

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

REVISION NO. 250 OF 2021

BETWEEN

EQUITY BANK TANZANIA LTD APPLICANT

VERSUS

ERICK MGOSI SHAO RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The application beforehand was lodged under the provisions of Section 91(1)(a) 91(2)(a), (b), (c) 91(4)(a)(b) and S.94 (1)(b)(i) of the Employment and Labour Relations Act Cap. 366 R.E. 2019 ("the ELRA"), Rule 24(1), 24(2)(a),(b),(c),(d),(e),(f) and 24(3)(a),(b),(c)(d) Rule 28(1)(c)(b),(d) and (e) of The Labour Court Rules GN. No. 106 of 2007. In both his Notice of Application and the Chamber Summons, the Applicant is applying for orders in the following terms.

1. That this Honourable court be pleased to call for the records, revise and set aside the Commission for Mediation and Arbitration award dated 24/05/2021 made by Hon. Wambali V. (Arbitrator) in Labour

dispute No. CMA/DSM/ILA/508/2020 on grounds set forth in the annexed affidavit.

2. That the Honorable Court issues an order to quash findings of the Commission for Mediation and Arbitration.
3. That the honorable Court declare the Award which was given and delivered by the trial Arbitration hereinabove mentioned is unjustifiable in the eyes of laws due to material errors to the merit of the said award which involving injustices.

The application was supported by an affidavit of Mr. Makoye Angelo, Human Resource Director of the applicant dated 01st July, 2021. Before this court, the applicant was represented by Mr. Peter Ngowi, learned advocate while the respondent was represented by Mr. Rahim Mbwambo, learned advocate. The application was disposed by way of written submissions.

The dispute at hand traces its history back to 07th January, 2019 when the Respondent was employed by the applicant as a General Manager, Corporate Banking on permanent basis contract. The relationship between the parties ended on the 23rd May, 2020 when the respondent was informed that his employment was terminated under Section 13 of the Banking and Financial Institutions (Licensing) Regulations, 2014 due to

denial of the Central Bank to approve his appointment. Aggrieved by the termination, the respondent approached the Commission for Mediation and Arbitration for Ilala ("the CMA") via a dispute No. CMA/DSM/ILA/508/2020 ("the Dispute"). In his CMA Form No. 1, the nature of dispute complained of by the respondent was filled in two categories, the first one was termination of employment and the second one was unfair labour practice. The respondent claimed to be compensated an amount equivalent to 36 months salaries which totaled at Tshs. 720,000,000/-. The award of the CMA was in favor of the respondent, ordering the applicant to compensate the respondent a total of 24 months' salary as compensation for unfair labor practice.

Having been aggrieved by the whole of the said award, the applicant has lodged this revision on the ground that the honorable Arbitrator immensely erred in law and in fact for failure to reasonably assess the applicant's evidence in comparison with the respondent's evidence and erroneously concluded that the applicant did not disapprove the fact that the respondent was solicited to quit his job from FNB. On that ground, she raised the following legal issues;

1. Whether it is proper for the Honorable Arbitrator to rely on the respondent's documents/evidences and exhibits which were not admitted during the hearing.
2. Whether it is proper for Arbitrator to awarding the respondent compensation of 12 months salaries as if the applicant was found guilty for unfair termination, the issue which was dropped by the respondent himself.
3. Whether it is proper for the Hon. Arbitrator to issues an award out of the prescribed time without justifiable reasons.
4. Whether the Respondent managed to establish the conduct which amounted to unfair labour practice as alleged by the arbitrator
5. Whether the amount of compensation of Tanzania Shillings Two Hundred and Forty Million (Tshs. 240,000,000/=) which was ordered by the CMA was fair and reasonable basing on the circumstances of the case at hand.
6. Whether there was a laid down procedures which were violated when the respondent was notified with the outcome of the vetting process from the Applicant Central Bank (BOT).

My determination of the application will start with the second issue, whether it is proper for Arbitrator to award the respondent compensation

of 24 months salaries as if the applicant was found to have unfairly terminated the respondent, an issue which was dropped by the respondent himself. I have decided to start with this issue because I have noted some discrepancies on the way the dispute was initiated and how the CMA proceeded to determine it.

The submissions to support the issue, Mr. Ngowi argued that the compensation awarded to the respondent of 12 months salaries was for unfair labor practices. However, Section 40(1)(c) of the Act provides the remedy for compensation in terms of salaries in case the employer is found guilty of unfair termination. That as per the records of the CMA, the respondent dropped the issue of on unfair termination hence the arbitrator erred in awarding the compensation according to Section 40(1)(c).

In reply Mr. Mbwambo begged to differ with the conclusion of the Applicant, arguing that there is nowhere in the award where the Arbitrator found the Applicant of unfair termination nor did he invoke Section 40(1)(c) of ELRA as the basis of his award. He then submitted that as rightly pointed out by the Applicant, indeed the Respondent dropped the claim of unfair termination as the Respondent was never confirmed and further itself on unfair labour practice as discussed by the Arbitrator in

reliance with the case of **Abubakar Haji Yakubu vs Air Tanzania Co. Ltd (2011-2012) LCCD No. 104**. He argued that it through the findings of that case where the Arbitrator sought the basis of his assessment in determination of a fair compensation given the circumstances.

Mr. Mbwambo submitted further that the 12 month's salary compensation as awarded was from the 36 months initially sought by the Respondent. He argued that the payment of 12 months' salary as compensation for unfair labour practice is not a new phenomenon in our jurisdiction, citing the case of **Agness Buhere Vs. UTT Micro Finance PLC Revision No. 459 of 2015** whereby the High Court, Labour Division at Dar es salaam held:

" In the event since the learned Arbitrator erred in dealing with the matter labouring himself on the unfair termination instead or in lieu of unfair labour practice, thus on the foregone I proceed to quash and set aside the ruling /award of the commission for mediation and Arbitration. ...for the unfair Labour Practices conduct committed by the employer I order the employer to cough money in the equivalent of twelve months salaries as compensation to the

employee who was affected by the conduct of unfair labour practice relating to probation committed by the employer.”

He then argued that since the Applicant could not be able to prove her assertion that the Arbitrator applied unfair termination remedy to the claim of unfair Labour Practice, this issue has been answered against the Applicant.

Having heard the rival submissions of the parties, on my part, as stated earlier, I was also concerned with the way the arbitrator handled the matter. To begin with, in the CMA Form No. 1, the respondent initiated an issue of Termination of Employment and unfair labor practices. That in itself was not proper because the two issues cannot be lodged under the same umbrella. While the issue of unfair termination is determined under sub-part E of Part III to the Act, the issue of unfair labor practices does not fall under that part.

Secondly, the records of the CMA show that the respondent dropped the issue of termination of employment because he was never confirmed his employment. This was also substantiated by the submissions of Mr. Mbwambo at page 4 of his submissions where he supported the submission of the applicant, that the respondent dropped the claim of unfair

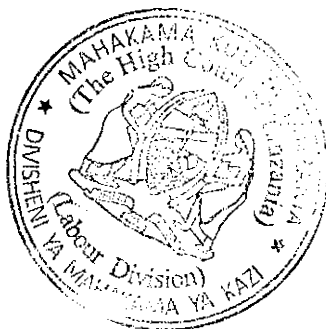
termination as he was never confirmed from his employment. His argument was that the other befalling issue was that of unfair labor practices and he cited the case of **Abubakar Haji Yakubu Vs. Air Tanzania Co. Limited (2011-2012)LCCD 104.**

From the undisputed facts, it is evident that the respondent was never confirmed in his employment hence the issue of unfair termination could not be featured in the proceedings therefore the CMA Form No. 1 was fatally defective because in there, the respondent pleaded termination of employment. I have noted Mr. Mbwambo's argument that there is nowhere in the award that the arbitrator faulted the applicant of unfair termination, nor did he invoke Section 40(1)(c) on the basis of his award. His argument is that the issue was dropped. However, I think Mr. Mbwambo has looked at only one aspect of this argument. He is just relying on the fact that the respondent dropped the issue of termination because he was not confirmed, but he forgot to look at the bigger picture, the award in its totality. For instance, looking at the reliefs that were awarded by the arbitrator, the respondent was awarded a compensation of 24 months, a relief which is based on Section 40(1)(c) of the Act. The respondent was further awarded Severance pay, a relief which is also awarded to the parties under Sub Part F of Part III of the Act which is titled

"other incidents of termination". Therefore if Mr. Mbwambo admits to have dropped the issue of termination and only prosecuted the issue of unfair labor practices, then the respondent was not entitled to payments incidental to termination of employment. The arbitrator therefore erred in awarding the relief.

On that note therefore, since the discrepancy emanated from the way the CMA was filled, and the CMA Form No. 1 being the initial pleadings which moves the Commission to determine a labor dispute, then the dispute was wrongly initiated at the CMA. For that reason, I allow this revision basing only on this ground. The CMA Form No. 1 having been defective, the proceedings of the CMA and the subsequent award are hereby set aside. Should the respondent still be interested to pursue his dispute, he should lodge a fresh dispute of unfair labor practices and not termination of employment as pleadings are supposed to be clear without ambiguity. The intended dispute (if any) shall be lodged at the CMA within 30 days from the date of this judgment.

Dated at Dar es Salaam this 22nd day of July, 2022.




S.M. MAGHIMBI
JUDGE