IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

REVISION NO. 177 OF 2020

BETWEEN

SERENGETI BREWERIES LTD..... APPLICANT

VERSUS

SAMUEL NYAKI ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J

The application beforehand was lodged under the provisions of Section 91 (1) (a) and (2) (c), Section 94 (1) (b) (i) of the Employment and Labour Relations Act No. 6 of 2004 ("ELRA"), Rule 24 (1), (2) (a), (b), (c), (d), (e) and (f), (3) (a), (b), (c) and (d) and Rule 28 (1) (c), (d) (e) of the Labour Court Rules Government Notice No. 106 of 2007 ("the Rules"). The applicant was aggrieved by the decision of the Commission for Mediation and Arbitration for Kinondoni ("the CMA") in dispute No. CMA/DSM/KIN/843/19 ("The Dispute"). She is moving the court for the following:

1. This Honorable Court be pleased to call for records and examine the proceedings of the Commission for Mediation and Arbitration in Labour

Dispute Number CMA/DSM/KIN/843/19 ("the Dispute") with a view to satisfy itself as to legality, propriety, rationality, logical and correctness thereof.

2. That, the Honourable Court be pleased to revise and set aside the CMA Arbitration Award made on the 28th April 2020 by the Honourable Alfred Massay, Arbitrator on the following grounds: -

   a) That, the Arbitrator erred in law and fact, holding that the Applicant did not pay the Respondent in accordance with the Settlement Agreement despite sufficient evidence produced during the hearing.

   b) That, the Arbitrator erred in law and fact in ordering the Applicant to pay the subsistence allowance despite the fact that the Respondent failed to do clearance as required

   c) That, Arbitrator erred in law and fact in analyzing the evidence adduced by parties and thereby arriving at wrong decision.

The Chamber Summons was supported by the affidavit of Lucia Minde, Legal and CC & E Director of the Applicant deponed on 11th May, 2020. The respondent opposed the application by filing a notice of opposition under Rule 24(4) of the Rules and on the grounds set out in the counter affidavit

deponed by Mr. Hekima Mwasipu, the respondent's advocate dated 25/06/2020.

The brief factual background of the matter dates back to July, 2012 when the respondent was employed by the Applicant in the position of Divisional Sales Manager. Sometimes in 2019, the Applicant conducted restructuring exercise in her company and the respondent's employment was terminated on operational ground on 04th July, 2019. The respondent was allegedly paid as per the Retrenchment Agreement and upon receiving the settlement payments, the Respondent instituted a dispute at the CMA alleging that he was not paid settlement payout as agreed by the parties in the Settlement Agreement. The CMA decided in favor of the respondent ordering the Applicant to pay the Respondent the sum of Tshs. 216, 211, 556.11 as repatriation allowance and settlement payout. Aggrieved by the said decision, the applicant has lodged this application raising the following legal issues:

1. Whether the Arbitrator erred in holding that the Applicant did not pay the Respondent in accordance with the Settlement Agreement despite of evidence produced that the amount paid to the Respondent is equal to the amount agreed.

2. Whether Arbitrator erred in law and fact in making an order for the Applicant to pay the Respondent subsistence allowance despite the fact that it is the Respondent who delayed clearance and hence delay in payment.

On those grounds and issues, the applicant is moving the court to call for records of Arbitration proceedings and set aside the decision and award of the Arbitrator and order that the payment made to the Respondent by the Applicant was in accordance with the Settlement Agreement.

By an order of the court dated 28/09/2021, the application was disposed by way of written submissions. The applicant's submissions were drawn and filed by Mr. Juvenalis Ngowi, learned advocate while the respondent's submissions were drawn and filed by Mr. Hekima Mwasipu, learned advocate.

Having considered the records of this application, I find that the issue that is for determination in this revision is whether the applicant paid the Respondent in accordance with the Settlement Agreement (EXP2). It is therefore pertinent to find out what were the terms of the settlement

agreement, what the respondent was paid and whether the said amount was in accordance with the settlement agreement.

According to the evidence adduced at the CMA, there is no dispute that the respondent was paid by the applicant a total sum of Tshs. 168,900,445.08/- as per the EXP2. This amount, according to the evidence, was paid in the name of "token of appreciation" while in the settlement agreement, the amount to be paid was termed as "settlement payout". According to the respondent who also persuaded the CMA, the said "token of appreciation" paid to the respondent is different from the "settlement payout" that was to be paid according to the agreement.

In his submissions to support the issue, Mr. Ngowi argued that the amount was paid to the respondent as per the EXP3 and EXD7. That the amount paid to the respondent was a result of negotiations for the purposes of retrenchment. That in accordance with Section 38(1)(c)(v) of the Act, the employer and employee are supposed to agree on severance pay in respect of retrenchment. Further that Regulation 23(4)(e) of the Employment and Labor Relations (Code of Good Practice) G.N. No. 42/2007 ("the Code") requires parties to agree on other conditions on which termination will take place. That looking at EXP2, parties agreed that the respondent shall be paid

the sum of Tshs. 168,900,445.08/- subject to tax deduction, the amount was equal to twelve months' salary.

Mr. Ngowi then argued that the arbitrator ought to have looked at the objective of the payment and how it was arrived at, instead of looking at the same in the pay slip. That minutes of consultative meeting held on 03/07/2019 which was admitted as EXP4 referred the amount as "golden Handshake" which was 12 months' salary and after negotiations the amount was names "Settlement payout" but the formula remained 12 months' salary. He argued further that looking at EXP3, the pay slip, it is the same amount of Tshs. 168,900,445.08/- that was paid, only the name in the slip was "token of appreciation". That the arbitrator ought to have looked at the genesis of the amount paid and come to finding that the amount paid was for the intents and purposes of the amount agreed in clause 1.1.5 of EXP2. That the name ought to have been immaterial.

In reply, Mr. Mwasipu submitted that the amount that is reflected in the pay slip, which is equivalent to the amount agreed as settlement payout, is a token of appreciation which is vote of thanks for a work well done for the entire tenure of 7 years with applicant. That this "may be" one of the

elements which were considered for the token of appreciation. He argued that a token of appreciation and settlement payout were different things.

In rejoinder, the applicant reiterated the submissions in chief and added that according to the settlement agreement, EXP2, the amount agreed to be paid to the respondent was the same amount that was paid according to EXP3 and EXD7.

What I have gathered from the parties' submissions is a matter of interpretation whether the "token of appreciation" and "settlement payout" as per EXP2, EXP3 and EXD7 were different things. The factors to be considered before determination of the issue is that **one;** the amount of the two terminologies, the one in EXP2 and one paid by EXP3 and EXD7 are exactly the same, amount which is based on the calculation of the respondent's 12 months' salary and **two;** it is admitted by the respondent that the amount paid in the name of "token of appreciation" was not part of the settlement agreement (EXP2). In the award, the CMA arbitrator reasoned:

"On whether or not the complainant was appropriately paid as per settlement agreement:- it is crystal clear that in terms of settlement agreement dated 4th July, 2019 parties agreed that the complainant

will be paid settlement payout equal to twelve months remuneration to the tune of Tshs. 168,900,445/=. Document relating payment features number of entitlements including token of appreciation but conspicuously missing item of settlement payout as agreed in the settlement agreement. ***Token of appreciation is a new entitlement which neither appears in the settlement agreement nor in the termination letter."***

The arbitrator correctly observed that there was payment in name of token of appreciation and not settlement amount. He further correctly so held that this token of appreciation is a new entitlement which neither appears in the settlement agreement nor in the termination letter. Therefore at this point, it is safe to conclude that the token appreciation in the amount of money that the respondent was paid was not in any part of the contract. My first question here is why did the respondent accept an amount of money that was not in any of the terms of the agreement as so alleged?

It is trite law that parties to an agreement are bound by the terms of the agreement (in this case EXP2). All the payments done (offered and accepted) were to be made in accordance with the terms of the agreement. Therefore if at any point the respondent received the amount as agreed in

the contract, then being bound by the agreement, he has received that which was agreed regardless of the terminology that was used. In case the respondent received an amount which was not part of the agreement entered between them, pocketed it and then goes round and lodge a claim that he was not paid according to the agreement, with respect, that is nothing but cheating the employer. My concern in that the arbitrator was also convinced by this ill intention of the respondent when he also fell for the English twist trap by writing:

> *"As correctly submitted by the complainant token of appreciation is not borne form the settlement agreement. As correctly stated, that token of appreciation is some sort of vote of thanks arising out of outstanding service which at any rate does correlate to settlement payout entitlement which is entirely different entitlement. Token of appreciation if at all was paid to the complainant is exgratia payment not arising out of settlement agreement as agreed by parties. So as it stand settlement payout remain outstanding in the sense that the same is not yet paid to the complainant. It follows therefore the complainant is entitled to the settlement payout to the tune of Tshs. 168,900,445.08/=."*

All I am seeing is that the arbitrator came up with his own settlement agreement, defined his owns terms of settlement and even went ahead to step into the shoes of the applicant holding that the payment was ex-gratia payment not arising from the EXP2. My question remains how and where did the arbitrator come up with all those conclusions and sympathies while his only task was to interpret the EXP2 and see whether the amount paid to the respondent was the same amount agreed in EXP2. The good thing is the law has provided for checks and balances of the decisions affecting rights of parties through avenues such as this revision, I am therefore going to stick only to the agreement (EXP2).

As per the agreement, the respondent was to be paid an amount of Tshs. 168,900,445.08/= as settlement payout. Then it follows that if that same amount was paid under a different name, the intention is what should have been the basis of determination. The applicant has clearly established that the amount was paid via EXP3 and EXD7 and the respondent does not deny it. If the terminology written on the pay slip did not match the one used in the agreement then at least the amount does. So if the respondent accepted an amount that was not in the agreement, he should immediately surrender that amount to the applicant and upon complete surrender of the

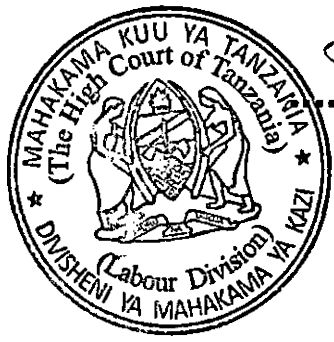
amount he accepted under a different name, then the applicant should pay the amount agreed in the "correct name".

The above notwithstanding, having found that the amount paid to the respondent was the exact amount agreed in the contract, and since the respondent failed to prove the basis of payment of the amount that he pocketed before showing up at the CMA to "claim unpaid amount", then it is the finding of this court that the applicant had fulfilled his obligation to pay as per the settlement agreement. The order for subsequent payment is therefore a nullity.

As for the repatriation expenses, as correctly argued by Mr. Ngowi, that as per the EXP2, the payment of repatriation expenses was to be done after completion of exit procedures and since it is the respondent who delayed the process, then he is not entitled to any payment by the employer as the delay was caused by him.

All said and done, this revision is allowed by revising and setting aside the CMA award. The applicant is not obliged to make any payments to the respondent.

Dated at Dar-es-Salaam this 18th day of February, 2022



.....

S. M. MAGHIMBI
JUDGE