IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 210 OF 2022

Arising from an Award issued on 20/6/ 2022 by Hon. Mbena, M.s, Arbitrator, in Labour dispute No. CMA/DSM/967/2020/30/21 at Ilala)

RAHA LIMITED .... APPLICANT

VERSUS

STEVEN RWELAMILA .... 1ST RESPONDENT

SHEMSA SELEMANI .... 2ND RESPONDENT

KHALID MKOMBWA .... 3RD RESPONDENT

JUDGMENT

Date of last Order: 12/092022
Date of Judgment: 11/10/2022

B. E. K. Mganga, J.

On 28th December 2020, respondents filed Labour dispute No. CMA/DSM/967/2020/30/21 before the Commission for Mediation and Arbitration henceforth CMA at Ilala claiming to be paid One Billion Tanzanian Shillings (TZS 1,000,000,000/=) being compensation, damages, notice, severance, leave Breach of contract. On 20th June 2022, Hon. Mbena, M.s, Arbitrator issued an award awarding (i) Steven Rwelamila TZS 36,544,905 as compensation for the remaining 9 months' of the contract and TZS 50,000,000 /= as general damages all amounting to

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86,544,905/=, (ii) Shemsa Seleman Ngambeki TZS 22,500,000/= as compensation for the remaining 9 months' of the contract and TZS 50,000,000 /= as general damages all amounting to TZS. 72,500,000/= and (iv) Khalid Mkombwa TZS 9,000,000/= as compensation for the remaining 9 months' of the contract and TZS 50,000,000 /= as general damages all amounting to TZS. 59,000,000/=.

Applicant was aggrieved by the said award hence this application for revision. In the affidavit sworn by Dorina Kemirembe Kirama, the Human Resources Officer of the applicant in support of the Notice of Application, she raised seven (7) grounds of revision as follows:-

1. *The arbitrator erred in law and fact in holding that there was no measure taken by the applicant to serve respondents contract by avoiding retrenchment.*
2. *The arbitrator erred to hold that applicant failed to justify reasons for retrenchment and that retrenchment was used as a pretext to terminate the respondent.*
3. *The arbitrator erred in holding that applicant did not follow procedure for retrenchment as there was no consultation*
4. *The arbitrator erred in holding that the consultation minutes did not prove existence of teleconference meeting.*
5. *That arbitrator erred in holding that applicant's acts amounted to breach of contract and that the manner in which respondents were dealt with was unjustifiably unfair and injurious*

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6. *The arbitrator erred in awarding each of the respondents nine (9) month salary.*
7. *That the arbitrator erred by awarding each respondent TZS 50 million as general damages.*

Respondents filed both the Notice of Opposition and their joint counter affidavit opposing the application.

When the application was called on for hearing, applicant was respondent by Ms. Bupe Kabeta and Ms. Maria Ringia, Advocates while respondent was represented by Dismas Raphael advocate.

Submitting on the 1st ground, Ms. Kabeta argued that respondents were retrenched in June 2020 and that reasons for retrenchment were technological reason because applicant shifted from Telecommunication Company to technological that led posts of the respondents redundant. She went on that, applicant advertised two posts for sales and another post that she did not recall as per Exhibit P4. She conceded that the two posts were taken by other employees i.e., new employees (new recruitment).

On the 2nd ground, Ms. Kabeta learned counsel, for the applicant submitted that there was technological reason that is a ground for retrenchment as per Rule 23(2) (b) and (c) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007. She went on

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that, applicant introduced new technology that led to retrenchment of the respondents. She also submitted that 1st respondent was in sales department and that applicant is dealing with internet connections to public. During submission, counsel for the applicant conceded that she did not have contracts for the 2nd and 3rd but maintained that she was aware that they were in technical department as field engineers. Counsel conceded further that she was not able to talk about the technology that was introduced by the applicant leading to redundancy of duties of the respondents.

It was submissions of Ms. Kabeta, learned counsel for the applicant on the 3rd and 4th grounds that consultation meetings were conducted four times i.e., (i) on 08th June 2020 twice, (ii) on 11th June 2020, (iii) on 17th June 2020. She submitted that a consultation meeting that was held on 08th June 2020 involved all employees through Microsoft teams as it was conducted online but she was unable to tell the court, the time it was conducted though she maintained that it was evidenced by exhibit D3. She submitted further that, other three meetings' minutes were tendered as Exhibit D4, D5 and D6 and added that all these meetings were held through Microsoft team. During submissions, counsel for the applicant

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conceded that the said exhibits does not reflect that they were generated from Microsoft team. She conceded further that, there is no voice record of what was discussed in the said meetings through Microsoft team as proof of consultation meeting. She however, maintained that one of the representatives of the employees was the 1st respondent although in his evidence 1st respondent (PW1) denied having participated in consultation meeting.

Submitting on the 5th counsel for the applicant, argued that retrenchment was fair because applicant had a valid reason for retrenching the respondents and followed procedures. She submitted further that, on 04th June 2020, a notice was issued to all employees (exhibit D2), consultation was done as per exhibit D3, D4, D5 and D6, a retrenchment agreement was signed (exhibit D7) on 17th June 2020, and terminal benefits were paid to the respondents (exhibit D9).

Arguing the 6th and 7th grounds, counsel for the applicant submitted that after retrenchment, respondents were paid as per exhibit D9 and considering that procedure was followed, then, awarding respondents more than TZS 200 million is unreasonable. She strongly argued that respondents were not supposed to be awarded. She added that

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respondents had fixed term contracts and that only 9 months were remaining on their contracts and concluded that the award was unreasonable and prayed that the application be allowed.

On the other hands, Mr. Raphael, learned advocate for the respondents resisted the application by submitting on the 1st ground that there was no consultation meeting that was held or in which respondents participated. He added that there was no measure taken by the applicant to avoid or minimize retrenchment. He argued that advertisement for post (exhibit P4) was done after retrenchment of the respondents and that the same relates to the job that was being done by the 1st respondent before termination. Counsel for the respondents added that, procedures for retrenchment are clear that consultation must be done as per Section 38(1) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] namely that a notice of disclosure of relevant information, consultation etc. must be issued. Mr. Raphael submitted that; the notice (exhibit D2) was not read by the respondents because they were working from home. He strongly submitted that consultation was not done and that none of the respondents attended consultation meeting and further that they did not participate in appointing a representative. Counsel added that, neither

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video nor audio teleconferencing was tendered as exhibit and that no evidence was adduced showing that a link was sent to the respondents.

Responding to submissions made by counsel for the applicant on the 2nd ground, Mr. Raphael counsel for the respondents submitted that, applicant was supposed to prove by evidence that she was migrating to technological company and that services of the respondents will not be required/needed. He argued that the 1st respondent was a Sales Officer, and the same service is being done to similar customers. He went on that; the 2nd and 3rd respondents were field engineers and that their service is being done to date as it used to be done.

Responding to submissions made on behalf of the applicant in relation to the 3rd and 4th grounds, Mr. Raphael submitted that Section 38(1) of Cap. 366 RE. 2019(supra) requires consultation to be done. He submitted further that, signing of the minute is a proof that consultation was done. He was quick to submit that, in exhibit D3 to D6 there is no signature of the 2nd and 3rd respondents. He added that, the only signature appearing in the said exhibit is that of the 1st respondent that also was cropped. Counsel submitted that, in his evidence, PW1 denied having signed the said minutes. Counsel for the respondents argued that in his

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evidence, DW1 testified that respondents signed online through email, but no email was tendered. He went on that, while under cross examination, DW1 testified that she does not recall the person who pasted 1st respondent's signature on the minutes.

Responding to the 5th ground, counsel for the respondents submitted that Section 37 of Cap. 366 R.E. 2007(supra) requires an employer to prove fairness of reason and procedure. He added that, applicant did not adduced evidence proving that she was migrating from telecommunication to technological company. On the argument that parties signed retrenchment agreement and that respondents were paid, Mr. Raphael submitted that respondents denied that allegation. He added that, the 1st respondent testified that he did not sign retrenchment agreement and that he did not appear before Augustine Kusarika, Advocate to sign the said agreement on 23rd June 2020 and further that there is discrepancy of dates in the said agreement. Counsel submitted further that, applicant was supposed to call the said Advocate as a witness, but she did not.

It was submissions of Mr. Raphael counsel for the respondents on the 6th and 7th grounds that, the remaining period of the respondents' contracts were 9 months' and that they were awarded the remaining

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period. Mr. Raphael submitted that salaries of the respondents were (i) TZS 4,060,545/=, (ii) TZS 2,500,000/= and (iii) TZS 1,424,374.6 for the 1st, 2nd, and 3rd respectively. He added that each applicant was awarded TZS 50,000,000/= as general damages based on the injuries they suffered and that they had loans whereas the repayment schedule was ending in 2023. When asked by the court as to whether; payment of the loans was dependent on their employment, Mr. Raphael submitted that respondents were retrenched in June 2020 while only 9 months were remaining on their respective contracts. He conceded that, contracts of the respondents were expiring in March 2021. Counsel for the respondent was of the view that TZS 50,000,000/= awarded to each respondent as general damage was fairly awarded. He therefore prayed that the application be dismissed.

In rejoinder, Ms. Ringia, advocate for the applicant submitted that, due to Covid 19, respondents were working from home and that the notice was communicated to them through emails. On the issue of repayment of loans, she submitted that loans were personal arrangement between the respondents and the banks and not the applicant. She added that, there is no proof that applicant guaranteed respondents' loans.

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At the time of composing the judgment I carefully examined the CMA record and find that respondents filed the dispute at CMA through CMA F1 on 28th December 2020 showing that the dispute arose on 25th June 2020. I also examined evidence of the respondents and find that Steven Rwelamila, the 1st respondent, testified that he was served with termination letter on 1st July 2020. Khalid Mohamed Mkombwa (PW2) testified that he was served with termination letter (exh. D8) on 29th June 2020. On his part, Shemsa Seleman Ngambeki (PW3) testified that she was served with termination letter (exh. D8) on 26th June 2020. Confronted with that situation, I therefore summoned counsels for both sides and asked them to address the court whether; the dispute was filed at CMA within time and whether CMA had jurisdiction to determine the dispute between the parties.

Responding to the issue raised by the court, Ms. Ringia, counsel for the applicant submitted that in terms of Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007, respondents were supposed to file the dispute at CMA relating to termination within 30 days from the date of termination. She also submitted that, termination of the respondents was on 25th June 2020, but

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respondents filed the dispute at CMA on 28th December 2020 while out of time without application for condonation. She submitted further that; CMA had no jurisdiction because the dispute was time barred. She therefore prayed that CMA proceedings be nullified, the award be quashed and set aside.

On the other hand, Mr. Raphael, counsel for the respondents maintained that the dispute was filed within time. Counsel for the respondents submitted further that, on 15th July 2020, respondents filed labour dispute No. CMA/DSM/ILA/583/2020/265 but applicant raised an objection relating to competence of CMA F1, as a result, a ruling was delivered on 14th December 2020 by Hon. Mpulla allowing respondents to file a fresh referral within 14 days. Counsel for the respondents submitted further that, on 24th December 2020, respondents filed a new CMA F1. He argued that it was proper for the arbitrator to strike out the dispute and extend time to the respondents to file a proper dispute within 14 days. When probed by the court as to whether parties were afforded right to address the issue of leave to file a proper application, though he was not certain, he submitted that he believes they were afforded.

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In rejoinder, Ms. Ringia, counsel for the applicant submitted that, the issue of extension of time was not raised at the time of arguing the preliminary objection but the arbitrator granted extension of time in absence of the application for extension of time and without affording parties right to address on that issue. She argued that it was not proper for the arbitrator to strike out the matter and proceed to extend time without affording parties right to be heard because the dispute that was before him was not relating to extension of time.

I have considered submissions of both sides and examined CMA record and in disposing this application, I will start with the issue of limitation of time and CMA jurisdiction raised by the court Suo motto. It was submitted on behalf of the applicant that there was no application for condonation that was filed by the respondents and granted by the Arbitrator. On the other hand, it was submitted on behalf of the respondents that on 15th July 2020, respondents filed labour dispute No. CMA/DSM/ILA/583/2020/265 but the same was struck out and leave was granted to them to file a fresh referral within 14 days. Mr. Raphael, though not sure, submitted that before granting 14 days leave to the respondents to file a file application, parties were afforded right to be heard. Ms. Ringia

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counsel for the applicant was of the view that parties were not afforded right.

The arguments of counsels prompted me to call the CMA record in labour dispute No. CMA/DSM/ILA/583/2020/265 to verify submissions of the parties in relation to the issue raised by the court. The record shows that, on 16th July 2020, respondents filed labour dispute No. CMA/DSM/ILA/583/2020/265 at Ilala. In the CMA F1, respondents indicated that the dispute was based both on unfair termination and breach of contract. They indicated further in the CMA F1 that the dispute arose on 25th June 2020. The record shows further that, on 28th September 2020, the herein applicant who was the respondent, filed a notice of preliminary objection that, (i) the complainants' complaint vide CMA Form No.1 is incurably defective for preferring to the Commission two different cause of action and that (ii) complainants' complaint offends the mandatory provision of Rule 8(2), (a), (b) and (c) of the Employment and Labour Relations(Code of Good Practice) Rules, GN.No.42 of 2007. On 26th November 2020, Adam Mwambene, advocate appeared before the Arbitrator and argued the two preliminary objections on behalf of the herein applicant. On the other hand, Mrisho A. Mrisho, advocate argued on

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behalf of the respondents. Mr. Mwambene advocate submitted that, CMA F1 was incurably defective because the herein respondents combined both unfair termination and breach of contract. He therefore prayed the dispute be struck out. On his part, Mr. Mrisho learned advocate submitted that it was not defective because the two causes of action arose in the same transaction.

On 14th December 2020, Hon. U.N. Mpulla, Arbitrator, having referred to various case laws, delivered his ruling upholding the preliminary objection raised by the herein applicant that CMA F1 was defective. Having held that CMA F1 was defective, the arbitrator went on: -

> *"...Now what is the available remedy for a defective CMA F1? As rightly submitted by Mr. Mwambene(advocate) for the respondent and I join hands with him. However, before I make my final orders, I condemn the respondent for not raising this type of P.O at the commencement of Mediation so that the defect could be rectified..."*

It is clear that parties were not afforded right by the arbitrator to make submissions before granting 14 days leave to the respondents to file a proper application. The Court of Appeal in the case of ***Wegesa Joseph M. Nyamaisa vs Chacha Muhogo***, Civil Appeal No. 161 of 2016 [2018] TZCA 224 had an advantage of discussing the effect of raising an issue suo

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moto and proceed to make a decision thereof without affording parties right to be heard. In the said case, the Court of Appeal found that there was violation of fundamental right to be heard and nullified proceedings and ordered the matter to be reheard. A similar stance was taken in the case of ***Hai District Council & Another vs Kilempu Kinoka Laizer & Others***, Civil Appeal No. 110 of 2018 [2021] TZCA 39 wherein the Court of Appeal quoted its decisions in the case of ***Abbas Sherally and Another v. Abdul Fazalboy***, Civil Application No. 33 of 2002 (unreported), that:-

> *"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

The Court of Appeal went on to cite its decision in the case of ***DPP v. Sabinis Inyasi Tesha and Another*** [1993] TLR 237 to that position and quoted its decision in the case of **Mbeya *- Rukwa Auto Parts & Transport v. Jestina George Mwakyoma*** [2003] TLR 251 that: -

> *"It is a cardinal principle of natural justice that a person should not be condemned unheard but fair procedure demands that both sides should be heard,* ***audi alteram partem****. In* ***Ridge v. Baldwin*** *[1964] AC 40, the*

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leading English case on the subject it was held that a power which affects rights must be exercised judicially, i.e., fairly. We agree and therefore hold that it is not a fair and judicious exercise of powers, but a negation of justice, where a party is denied a hearing before its rights are taken away. As similarly stated by Lord Morris in ***Furnell v. Whangarei High School Board*** *[1973]AC 660, natural justice is but fairness writ large and juridically."*

It should be recalled that at that time the arbitrator granted 14 days to the respondents to file a proper dispute, the dispute that was filed before the CMA was incompetent and time available for them to file a proper dispute had already expired. They were. Therefore, supposed to apply for condonation.

It is a settled principle of law that, the issue of jurisdiction and limitation of time can be raised by the court Suo moto or by the parties at any stage even on appeal. This is also the position of the Court of Appeal in the case of **Tanzania Revenue Authority Vs. Tango Transport Company Ltd.** Civil Appeal No. 84 of 2009 **[2016] TZCA 84]** where it was held that:-

'The law is well settled and Mr. Bundala is perfectly correct that ***a question of jurisdiction can be belatedly raised and canvassed even on appeal by the parties or the court Suo moto, as it goes to the root of the trial*** *(See,* ***Michael Leseni Kweka; Kotra Company Ltd; New Musoma Textiles Ltd. cases****, supra).* ***Jurisdiction is the bedrock on which the***

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court's authority and competence to entertain and decide matters rests.' [Emphasis added].

In her submission Ms. Ringia for the applicant firmly submitted that, CMA had no jurisdiction to entertain the matter because it was filed out of time. Her contention was vehemently disputed by Mr. Dismas Counsel for the respondents who firmly stated that, arbitrator properly stuck out the application and extended time for the respondents to file a fresh dispute.

It is my considered view that, having found that CMA F1 was defective arbitrator was supposed to struck out the application and end there because that is where his jurisdiction ended. He had no mandate to condone the new dispute which was intended to be filed by the respondents as there was no application for condonation filed by the respondents before him. Following that order striking out the application, respondents ought to have followed proper procedure by filling an application for condonation as they were already out of time prescribed by the law.

Based on the above discussion, it is my firm opinion that, CMA had no jurisdiction to determine this application. Since the issues raised by the

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court has disposed the whole application, I will not discuss grounds of revision raised by the applicant.

For the foregoing, I hereby nullify CMA proceedings, quashed, and set aside the award arising therefrom.

Dated in Dar es Salaam on this 11th October 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 11th October 2022 in chambers in the presence of Ms. Maria Ringia, Advocate for the Applicant and Steven Rwelamila and Khalid Nkombwa, the 1st and 3rd respondents.

B. E. K. Mganga
JUDGE

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