

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

REVISION APPLICATION NO. 159 OF 2022

*(From the Ruling Commission for Mediation & Arbitration of DSM at Ilala (Gerald,
G.M: Arbitrator) Dated 20th May 2022 in Labour Dispute No.
CMA/DSM/ILA/667/2020/371)*

TAKIMS HOLIDAYS TOURS AND SAFARIS LTD.....APPLICANT

VERSUS

MWAJUMA R. KUDUGA.....RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J.

11th October 2022 & 21st October 2022

This Revision application arises from the award delivered by Hon. Gerald, G.M Arbitrator dated 20th May of 2022 in Labour Dispute No. CMA/DSM/ILA/697/2020/371 originating from the Commission for Mediation and Arbitration of Dar es Salaam, Ilala (CMA). The Applicant herein is praying for the following orders of the Court: -

1. That this Honorable Court be pleased to call for and examine the proceedings of the Commission for Mediation and Arbitration Award in Labour Dispute No. CMA/DSM/ILA/697/2020/371 issued at Dar es salaam issued on 20th May 2022 in order to satisfy itself as to the legality,

veracity, propriety, rationality, logic and correctness of the said award.

2. That the Honourable Court be pleased to revise and set aside the CMA award delivered on 20th May 2022.
3. That, any other reliefs this Honourable Court deems just and fit to grant.

From what I gather from the CMA record, affidavit and counter affidavit filed by the parties, the Respondent was an employee of the Applicant working as a cleaner under permanent contract from 01st October 2014. Her employment ended on 19th March 2020 on a disputed resignation.

Having not been satisfied with her exit, the Respondent filed the Labour Dispute in the CMA claiming to have been unfairly terminated. At the CMA, the matter was decided in respondent's favor where she was awarded TZS 4,200,000.00. Dissatisfied with the CMA award, the Applicant filed the present application.

The applicant advanced five legal issues of revision as stated at paragraph 20 of his affidavit as follows: -

- i) Whether the respondent was terminated from the employment.

- ii) Whether the arbitrator erred in law and facts in introducing the new issue which were not issue in dispute and without affording the parties with an opportunity to argue on the same.
- iii) Whether the arbitrator properly considered and analysed the evidence presented before the Commission for Mediation and arbitration by all the witness in the dispute.
- iv) Whether the exhibits tendered in the Commission for Mediation and arbitration were considered in entertaining the dispute and in drafting the award.
- v) Whether the reliefs issued was fair to the parties.

Along with the Chamber summons, the applicant filed an affidavit sworn by Frank Milanzi, the applicant's Principal Officer, in which after explaining the chronological events leading to this application, alleged that, the Respondent terminated his employment after issuing a letter of resignation which was accepted by the Applicant.

The application was challenged through a counter affidavit sworn by the respondent who vehemently disputed the applicant's allegation regarding the validity of the termination. She alleged that she was unlawfully terminated orally.

The application was disposed of by a way of written Submissions. The Applicant was represented by Mr. Erick Mwanri, Advocate, whereas the Respondent was represented by Mr. Denis Mwamkwala, Personal Representative.

Arguing in support of application on the 1st ground Mr. Mwanri submitted that the arbitrator entertained the dispute which was time barred. Referring to exhibit TH2 & TH3, Mr. Mwanri is of the view that it is clear the Applicant wrote a letter to the employer which was dated 19th March 2020, which she signed on 21st March 2020 explaining that she will resign on 21th March 2020. He stated that the respondent's letter shows that, she only wanted her salaries for the month of March 2020, which was TZS 199,307.56, gratuity TZS 597,922.68 with no leave claims and all made a total of TZS 797,230.24.

Mr. Mwanri referred to TAKIMS 3 which is NBC paying slip and stated that the document shows that the Respondent was paid an amount of TZS 800,000.00 in her bank account on 23 March 2020. In his view, this shows that the respondent was paid his terminal benefits after her resignation.

Submitting on the timeliness of the matter in the CMA, Mr. Mwanri submitted that on 1st September 2020 the respondent filed the matter at the CMA and stated that she was terminated on 4th August 2020 which was more than 5 months from the time the dispute arose, contrary to **Rule No. 10 of the Labour Institution Mediation and Arbitration Rule G.N. No. 64 of 2007.**

Mr. Mwanri consolidated grounds 2 and 3 and submitted that the arbitrator erred in law by holding that there was unfair termination while the respondent resigned from the employment. He challenged the arbitrator's holding that, the applicant was verbally terminated without sufficient prove.

With regards to the issues addressed, Mr. Mwanry submitted that parties agreed on the issues in the CMA one of them being, whether there was a termination of the employment contract. He averred that this issue was never discussed by the arbitrator, while exhibit TH2 & TH3, proved the respondent's resignation.

Mr. Mwanri challenged the respondent's assertion that she was verbally terminated. Supporting his position, he cited the case of **Bright Choice Limited vs. Ramadhani Ally Abeid**, Labour Revision No. 245 of 2021, High Court of Tanzania, Labour Division, at

Dar es salaam, (unreported), where in a circumstance where verbal termination was made the court was of the view that there should be explanation on what the employee did to secure formal termination or to confirm the oral termination. He added that Section 100 (1) of the Evidence Act Cap 6 R.E 2019, directs that documentary evidence cannot be defeated by oral evidence.

On ground No. 4 as reflected at paragraph 14 and 15 of the affidavits Mr. Mwanri submitted that the arbitrator failed to evaluate the evidence on record to give reasons on what made him to give such a conclusion on the award. He stated that according to **Rule 27(3) of the Labour Institution (Mediation and Arbitration) Guidelines G.N. No. 67 of 2007**, contents or things to be considered in drafting an award, include summary of parties' evidence, arguments and reasons for the decision but in this application, the decision sought to be revised lacks those contents or qualities since it has no summary of evidence of all witness and exhibits. In his view, this contravenes the mandatory requirement of the guidelines.

On ground six Mr. Mwanri submitted that the arbitrator failed to note that the respondent's representative was unqualified with no locus to represent her. He stated that representative Denis Mwamkwala was coming from JOSHITU while during the hearing there was an

objection to the changing of an advocate Renata to Denis Mwamkwala without notice. According to Mr. Mwanri, the arbitrator said that if there would be any doubt, they can challenge it on revision.

On ground 7, Mr. Mawnri submitted that the arbitrator failed to consider the closing statements of the parties. Citing Rule No. 27(1) of G.N No. 67 of 2007 he averred that closing submissions were detailed enough addressing the evidence adduced by parties and their witnesses but the decision of the arbitrator did not show any consideration of such closing submissions.

Regarding right of revision Mr. Mwanri challenged the act of the arbitrator in stating that the applicant should pay 4,200,000 to the respondent within 14 days. In his view setting deadline to pay the decretal amount is contrary to Rule 27 (3) (e) of G.N. No. 67 of 2007 as it barred the right of appeal. In his view, there is no law which compels a decretal sum to be paid within 14 days after the decision as it defeats the spirit of right to revision which gives 6 weeks for lodging of the revision.

In reply to the 1st ground concerning the timeliness of the application in the CMA, Mr. Mwamkwala submitted that time is determined by

CMA form No. 1 which shows that the dispute arose on 4th August 2020 and the dispute was lodged on 1st September 2020. Basing on this, he is of the view that the dispute was filed within 30 days as per the requirement of the law.

He challenged the applicant's reliance on exhibits tendered as TAKIM'S 2 and TAKIMS 3, and submitted that the documents are not related to both parties. He submitted that the applicant is **TAKIM'S Holidays Tours & Safaris Limited** and the respondent is **Mwajuma Ramadhani Kuduga** while Exhibit TH2 is a resignation letter signed by **Najma Mwajuma Ramadhani Kuduga** and it concerned **TAKIMS** Holidays. In his view, these names are different from the names of the parties in this matter since no record showing that the applicant uses the name of TAKIMS Holidays. He averred that the respondent has never agreed to have signed the documents.

Concerning the second ground that the arbitrator came with a new issue of termination contrary to **section 100 (1)** of the Law of Evidence Act, Mr. Mwamkwara stated that the arbitrator did not misdirect herself because while considering the matter, he noted that the documents had no relationship with the respondent.

On the third ground that the arbitrator did not consider the evidence given according to **Rule 27**, Mr. Mwamkwara is of the view that it is clear that by reading the award of CMA the arbitrator summarized by quoting the Rule and mentioned all the witnesses and exhibits. He considered nonissue the writing of 4 pages, so long as they cover what he ought to have said.

Regarding representation, Mr. Mwamkwala submitted that it is true the objection was raised during arbitration questioning the absence of the notice of representation. The arbitrator held that notice of representation is not necessary according to **Rule 7 of G. N. No. 67 of 2007** read together with **section 86 (6)(a)(b) & (c) and section 88 (9) (a)(b)(c) of the ELRA** since all these do not require notice of representation before the CMA. On such basis he is of the view that the arbitrator was right to continue with the arbitration in absence of notice of representation.

On denial of right to revision, Mr. Mwamkwala submitted that they object on the same because the award at the last paragraph, the arbitrator stated the right to revision is open and that setting a deadline to pay does not deny right to appeal. He thus prayed for the application to be dismissed.

Mr. Mwanri made a rejoinder which is also considered in the determination of this matter.

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** and secondly, **to what reliefs are parties are entitled?**

In addressing the first issue, I am concerned with parties debate on the point of the propriety of the decision of the CMA and the nature of the respondent's exit from the employment with the applicant. Mr. Mwanri identified several factors which in his view tainted the award with irregularities. The factors include the arbitrator's failure to address the issue as to whether there was a termination or resignation, and arbitrator's framing of new issues without affording parties with an opportunity to argue them.

It is a well-known principle of law that in arbitration process the arbitrator has a legal duty of observing various stages provided under **Rule 22 (2) of G.N No. 67 of 2004** in determination of a labour dispute. According to this Rule an arbitration process involves introduction, opening statement and narrowing issues, evidence,

argument and award. Furthermore, an award should have contents as provided under **Rule 27 (3) of G.N 67 of 2004**. It provides: -

"Rule 27(3) An award shall contain the following;-

- a) Details of parties.*
- b) The issue or issues in dispute.*
- c) Background information*
- d) Summary of the parties' evidence and arguments.*
- e) Reason for decision."*

In the case of **Safi Medics v. Rose Peter and 2 others**, Revision. No. 82 of 2010, High Court of Tanzania, Labour. Division, at Tanga, (Unreported), the Court held; -

"A successful arbitration requires that both the arbitrator and the parties in the dispute have common understanding of the issue in controversy".

In the CMA record, it is stated in the opening statement of the applicant that she was terminated orally on 4th August 2020 while the respondent's opening statement states that the applicant resigned on 21st March 2020. This is a misunderstanding, from which an issue ought to have been framed by the arbitrator to ascertain the nature of the respondent's exit from the employment. On this point, the

issue was never framed by the arbitrator. This indicates that **Rule 22(2) (c) of G.N No. 64 of 2007** was not complied with in arbitration process. Therefore, respondent's assertion that the matter was filed within time lacks legal stance since it is not ascertained as to when the respondent's employment terminated.

Further to that, the arbitrator in his award at page 1 and 2 raised three issues, firstly, **whether there was a valid reason for termination**, second, **whether procedure for termination was fair** and thirdly **to what reliefs parties are entitled**. In his findings at page 2 of the CMA award, the arbitrator just mentioned provision relating to unfair termination. He did not address the issue regarding to the validity of reason for termination, the only issue addressed is the fairness of procedure. Fairness of reasons was a contentious fact which needed ascertainment but was left unaddressed in the CMA. Parties' pleadings must guide a decision maker. (See **Astepro Investment Co. Limited V. Jawinga Company Limited, Civil Appeal No. 08 Of 2015 (CAT) DSM (Unreported)**). In this case, their Lordships justices of Appeal (MMILLA. J.A., MWANGESI, J.A., and NDIKA. J.A) had the following to state:-

*"Now looking at the Issues which were framed by the learned trial Judge, which were reproduced above, and the proceedings thereto, it is evident that there was departure from what had been pleaded by, the parties. In the circumstances, we are constrained to subscribe to what was submitted by the learned counsel for the appellant that, the issues framed did not reflect the actual dispute which existed between the parties. As a result, the procedure offended the cherished principle in pleading that, the proceedings in a civil suit and the decision thereof, has to come from what has been pleaded, and so goes the parlance 'parties are bound to their own pleadings'. See: **Nkulabo vs Kibirige [1973] EA 1Q2, Peter Ng'homango vs the Attorney General, Civil Appeal No. 214 of 2011, Sean TAN Tours Limited vs the Catholic Diocese of Mbulu, Civil Appeal No. 78 of 2012 (both unreported) and James Funge Ngwagilo vs the Attorney General [2004] TLR 161.** Explaining the purpose of pleadings in civil suits, the Court held in the case of James Funge Ngwagilo's case (*supra*), that:*

"The function of pleading is to give notice of the case which is to be met. A party must therefore, so state his case that his opponent will not be taken by surprise. It is also to define with precision the matters on which the parties differ

and the points on which they agree, thereby to identify with clarity the issues on which the court will be called upon to adjudicate and determine the matter in dispute.”

From the above authority what transpired in the CMA where the important issues were left unaddressed, I agree with the applicant that there were material irregularities in the CMA proceedings and award which need to be corrected. The applicant's assertion that the evidence adduced, and Exhibits tendered has never been considered in drafting the award holds water, in this kind of a situation.

Further to that the arbitrator acted contrary to Rule 27(3) of GN 67 in drafting the award as the parties' evidence and arguments were not summarised in his award. The above analysis is sufficient to answer all the issues raised by the applicant in the affidavit as hereunder:-

Starting with timeliness of the matter in the CMA, there could be no time barred case if it was not established when the cause of action arose. It is already established that the nature of the respondent's exit was not ascertained, therefore the arbitrator's conclusion that the applicant was unfairly terminated was wrongly arrived at. It is apparent from the aforesaid that the awards do not contain the appropriate contents since it lacked evaluation of evidence and

reasons for decision while disregarding the parties' submissions. These are sufficient to answer the main issue affirmatively that there are sufficient grounds established to warrant the revision of the CMA record.

Regarding reliefs, since the first issue is answered affirmatively, and since it is the finding of the court that the proceedings of the CMA and the award are tainted with material irregularities, the available remedy is to revise the proceedings set aside the award and return the record back to the CMA for the matter to be determined afresh.

Consequently, I hereby revise the proceedings of the Labour Dispute No. CMA/DSM/ILA/667/2020/371 from the Commission for Mediation and Arbitration of Dar es salaam, Ilala, quash and set aside the award therein. I remit the record back to the CMA to be determined afresh from the arbitration stage before another competent arbitrator. Each party to take care of its own cost. It is so ordered.

Dated at Dar es Salaam this 21st day of October 2022.



KATARINA REVOCATI MTEULE

JUDGE

21/10/2022