on 12th February 2021 and Gilbert Mushi, advocate for the applicant on 26th July 2021.

On 26th July 2021, the date Mr. Gilbert Mushi was served with the copy of the ruling dismissing an application to set aside the exparte

award, signed and swore an affidavit in support of this application. Both the Notice of Application and the Affidavit in support of the Notice of Application were received by the court on 7th March 2022. In the affidavit in support of the application, applicant raised two issues namely: -

(i) Whether it was legally proper for trial arbitrator to hold that applicant had no justifiable reason to justify his absence when the case was set for arbitration.

(ii) Whether it was legally proper for the trial arbitrator to award respondent TZS 5,889,230/= as twelve months' compensation plus severance pay.

In the same affidavit, applicant raised six (6) grounds of revision namely: -

(a) The trial Arbitrator erred in law and fact by holding that applicant had not shown good grounds for his absence when the case was set for arbitration.

(b) The trial arbitrator erred in law by issuing exparte order when the case was not coming for hearing.

(c) Trial arbitrator erred in law for failure to issue summons for the Applicant when the matter was set for exparte award.

(d) Trial arbitrator erred in law and fact for failure to hold that the applicant was never served summons to appear on 6th March 2019, 8th April 2019, 24th April 2019.

(e) Trial arbitrator erred in law and fact by relying on uncorroborated evidence of the respondent.

(f) Trial arbitrator erred in fact by failure to properly analyze the evidence hence reached unfair conclusion.

Respondent filed his counter affidavit opposing the application. In the counter affidavit, respondent deponed that applicant denied herself right to defend her case after being served but decided not to enter appearance. The respondent deponed further that, applicant filed an application to set aside the said exparte award to delay execution of the said award. Together with the counter affidavit, respondent filed a notice of preliminary objection that the application was time barred.

When the matter was called on for hearing the preliminary objection, it was argued by Mr. Onesmo Kinawari, learned counsel for the respondent that on 31st March 2022 applicant filed this application seeking the court to revise an exparte award issued on 12th September 2019 and CMA ruling dated 29th January 2021 that dismissed her application to set aside the said exparte award. Counsel for the respondent submitted that this application was filed out of time because it was supposed to be filed within 42 days from the date CMA delivered its ruling dismissing applicant's application to set aside the exparte award. Counsel for the respondent submitted further that applicant filed an exparte application to set aside the exparte award and that the ruling was delivered on 29th January 2021. Counsel submitted that applicant did not serve the said ruling to the respondent. Mr. Kinawari submitted further that, respondent became aware of existence of the said ruling at

the time he filed Execution application No. 150 of 2021 before this court. Mr. Kinawari went on that, applicant filed this application online through e-filing system on 28th July 2021 but filed the hard copy on 7th March 2022. He argued further that, applicant served the respondent with this application on 23rd March 2022. Counsel for the respondent strongly submitted that the application is time barred and prayed the same be dismissed.

Mr. Gilbert Mushi, learned counsel for the applicant in his submissions admitted that the said exparte award was issued on 12th September 2019 and the ruling dismissing the applicant's application to set aside the said exparte award was delivered on 29th January 2021. Mr. Mushi submitted that applicant was served with the said ruling on 26th July 2021. Mr. Mushi submitted that time started to run against the applicant from the date she was served with the CMA ruling and cited the case of ***Serengeti Breweries Limited v. Joseph Boniface,*** Civil Appeal No.150 of 2015, CAT (unreported) to support his argument. He submitted further that on 10th May 2021, applicant was served with summons to appear in Execution application No. 150 of 2021 without the copy of the exparte award.

Mr. Mushi learned counsel for the applicant submitted further that, applicant filed this application through e-filing system on 28th July 2021

and that it was admitted on the same date. He submitted further that, in terms of Rule 9 and 21 of the Electronic Filing Rules, GN. No. 148 of 2018, the date of submission online is the date of filing and not the date the hard copy was received by the court. He cited the case of ***Khamis Soud Abushiri v. Hamisa Ally Shabani & 2 Others,*** Miscellaneous Civil Application No. 20 of 2020, HC(Unreported) and ***Mohamed Hashil v. National Microfinance Bank Ltd (NMB Bank),*** Revision Application No. 106 of 2020, HC(unreported). He went on that there is no requirement in GN. No. 148 of 2018 for parties to file hard copy and that it was not the duty of the applicant to file the hard copy in court. He went on that, in terms of Rule 25 of GN. No. 148 of 2018(supra), the hard copy for use of the court is supposed to be printed by the Deputy Registrar and not by the parties and added that, parties are supposed to print their own hard copies. He argued that, once the application is filed electronically, it is the duty of the Deputy Registrar to issue summons, then upon being served with summons, the other party requests access from the Deputy Registrar to access documents filed electronically. During submissions, Mr. Mushi conceded that he was served with summons but that he did not have a direct answer as to why he also filed the hard copy. He submitted further that, the blame should go to the court because it delayed issuing the summons and that applicant

should not be blamed. He cited the case of ***Indo-African Estate Ltd v. District Commissioner for Lindi District and 3 Others,*** Civil Application No.12/07 of 2022, CAT (unreported) to cement on his submissions. He submitted further that, hard copies can only be filed in court upon the request by the court in terms of Rule 16 and 17 of GN. No. 148 of 2018(supra). He maintained that failure to file hard copy timely is not fatal and prayed the preliminary objection be overruled.

In rejoinder, Mr. Kinawari submitted that, in the application at hand, applicant did not indicate the phone number or email address for the respondent to be served. He submitted further that, on 12th February 2021 respondent filed execution application No. 150 of 2021 and served the applicant on 10th May 2021 through Peter Nyange, applicant's HR hence at the time of filing this application, applicant was aware of existence of the said execution application. He argued that, in the said execution application, the CMA ruling that is also the subject of this application was attached.

Having heard submissions of the parties on the aforementioned preliminary objection, I overruled it and reserved reasons to be delivered in the main application.

The central issue between the parties was whether this application is time barred or not. Mr. Mushi submitted that he filed the application through e-filling system on 28th July 2021 and filed the hard copy on 7th March 2022. It was submissions by Mr. Mushi that the copy of the Ruling was served to the applicant on 26th July 2021. I examined the CMA record and find that the copy of the said ruling was served to the applicant on 26th July 2021. That being the case, in the strength of the holding in ***Serengeti Breweries's case*** (supra), time started to run against the applicant from 26th July 2021, the date she was served with the ruling dismissing her application to set aside the said exparte award. The copy of the e-filing shows that applicant submitted the application online on 28th July 2021 and there is no dispute with that. In terms of Rule 21(1) of the Judicature and Application of Laws (Electronic Filing) Rules, GN. No. 148 of 2018, a document is considered to have been filed if it is submitted through the electronic filing system before midnight East African time, on the date it is submitted, unless a specific time is set by the court, or it is rejected. Reading the e-filing print out, I have found that the application was filed within 42 days prescribed under Section 91(1). It is for that reason I overruled the preliminary objection and ordered parties to file their written submissions because the application was filed within time.

By consent of the parties, on 4th July 2022, I ordered the application be disposed by way of written submissions. I ordered further that applicant shall file her written submissions by 11th July 2022 and respondent to file a reply thereto by 18th July 2022 and rejoinder by the applicant by 20th July 2022. I also ordered that the application will be mentioned on 21st July 2022 at 10:00hrs. When the application was called on for orders on 21st July 2022, Mr. Mushi, advocate did not enter appearance, instead, Olesto Njalika, Advocate held his brief. Respondent informed the court that he was served with written submissions in chief on 14th July 2022 at 16:13hrs hence he had only three (3) days out of the seven (7) days the court granted him to file reply submissions. Faced with that situation, the court granted leave to the respondent to file his reply submissions on the same day and ordered applicant to file rejoinder by 25th July 2022 and issued an order that the matter will be mentioned on 1st August 2022. But, the applicant did not file the rejoinder.

In his written submissions in support of the application, on the 1st and 4th grounds namely, (i) that the trial Arbitrator erred in law and fact by holding that applicant had not shown good grounds for his absence when the case was set for arbitration and (ii) that the trial arbitrator erred in law and fact for failure to hold that the applicant was never

served summons to appear on 6th March 2019, 8th April 2019, 24th April 2019, Mr. Mushi learned counsel for applicant submitted that, no summons were served to the applicant to appear on 6th March 2019, 8th April 2019, and 24th April 2019 hence she had no knowledge. He argued further that, respondent had a duty to prove that applicant was dully served and cited the case of the ***Managing Director of TAWFIK Bus Service v. Angelo Rwakatale,*** Civil Appeal No. 13 of 2003 to support his submissions. He argued further that respondent failed to prove that applicant was duly served and prayed the exparte award be set aside.

Submitting on the 2nd ground namely, that the trial arbitrator erred in law by issuing exparte order when the case was not coming for hearing, Mr. Mushi argued that, an exparte order was issued when the dispute was not scheduled for hearing. He argued further that it is a trite law that an exparte order should be granted when the case is set for hearing and not otherwise.

Submitting on the 3rd ground namely, that the trial arbitrator erred in law for failure to issue summons for the Applicant when the matter was set for exparte award, Mr. Mushi argued that applicant had right to be served with summons to appear on 12th September 2019, the date the dispute was fixed for exparte award. He went on that, that failure denied the applicant right to take an action to protect her interest hence

rendered the proceedings nullity. To support his argument, he cited the case of ***Chausiku Athumani v. Atuganile Mwaitege,*** Civil Appeal No. 122 of 2007, HC (unreported).

Arguing the 5th and 6th grounds namely, (i) that the trial arbitrator erred in law and fact by relying on uncorroborated evidence of the respondent and (ii) that the trial arbitrator erred in fact by failure to properly analyze evidence hence reached unfair conclusion, Mr. Mushi submitted that, in the exparte award, the arbitrator failed to take into account the admission by the respondent that he was coming late at work hence valid reason for termination. He went on that, evidence in the CMA record shows that procedures for termination was followed and that the finding by the arbitrator that respondent was not present during the disciplinary hearing is not supported by evidence.

In the reply submissions, Mr. Onesmo Mathius Kinawari, learned counsel for the respondent submitted generally that in April 2015 applicant filed an application at CMA to set aside the exparte award on ground that on 24th April 2019 when an order was issued for the dispute to be heard exparte, counsel for the applicant did not appear because he was attending another case before the High Court. He went on that, applicant's application was dismissed for lack of sufficient reasons. He argued further that applicant was bound to adduce sufficient ground/

reason that prevent her from appearing. Counsel cited the case of ***Abdallah Zaraf v. Mohamed Amari*** [1969] HCD 191 to support his arguments. Counsel for the respondent submitted further that the affidavit filed by the applicant in support of the application to set aside the exparte award did not disclose these new facts that she was not summoned to appear at CMA and that, raising those grounds at this stage is a new fact that was not argued at CMA. Counsel for the respondent argued further that, the appellate court cannot consider or deal with issues that have not been canvassed, pleaded and or raised at the lower court and cited the case of ***Yazidi Rajabu @ Byamungu and 2 Others v. Nakuroi Investment co. Ltd,*** land case No. 118 of 2016 to support his arguments.

It was submissions by Mr. Kinawari that, applicant was served with summons to appear on both the date of hearing and the award. He concluded his submissions by praying that the application be dismissed for being vexatious and frivolous.

As pointed hereinabove, applicant did not file rejoinder submissions.

I have carefully considered submissions by the parties in this application, and it appears that there are some confusions between

counsel for the parties. In order to be focused, I will restrict myself to what was prayed in the Notice of Application. For clarity, the said Notice of Application reads:-

> *" TAKE NOTE THAT, the applicant intends to apply to the court at a date and time fixed by the Registrar for an order in the following terms: -*
>
> *(i) This Honourable Court be pleased to call for records, inspet, examine such records therein and its proceedings to satisfy itself as to the correctness, rationality, propriety and legality of the Ruling of the Labour Dispute No. CMA/DSM/ILA/1204/18/07 delivered by Honourable IGOGO, M -Arbitrator dated 29th January 2021 and served upon the applicant on 26th July 2021.*
>
> *(ii) This Honourable Court be pleased to revise and set aside the whole proceedings and subsequent Award of the Labour Dispute No. CMA/DSM/ILA/1204/18/07 delivered by Honourable IGOGO, M - Arbitrator dated 29th January 2021 and served upon the applicant on 26th July 2021."*

From the above quoted Notice of Application that was filed in terms of Rule 24(1) of the Labour Court Rules, GN. No. 106 of 2007, it is clear in my mind that, in the application at hand, applicant is only challenging the ruling delivered by Ho. Igogo, M, Arbitrator, on 29th January 2021. I should point out that, the exaprte award was issued on 12th September 2019 and according to the CMA record, it was served to the respondent on 16th September 2019 and to the applicant on 23rd September 2019.

The CMA record shows that on 4th October 2019, Gilbert Mushi, counsel for the applicant signed both the notice of application and the affidavit praying to set aside the said expate award. Mr. Mushi attested his affidavit in support of the application before Ashura Ally, Notary Public and commissioner for Oaths. In the said affidavit, Mr. Gilbert Mushi deponed as hereunder:-

1. *THAT I am authorized legal representative of the applicant Company thus conversant with the facts that I am about to depose hereunder.*
2. *THAT, the applicant company is a limited company registered under the laws of the Tanzania (sic) and carries on business of buying and selling tyres.*
3. *THAT, the respondent herein was employed by the applicant as the tyre fitter until when his contract was fairly terminated.*
4. *THAT, respondent was dissatisfied with ground and procedure which led to his termination and opted to refer this current dispute.*
7. *THAT …on 24th April 2019 when the exparte award was delivered…the counsel for the respondent was at the High Court Labour Revision responding to summons issued to him.*
8. *THAT, failure of the applicant to attend on 24th April 2019 and previous dates was not due to Negligence, furthermore the Respondent did not receive summons to that effect.*
9. *THAT, the Applicant after being served with the Exparte award on 23rd September 2019, he discovered that the commission has inadvertently awarded the respondent TZS 5,889,230/= as compensation.*

In the Verification clause, Mr. Gilbert Mushi verified that all what is stated in paragraph 1, 2,3,4,5,6,7,8,9, 10 and 11 is true to the best of

his knowledge. It is my view that the verification clause was defective making the whole affidavit defective hence no application.

The respondent filed the counter affidavit sworn by Onesmo Mathias Kinawari resisting the application. In the counter affidavit, the deponent deponed *inter-alia* that there is no notice of representation proving that Mr. Mushi was attending before the high court in the case mentioned in his affidavit.

In the ruling dismissing the application to set aside the exparte award, the arbitrator found that on 6th March 2019 summons requiring applicant to appear on 8th April 2019 was issued and the same was received by **Ritha Nyange** but no appearance was entered, as a result, the dispute was scheduled for hearing on 24th April 2019. The Arbitrator found further that, summons to appear before the High court was issued on 2nd April 2019 requiring Mr. Mushi to appear on 24th April 2019. The arbitrator found that there was no reason as to why counsel for the applicant failed to appear on 8th April 2019. The arbitrator went on that, the matter was thereafter adjourned to 25th May 2019 and 30th May 2019, but applicant did not enter appearance. The Arbitrator concluded that, there was no justification or cause for non-appearance, as a result, she dismissed the application.

I have examined the CMA record and find that respondent filed the dispute at CMA on 26th November 2018 claiming to be paid 24 months' salary as compensation for unfair termination of his employment. The record shows further that, the referral Form referring the dispute at CMA (CMA F1) was received on 23rd November 2018 by Ritha A. Nyange for the applicant. The CMA record shows further that the summons showing that the dispute was fixed for hearing on 11th December 2018 at 11:00 Am was received by Ritha A. Nyange, the Executive Director of the applicant on 26th November 2018 at 12:07 Pm. The CMA record shows that even though applicant was dully served, she did not enter appearance, as a result, the dispute was scheduled for hearing on 9th January 2019. It is on the CMA record that on 9th January 2019 Gilbert Mushi, counsel for the employer (the herein applicant), and Onesmo Kinawari, for the employee, the herein respondent, signed agreement by the parties to extend time for mediation (CMA Form No. 5 herein referred to as CMA F5). It is further on CMA record that, on 18th January 2019, Shaban Mohamed Malinda, the herein respondent and one C. Sebatian Kabisa, for the employer (the herein applicant) signed CMF F6 before Amos, Mediator to show that mediation has failed.

The CMA record shows that on 19th February 2019 Mr. Praygod Uiso, advocate for the applicant on one hand, and Shaban Mohamed

Malinda, the respondent on the other, appeared before Hon. Igogo Arbitrator. On this date, the matter was adjourned to 6th March 2019 for framing issues. On 6th March 2019, applicant did not enter appearance, as a result, the matter was adjourned to 8th April 2019. The CMA records shows further that on 20th March 2019, at 16.00hrs, Ritha Nyange, signed the summons requiring the applicant to appear on 8th April 2019 at 12:00hrs for hearing of the dispute, but applicant failed to enter appearance, as a result, the matter was adjourned to 24th April 2019 at 10:00 hrs. On 24th April 2019, despite that she was duly served, applicant did not enter appearance as a result, the arbitrator issued an order for the dispute to be heard exparte. On the same date, issues were framed, and the matter was adjourned to 20th May 2019 for exparte hearing. I should, at this moment, point out that from the above narration, it is clear that applicant was duly served for the date of hearing. It is not correct for the applicant now to complain that she was not served. I therefore find that the 4th ground has no merit. It is equally not correct for the applicant to argued that an order for the dispute to be heard exparte was issued on the date it was not schedule for hearing. I therefore dismiss the 2nd ground in which it was submitted by the applicant that exparte order was issued when the dispute was not scheduled for hearing.

On 20th May 2019 exparte hearing did not take off, as a result, it was adjourned to 30th May 2019. On the latter date, respondent gave his evidence and closed his case. The arbitrator scheduled the 1st July 2019 at 13:00 hrs as the date of issuing an exparte award. Applicant did not enter appearance but also the exparte award was not issued because there were no papers for printing the award as it is recorded in the CMA record, as a result, it was adjourned to 19th July 2019 at 13:00hrs. The CMA record shows that the exparte award was not issued because applicant was not present. The arbitrator adjourned the matter to 2nd August 2019 at 13:00hrs and issued summons to the applicant to appear on 2nd August 2019. The CMA record shows that the said summons was received on 19th July 2019 by Ritha Nyange, HR, of the applicant. Again, on 2nd August 2019 applicant did not enter appearance, as a result, the arbitrator issued summons to the applicant to appear on 12th September 2019 as the last adjournment. According to the CMA record, on 12th September 2019 applicant failed to appear, as a result, the arbitrator issued an exparte award and awarded the respondent to be paid TZS 5,760,000/= being 12 months' compensation and TZS 129,230, being severance pay all amounting to TZS 5,889,230/= as she found that termination of employment of the respondent was both substantively and procedural unfair.

From what I have pointed out hereinabove, it is my considered view that, applicant was duly served and willfully, disobeyed the summons and did not enter appearance. With that conclusion, I find that the 3rd complaint that applicant was not served to appear on the date the dispute was set for exparte award has no merit.

It was submitted by counsel for the applicant in the 1st ground that the trial Arbitrator erred in law and fact by holding that applicant did not show good grounds for his absence when the case was set for arbitration. It is my considered view that, this criticism is unjustified. The CMA record is clear as pointed out herein above that applicant, though duly served, did not enter appearance. In the application to set aside the exparte award, it was deponed by Mr. Gilbert Mushi in the 1st paragraph of his affidavit that he is the authorized legal representative of the applicant. With due respect to counsel for the applicant, there is no document that was attached to his affidavit proving that he was authorized to appear on behalf of the applicant in both the application to set aside the exparte application and the main dispute. In fact, there is no notice of representation showing that Mr. Mushi was appointed by the applicant to appear on her behalf in the dispute that was filed by the respondent. That being the position, the principal officer of the applicant was supposed to enter appearance in hearing the dispute. In my view,

since there was no notice to the effect that applicant will be represented by Mr. Mushi in the said dispute, then, all grounds raised by Mr. Mushi that he was before the High Court are of no help. But assuming that he was duly authorized, I am still of the view that, no sufficient reasons were advanced for non-appearance of the applicant. I am of that view because, as pointed herein above, on 19th February 2019 Mr. Praygod Uiso, advocate, appeared for the applicant on one hand, and Shaban Mohamed Malinda, the respondent appeared in person. It was not disclosed in the affidavit of Mr. Mushi in support of the application to set aside the exparte award as what prevented Mr. Praygod Uisso to enter appearance on 24th April 2019 when Mr. Mushi was appearing before the High Court or on subsequent dates when the dispute was scheduled for hearing and issuance of the exparte award. I therefore conclude as the arbitrator did, that applicant failed to adduce sufficient or good reasons for his non-appearance.

I have noted that, at the time of filing an application to set aside the exparte award, Mr. Mushi filed the allegedly notice of representation in terms of Rule 23(1) and (2) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007. The said purported notice of representation reads:

*"**TAKE NOTICE THAT, GILBERT N. MUSHI,** From **HR SOLUTIONS LIMITED** has been duly appointed to represent the Applicant in this matter…"*

The said notice was signed on 4th October 2019 by counsel for the applicant and not the principal officer of the applicant. It is my view that, there was no notice of representation. In my view, counsel cannot sign a notice to appoint himself to appear on behalf of the party. In my view, it is the party who must sign the Notice of representation appointing an advocate or the personal representative to appear on his or her behalf. My conclusion is supported by the holding of the Court of Appeal in the case of ***NIC Bank Tanzania Limited v. Princess Shabaha Company Limited and 2 Others*** , Civil Appeal No. 248 of 2017 (unreported) wherein it was held that advocates have no mandate to give instructions to each other without involving the party to the case because instruction must be received from the party to the case. It is my view therefore, that it was improper for Mr. Gilbert Mushi to sign the notice of representation to show that he was appointed by the applicant to file an application to set aside the exparte award.

It was submitted on behalf of the applicant on the 5th and 6th grounds that the arbitrator relied on uncorroborated evidence of the respondent and further that she failed to analyzed evidence. Counsel for

the applicant did not clarify these grounds in his written submission. Since the dispute was heard exparte, it is my settled opinion that the only evidence on record is that of the respondent who testified as PW1. In his evidence, respondent testified that he was unfairly terminated and tendered termination letter as exhibit A5. According to exhibit A5, the reason for termination of employment of the respondent is that he committed a misconduct that breached trust of the applicant and further that he was incompatible to the employment. But the charge that was served to the respondent (exh A3) on which respondent was required to give explanation as to why disciplinary measures should not be taken against him was that, he used to go at work late. Surprisingly, the notice to attend the disciplinary hearing had three counts namely (i) going at work late, (ii) disobedience of superior orders and (iii) endangering business relationship between applicant and SBCTZ. It is my opinion that, applicant had no valid reason to terminate employment of the respondent, which is why, she was fumbling to create different counts from now and then. This, in my view, was gambling, as she was not sure which amongst the counts will help him to get rid of the respondent. In other words, applicant had a predetermined decision to terminate the respondent.

I have examined the minutes for the disciplinary hearing (part of exh A4) and find that applicant did not adduce evidence to support the allegation that respondent was (i) going at work late, (ii) disobeying superior orders and (iii) endangering business relationship between applicant and SBCTZ. I therefore safely conclude that there was no valid reason for termination hence termination was unfair for want of reason as it was concluded by the arbitrator.

It was alleged by the applicant that respondent was incompatible hence reason for termination. It is true that incompatibility is one of the fair reasons for termination as provided for under the provision of Rule 22 of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007. Still, it cannot only be whole swallowed that an employee was incompatible. It is the duty of the employer to prove that (i) an employee was unsuitable due to his character or disposition - see Rule 22(1)(a) of GN. No. 42 of 2007(supra), or (ii) is unsuitable because he relates badly with fellow employee, client or other persons who are important to the business -see Rule 22(1)(b) of GN. No. 42 of 2007(supra). Even if proven that an employee is incompatible, in terms of Rule 18 and 22(2) and (3) of GN. No. 42 of 2007 (supra), the employer is required (i) to investigate the reasons for incompatibility of the employee, (ii) to give appropriate guidance to the employee, (iii) to

afford an employee reasonable time to improve, (iv) if incapability continues, record the incidents of incompatibility that gave rise to concrete problems or disruption and warn an employee before decides to terminate an employee. Rule 22(4) of GN.No.42 of 2007(supra) provides that before terminating an employee based on incapability, an employee shall be given a fair opportunity (i) to consider and reply to the allegation, (ii) to remove the cause for disharmony, (iii) to propose an alternative to termination. I have revised the evidence on record and find that all these were not complied with by the applicant. In short, even if we assume that respondent was incompatible, of which it was not proved as no evidence was adduced by the applicant, the above procedure for termination was flawed.

I have carefully examined the minutes for the disciplinary hearing (part of exh A4) and find that applicant did not adduce evidence to support the allegation that respondent was (i) going at work late, (ii) disobeying superior orders and (iii) endangering business relationship between applicant and SBCTZ. This was contrary to the provisions of Guideline 4(6) of the Guideline for Disciplinary, Incapacity and Incompatibility Policy and Procedures issued under GN. No. 42 of 2007 (supra) that requires a person representing the management to present the case of the employer in support of the allegation. In the application

at hand, it is only the respondent who was asked to prove his innocence. That procedure is not proper.

For all discussed hereinabove, I find that the application is devoid of merit. I hereby uphold the CMA award and dismiss it.

Dated at Dar es Salaam this 26th August 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 26 th August 2022 in chambers in the presence of Siza Kabisa, Advocate for the applicant and Shaban Mohamed Malinda, the respondent.

B. E. K. Mganga
JUDGE