IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 101 OF 2022

(*From the decision of the Commission for Mediation and Arbitration of DSM at Ilala* by ***(Faraja: Arbitrator)***, dated 8th Day of March 2020 in Labour Dispute No.CMA/DSM/KIN/285/20/2005

BICCO A. WILSON..... APPLICANT

VERSUS

IDFABRIC TANZANIA LIMITED..... RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J

30th September 2022 & 10th October 2022

Aggrieved by the award of the Commission for Mediation and Arbitration of Dar es Salaam, Kinondoni [herein after to be referred to as CMA], the applicant has filed this application **under Sections 91(l)(a)(b), (2)(a)(b)(c), (4)(a) (b) and 94 (l) (b) (i) of the Employment and Labour Relations Act No. 6 [CAP 366 RE 2019]; and Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and 28 (l)(c)(d) and (2) of the Labour Court Rules, GN No. 106 of 2007.** The application is seeking for orders that this Court to call for records, examine and revise the proceedings and set aside the award of the CMA in Labour Dispute No. CMA/DSM/KIN/285/20/2005 dated 8th Day of March 2022. The applicant is further praying for an order for

reinstatement of the applicant without any loss of remuneration and or benefits and compensation by way of damages, general damage, aggravated damages and punitive damages; and any other reliefs(s) as this court may deem fit and just to grant.

At this juncture, I find it worth to offer a brief sequence of facts leading to this application as extracted from CMA record, applicant's affidavit and the respondent's counter affidavit. On 1st Day of February 2019, the applicant was employed by the respondent as a manager and before he left the office, he held a position of the General Manager. Their employment relationship started to experience tension when they started to exchange correspondences regarding applicant's performance. It went further to the extent where the respondent employed another employee which worsened the situation, especially when the applicant questioned the line of reporting in performing his duties something among the things which aggrieved the respondent, leading to disciplinary proceedings which culminated to the applicant's termination. On 11th March 2020 the applicant was terminated after being charged with various offences falling under alleged misconduct and poor performance.

In the disciplinary hearing the applicant was charged with four offences, the **first** being failure to perform duties and refusal to undertake

instructions; **secondly**, acts of dishonesty which led to breach of trust; **thirdly**, acts and conducts which lead to loss of employer's funds; and **fourthly**, absence from work without reasonable cause and without notification.

The disciplinary committee found the applicant to have conducted several acts and omissions of insubordination towards his immediate supervisor (complainant) which created unhealthy working environment amongst the parties hence his termination from the employment. In the letter of termination (Exhibit D23) the reasons were stated to be failure to perform duties, refusal to undertake instructions, acts of dishonesty which led to breach of trust, acts and conducts which lead to loss of employer's funds and absence from work without reasonable cause and without notification.

Being dissatisfied with the employer's decision in terminating his employment, on 5th Day of April 2020 the applicant referred the matter to the CMA. At the CMA, the arbitrator found the termination in both aspects, procedurally and substantively to be fair, hence the applicant was awarded nothing. The applicant being aggrieved with the CMA award, preferred this application.

Along with the Chamber summons, the affidavit of the applicant was filed, in which after elucidating the chronological events leading to this

application, the applicant protested the award asserting it to be unlawful, illogical or irrational. The applicant claimed that his termination was both substantively and procedurally unfair.

In the affidavit the applicant, advanced two ground of revision as stated at paragraph 17 as follows; -

a) Whether there was substantive reason to amount to termination

b) Whether procedure for termination was followed.

To challenge the application, the respondent filed a counter affidavit sworn by one Mathias Ceccile Vercruysse, the respondent's Director. The deponent of the counter affidavit disputed the allegation that there was unfair termination and countered all the material facts. The deponent alleged the applicant of poor performance which persisted even after being afforded with an opportunity to improve through performance improvement plan (PIP) which was not honoured by the applicant.

Parties enjoyed legal services. The applicant was represented by Ms. Rehema Mgovano, Advocate from Mvano Attorneys, whereas the Respondent was represented by Ms. Helena Mteti, Advocate from Hecon Association. The hearing of the matter proceeded by a way of written submissions following the parties' prayer on 25th Day of July 2022. I thank both parties for complying with the Court's schedules in filing their respective submissions and the industrious work done therein.

Arguing in support of the application regarding the fairness of the reason for termination, **Ms. Rehema** challenged the arbitrator asserting him of having not consider the failure of the respondent in proving the four disciplinary offences stated in the termination letter as the reason for termination.

According to Ms. Rehema the arbitrator erred in law for not realizing that the employee was not afforded fair opportunity to meet the performance standard following the allegation by the employer that the applicant updated the business plan below the standards expected. In the view of Ms. Rehema, there is no proof as to whether the applicant was properly taught how to update the said Business Plan as well as availability of all the necessary information to do so, taking into account that it was the first business plan updated by the applicant with limited access to the bank information such as bank statement. According to her accessibility to this information was taken over by the newly appointed employee. According to Ms. Rehema, the said bank statement was a tool for implementing an assignment of updating the said business plan.

It was further submitted by Ms. Rehema that the arbitrator did not adhere to **Rules 17 (1) and 18 (2) of the Employment and Labour Rules (Code of Good practice) GN 42 of 2007** in allowing the

respondent to rely on PIP as a reason for termination without evaluating the evidence from both sides on whether the said PIP was realistic or not, taking into account that it was introduced against the applicant when he rejected the offer of resignation. She is of the view that performance improvement plan was not realistic. To support this contention, she cited the case of **MIC Tanzania Limited versus Christ Stratham Rev. No. 271 of 2014, High Court Labour Division**, Dar es Salaam, Nyerere, J.

Regarding dishonest, Ms. Rehema submitted that the arbitrator did not bother to accept that the respondent did not show any evidence through exhibits or testimony to prove the Applicant's conduct of dishonest causing loss to the employer's funds and how the complainant caused the said loss. She emphasized that the applicant gave the evidence on how he tried to advice the respondent on shipment of containers. She stated that the arbitrator ignored evidence adduced by the applicant to justify that Mathias, Ceccile Vercruysse acting on behalf of the respondent and the testimony given by witness PW2 that the applicant had no powers neither to make any decision regarding fund nor to conclude any contract. In her view, this piece of evidence countered the respondent's testimony that the applicant was playing with prices when

entering contracts. She blamed the arbitrator for having failed to record some of the evidence given by the applicant's witnesses.

On procedure, Ms. Rehema submitted that the arbitrator did not take into consideration the proper procedure in terminating the employment including warning and appeal after disciplinary hearing. She further challenged the handling of the disciplinary proceedings where the proceedings and outcome were given by the managing director instead of the Chairman of disciplinary hearing committee as per the requirement of the law. She further challenged the fairness of the procedure of appeal where the applicant was given a right to appeal to the same person who was the complainant during disciplinary hearing, contrary to the principle of fair hearing. She thus prayed for the application to be granted.

Opposing the application Ms. Hellen submitted that that the respondent had a substantive reason for termination and the Arbitrator considered all the evidence submitted and gave a clear indication of the areas he found the Applicant guilty or not guilty of the charges leveled against him. Referring to page 20 paragraph 1 of the award she submitted that the Arbitrator indicated that the CMA found the applicant not guilty of three allegations leveled against him which are dishonest, underperformance from the EPZ project and Absenteeism. She is of the

view that at paragraph 2 of the award, the Arbitrator saw undeniable facts from records of disciplinary minutes, termination letter, testimonies from respondent's witnesses and facts admitted by the applicant himself, that the respondent terminated the applicant for refusal to follow employer's instruction (insubordination). Ms. Hellen made further reference to page 21 of the award, and stated that the commission found water tight evidence of the applicant's acts of insubordination.

According to her the arbitrator found it right and proper to end with allegations of insubordination on the reason that it proved misconducts against the applicant as narrated in the minutes of disciplinary hearing (exhibit D18) in paragraph 1 (d) and (e) as sufficient and valid ground for termination of the applicant's contract.

In response to the applicant's assertion that the arbitrator has erred for not realizing that the applicant was not afforded with a fair opportunity to meets the performance standards, Ms. Hellen submitted that the arbitrator did not error in his findings by considering exhibits, D2, D3, D5, D11 and D12 that the opportunity was given to the applicant to meet the performance standard. Ms. Hellen submitted that it should be noted that the level the Applicant was hired, he was expected to be able to handle his various responsibilities including preparing the business plan. She stated that the applicant was assigned to prepare the business

plan via email dated 19th January 2022 marked exhibit D6 but he didn't respond to the supervisor on the business plan assignment until 13th February 2022 via email marked as exhibit D7 and after several follow ups by the supervisor where the Applicant expressed his inability to handle the business plan assignment claiming that he was unable to access bank account as per Exhibit D8b. According to her, the Respondent noticed that the applicant used the same business plan template but surprisingly the only changes made to that document were dates and the name of the interior architect in Belgium, but everything else remained the same.

Ms. Hellen submitted further that the respondent expected that if the Applicant didn't have the skills needed to prepare the business plan or the information to help him populate the date in there, he should have expressed that to the respondent timely instead of waiting from 19th January 2022 to 13th February 2022. She stated that during the hearing the respondent expressed that the issue of assess to bank account being shifted to somebody else was not a surprise to the applicant as it was already explained to him via the Email dated 21st January 2022 and marked Exhibit D6 introducing Mr. Lyanga to the bank. According to her there was no evidence showing that the Applicant informed his supervision of his inability to handle the assignment or missing any

information to assist him to complete the assignment prior to his email marked Exhibit D7. In her view, the respondent didn't find any weight in the Applicants reasons not to deliver the assignment given to him by the respondent.

In response to the applicant's submission that the PIP which was the basis for termination being unrealistic, Ms. Hellen submitted that the arbitrator considered all evidence relating to PIP issued and expected the applicant to have reacted on it. She added that when the respondent hired the applicant as a manager, the respondent expected that the applicant will be in a position to deliver according to his role as a manager.

According to Ms. Hellen, in reference to ***Exhibit D2, D3, D5, D12***, the respondent cleary proved his dissatisfaction with the performance, and informed the applicant of the intention of introducing Performance Improvement Plan (PIP) to the applicant to improve his performance. She acknowledged that the respondent did not indicate the specific areas of improvement as per ***Exhibit D13***, but upon the Applicant's request for an itemized listing of area of improvement, the Respondent issued a performance Improvement program (PIP) marked ***Exhibit D12*** which categorically stated the areas that the Applicant needs to improve which specifically include, Time management, planning skills reporting

skill, commercial skills, proper use of fund, Avoidance of Absenteeism, Insubordination and people skills. Ms. Hellen submitted that the performance improvement areas were elaborated in very general terms together with an offer of management assistance in ensuring that they are achieved as indicated in exhibit D14 but the applicant rejected every suggested area of improvement which indicated that he was not interested in improving his performance but rather, he was focusing in creating chaos to the respondent.

Ms. Hellen described the language of the applicant as a commanding language, which was a clear indication that he didn't understand his position in the organization and he has no respect as indicated in exhibit D14 "*My stand: I see this PIP unrealistic but rather a tool or sign to give him a forceful exit to the company.*"

Ms. Hellen referred to ***Rule 12 (3) (f) Employment and labour Relations (Code Of Good Practice*) Rule GN NO 42 of 2007**, which provides for gross insubordination to be an act that justify termination. Supporting her stand she cited the case of **Vedastus s. Ntulanyenka& other V. Mohammed Trans LTD,** Revision No.4 of 2014, High Court of Tanzania, Labour Division, at Shinyanga, (unreported).

She submitted further that the respondent had a valid reason for terminating the employment of the applicant because the applicant refused to comply with the lawful instruction of his employer by expressly refusing to honor respondent's performance Improvement plan which was a way to help newly introduced employee (Mr. LYANGA) while referring to him as a stranger after an official introduction.

Regarding proof of "conducts of dishonest causing loss of employer's funds, Ms. Hellen averred that, after analyzing all evidence submitted by both parties the arbitrator on Page 20 paragraph 1 of the Award indicated that the CMA found the applicant not guilty of the three-allegation leveled against him, which are dishonest, under performance from the EPZ Project and absenteeism. In her view, submitting on the same has no relevance to his revision.

On receipt of fringe benefit Ms. Helena submitted that the applicant did not return the terminal benefit based on his contract of employment a signature was not proof of receipt of payments arising from his contract. In her view, this court has to dismiss this matter since the complainant has no claim as he has accepted and received his terminal benefit in full and was also issued with a certificate of services dated 11th March 2020.

On second aspect regarding procedure Ms. Hellen submitted that the supervisor of the Applicant lives in Belgium, therefore the acceptable mode of communication for the company between the applicant and his supervisor was through E-mail and phone calls via what's up mobile application. She maintained that following the respondent's dissatisfaction with the applicant's performances, he gave several verbal warning, and with a chance to express himself to prove his position however, the biggest struggler was communication as the applicant used to disappear online for several days to avoid contact with his supervisor. According to the Ms. Hellen, after several verbal warnings and the struggle in communication the respondent issued the applicant with the first warning via e-mail dates 27th august 2019 marked as Exhibit D2 where paragraph 8 indicates the communication struggle experienced by the applicant's supervisor as quoted herein;

> *"When we ask for instance to compare of storage vs tax advantages, we must be able to count that the job is done in a decent way. And when we want an explanation, we cannot have you going offline (or pretend to) for several days."*

Ms. Helena referred to a second warning to the applicant issued via e-mail dated 26th November 2019 and marked **Exhibit D3** after the failure of the first one. In her view, both warnings were issued by applicant's

supervisor (Matthias Vercruysse) and he clearly expressed the reasons why he is issuing such warning to the applicant and they made reference to the procedures for written warning under to ***Rule 4 of Guideline for Disciplinary, Incapacity and Incompatibility Policy and Procedures Under Employment and Labour Relations (Code of Good Conduct)***. Ms. Hellen stated that, there are no records of appeal from the applicant showing he was aggrieved by both the written warning. She stated that the Arbitrator considered circumstances of the parties as a far as communication within the company is concerned and as presented by parties during the hearing, therefore he did not take note of any breach of procedure in issuing those warnings.

Guided by the submissions made by both parties, the applicant's affidavit, the Respondent's counter affidavit and CMA record, I draw up two issues for determination which are **whether the applicant has provided sufficient ground for this Court to revise the CMA award** and secondly, **reliefs entitled to the parties.**

In addressing the above issues, the grounds identified in the affidavit will be considered one after another. It is known that fairness in termination of employment is evaluated in two aspects; one being reasons and the other one procedures. This is so provided under **Section 37 (2) (a) and (b) of the Cap 366.**

Starting with the fairness of reasons, in the CMA, the applicant was terminated with four offences as per termination letter. And these were the offences which were facing the applicant in the disciplinary proceedings. The arbitrator found that there was a valid reason in terminating the applicant's employment. The arbitrator found the applicant to have committed insubordination and held all the other offences to be unfounded. Therefore the center of the dispute is whether there was insubordination committed by the applicant.

Fairness or fairness of reason, is guided by **Section 37 of Cap 366** which provides that it is unlawful for the employer to terminate the employment of an employee unfairly. It assigns the duty to prove the fairness of reason upon the employer. **Section 37 (1) and (2)** reads as follows: -

"37 (1) It shall be unlawful for an employee to terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) That the reasons for termination is valid;

(b) That the reason is a fair reason-

(i)Related to the employee's conduct, capacity or compatibility; or

(ii) Based on the operational requirements of the employer, and

(c) That the employment was terminated in accordance with a fair procedure."

In addressing as to whether there was insubordination, the applicant contended that the arbitrator erred in law for not realizing that the employee was not afforded fair opportunity to meet the performance standard. He questioned as to whether there was a proof as to whether the applicant was properly taught on how to update the said Business Plan as well as having all the necessary information to do so, taking into account that it was the first business plan updated by the complainant. He further question the realistic aspect of the PIP for it having being introduced against the applicant when he rejected the offer of resignation. In her view, there was no substantiated insubordination against the applicant.

The respondent's counsel maintained that the arbitrator was right in his findings by holding that there was a valid reason for termination on the reason that because the applicant failed to follow employer's instructions as per exhibit tendered before him which constitute insubordination.

From the above contested views, it is appropriate at this juncture to explore on what amounts to insubordination. In the case of **Sylvania**

Metals (Pty) Ltd v Mello N.O. and Others (JA83/2015) [2016] ZALAC 52 where it was held that;

> *"Insubordination in the workplace context, generally refers to the disregard of an employer's authority or lawful and reasonable instructions. It occurs when an employee refuses to accept the authority of a person in a position of authority over him or her and, as such, is misconduct because it assumes a calculated breach by the employee of the obligation to adhere to and comply with the employer's lawful authority. It includes a wilful and serious refusal by an employee to adhere to a lawful and reasonable instructions of the employer, as well as conduct which poses a deliberate and serious challenge to the employer's authority even where an instruction has not been given."*

The above authority is relevant in this application. For the act to be considered as insubordination regarding instructions, such instructions must be reasonable.

In this application the applicant is said to have refused to undertake several employer's instruction. It was stated by the complainant in the

disciplinary committee that the applicant refused to comply with the instructions issued to him vide email dated 19th January 2020 by:-

1. Just updating the previous version of business plan only on the dates and the name of the architect. He was not satisfied with that work to have been done for 20 days.
2. Failing to make market study and plan
3. Come up with the list of potential suppliers of raw materials
4. Failure to cooperate with Mr. Lyanga, the new employee
5. Refusal to accept a Performance Improvement Plan (PIP)

Under insubordination, the applicant was alleged to have refused to update the business plan. In the disciplinary proceedings (Exhibit D18), the applicant explained what he did to the business plan. He explained various steps he took to find some information to update it including going to the Ministry of works, changing dates but failed to get some bank information to input some other updates in the said business plan.

It is not disputed that the respondent employed a new employee by the name of Lyanga Shanalingigwa which followed by changes of signatory by putting the new employee at the place of the applicant who formally used to perform such a role. On that changes the applicant contested to have been experiencing some challenges in his working conditions which affected his performance. Those challenges included his inability to

handle the business plan assignment, claiming to be unable to access bank account as per **Exhibit D8** which was vital in preparing the business plan. He further claimed that the line of reporting for the new employee was not well known to him since he was the CEO of the Company. All these applicant's claims were not countered by the respondent as it was not shown how they were addressed the applicant's challenges in harmonizing the working conditions for the instructions to be reasonable. A new employee is placed in an organisation without consultation and knowledge of a person who is working as a CEO, in my view, this must create a tension which needs the employer's attention to clear. I am asking how can someone expect a smooth cooperation in that situation? Since the applicant updated some information in the business plan, he complied with the Respondent's instruction though it may be not to the satisfaction of the respondent.

Further to that, since the applicant did not understand the line of reporting between him and the new employee, there could be no smooth cooperation unless a clear guidance was given by the respondent. Failure to accept the PIP was a matter of negotiation which cannot be one side imposition. It cannot amount to insubordination. I see no reasonable instruction which the applicant failed to perform.

I could not see in the CMA how the respondent proved the offence of insubordination as per **Section 39 of the Employment and Labour Relations Act, Cap 366 R.E 2019** which places the duty to the employer to prove it. **Rule 12 (3) (f) of the Code** directs that for the insubordination to warrant a termination, it must be gross insubordination. The arbitrator made a general observation making reference to Exhibits D9, D10, D11, D12 and D14 and concluded that there was insubordination committed by the applicant. For clarity, I quote hereunder, the words of the arbitrator from page 16 of the award:-

> *"The first issue of fair reasons for termination, according to evidence on exhibit D9, D10, D11, D12, D13, and D14 collectively establishes the complainant's series of actions that were insubordination to the respondent, to mention a few, an act of refusing to recognize and cooperate with a new employee who was rightfully employed by his employer was a very serious act of insubordination to an employer. The complainant's acts of refusing every instruction given by his employer caused so much chaos to the employer, working environment*

as far as business growth. He was even creating a non-conducive environment to settle the matter and proceed with the peaceful execution of his employment contract. Therefore the commission finds there was a fair reason for the complainant's termination"

Exhibit D9 is the respondent proposal to advise the applicant to resign and Exhibit D10 is a letter by the applicant to disagree with the resignation proposal. I see no reasonable instruction noncompliance of which may lead to insubordination. In my view the applicant had liberty to refuse signing this negotiable document. Exhibit D11 was a settlement letter which settled the matter after applicant's refusal to sign the resignation proposal. Exhibit 12 was a proposed performance improvement plan (PIP) and exhibit D3 is an applicant's letter requesting clarification on the PIP while Exhibit P14 was applicant's letter requesting for clarification about the new employee including the definition of the line of reporting. In all these documents, I can't see insubordination, rather I see communication which go to the roots of contractual relationship between the applicant and the respondent and some requests for clarification of some important matters such as line of reporting for the new employee.

The arbitrator's failed to appreciate that the applicant was a CEO of the Company which he led while on site different from his directors who were abroad. Employment of a new employment needed to involve him so long as he was still in office, failure of which must have caused tension and the blame should rest on the respondent's directors, rather than the applicant.

In my view, the applicant complied with the instruction he was receiving from his boss, but the working conditions were not conducive for a smooth operation of his duties.

Since the applicant was charged with four offences including poor performance which was the epicentre of insubordination and the same was not proved I am of the view that the offence of insubordination could not exist as the applicant was not found guilty of such poor performance.

From the foregoing, it is my considered view that I could not see a proved offence of insubordination and therefore I differ with the arbitrator's findings that there was fair reason for termination.

Having been no insubordination which was the only ground under which the arbitrator found there to have reasonable reason of termination, it is my finding that, in absence of such insubordination, there was no valid and fair reasons for the applicant's termination from employment.

Having found that there was no valid and fair reason for termination the upcoming question is on procedural aspect. In the CMA, it was found that the applicant's termination was procedurally fair, but the applicant challenged the same that it was not fair on the reason that the chairman was responsible with issuing both the proceedings and the outcome to the complainant, but the same was done by the Managing Director of the respondent who was the respondent. It is further argued that the applicant was given a right to appeal to the same person who was the complainant during disciplinary hearing, contrary to the principle of fair hearing.

Since the termination was for misconduct the relevant provision is **Rule 13** of the Code. Apart from rival submissions regarding fair hearing I am aware that in terminating an employment due to misconduct, investigation is very important to be conducted. I find worth to reproduce the provision which provides that; -

> *"Rule 13(1) The* ***employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held."***

The above provision, speaks by itself that the purpose of investigation is to establish whether there is a ground of initiating hearing. Basing on the nature of the offence alleged to be committed by the applicant the

respondent had a legal duty to conduct investigation. In this application, the CMA record reveals nothing about investigation. Since investigation is a mandatory procedure in observing the fair hearing and it was not observed by the respondent, I have view that such failure to conduct investigation prior to holding of the disciplinary hearing constitutes infringement of **Rule 13 (1) of GN No. 42 of 2007** which renders the procedure invalid and unfair. Indeed, if the applicant was not given an opportunity to cross examine the contents of the report (**see Hamisi Jonathan John Mayage Vs. Board of External Trade**, Civil Appeal No. 37 of 2009, Court of Appeal of Tanzania, at Dar es salaam, unreported) then the right to a fair hearing was infringed. On such findings I agree with the applicant's counsel that there was no fair procedure in terminating the applicant.

What are the reliefs entitled to parties? Unlike the CMA I have found that the respondent had no valid reason to terminate the applicant and the procedure was violated. Since I have found there to have unfair termination, the remedy will be guided by Section 40 (1) of the Employment and Labour Relations Act which provides for reinstatement, reengagement and compensation. The applicant has prayed for the reinstatement. Taking into account the work relationship which existed before the applicant's exit, reinstatement cannot be a proper remedy.

There is no longer a conducive working environment amongst the parties. On this basis, I have view that compensation of 24 months remuneration constitutes sufficient remedy to redress unfairness in the applicant's termination.

From the above, the major issue as to whether there are sufficient ground for revision of the CMA award is answered affirmatively. For that reason the application for revision has merit. I hereby quash and set aside the CMA award. I award the applicant 24 months compensations basing on his monthly salary plus other terminal benefits as stipulated under section 44 of the Employment and Labour Relations Act if not yet paid.

The application is allowed. Each party to take care of its own cost.

It is so ordered

Dated at Dar es salaam this 10th Day of October 2022

KATARINA REVOCATI MTEULE

JUDGE

10/10/2022