

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

REVISION NO. 269 OF 2021

(Originating from Labour dispute no. CMA/DSM/ILA/R.1352/17/116)

BETWEEN

FREDY MBEYELA APPLICANT

VERSUS

TANZANIA EDUCATION AUTHORITY RESPONDENT

JUDGMENT

S. M. MAGHIMBI, J.

The applicant herein is a retiree. Before his retirement, he was employed by the respondent on the 10th March, 2004 as a Procurement Officer, a position which he served until 2007 when he was promoted to the position of Senior Procurement and Logistics Officer. Sometimes in the year 2008, the Public Procurement Regulatory Authority (PPRA) performed an audit on the Respondent as an institution. In the said audit, it was found that the respondent was operating without having an independent Procurement Management Unit (PMU) contrary to the requirements of the Public Procurement Act, 2004 ("the PPA"). Acting on the recommendations, in 2010, the Respondent established the PMU whereby the applicant was subsequently promoted from the position of

Senior Procurement and Logistic Officer to Head of Procurement Management Unit on 05th March, 2010 (EX-A3).

On her part, the Respondent alleges that the Procurement Management Unit (PMU) was established in 2010 and came into operation in 2014 after being incorporated into the Scheme of Service of February 2015 and it was not until 26th June, 2014 that the Applicant was promoted from the position of Senior Procurement and Supplier Officer to the position of Manager, Procurement Management Unit after obtaining the academic qualifications of being appointed as a Manager. This is where the dispute lies as the applicant alleges that he was occupying that position since 2010 and served until his retirement in the year 2016.

Following the above controversy, the applicant lodged the current dispute at the CMA on the ground that from 2004 to 2014 the Respondent was in contravention of the law governing public procurement by continuing to administer the Scheme of Service of 2001 which was silent as to remuneration of the Head of Procurement Management Unit. He further alleged that subsequent to consultation with the Procurement and Supplies Professionals and Technicians Board (PSPTB) in 2010; the Respondent was directed that there should not be

any disparity in terms of salaries and fringe benefits between Head of Procurement Management Unit and Head of other departments and having made several undertakings to follow up with the Respondent which proved futile, he referred a labour dispute with No. CMA/DSM/IAL/R.1352/17/116 ("the dispute") which was decided in favour of the Respondent.

Aggrieved by the award of the CMA, the applicant lodged the current application under the provisions of Section 91(1)(a)(b) and (2)(a),(b),(c), Section 94(1)(b)(i) of the Employment and Labour Relations Act, Cap 366 R.E. 2019 ("ELRA") and Rule 24(1)(2),(a),(b),(c),(d), and (f), (3)(a),(b),(c) and (d), Rule 28(1),(d) and (e) of the Labour Court Rules, G.N. No. 106 of 2007. He is moving this court for orders in the following terms;

1. This Honourable Court be pleased to call for records, revise and set aside the decision of the Commission for Mediation and Arbitration Dar es Salaam in Labour Dispute No. CMA/DSM/ILA/R.1352/17/116, and declare that by virtue of being the Head of the Procurement Management Unit he was entitled to remuneration commensurate to the Head of the Procurement Management Unit from 5th March, 2010 up to 26th June, 2014.

2. This Honourable Court be pleased to order the Respondent repay his underpaid salaries and other fringe benefits amounting TZS 236,488,660.73/=
3. That, this Honourable Court, be pleased to make such any other orders as it may deem fit.

In his affidavit to support the application the applicant raised the following legal issues:

- (a) Whether the Commission for Mediation and Arbitration applied the same standard in accepting the evidence of the Respondent against cogent evidence of the Applicant.
- (b) Whether the Commission for Mediation and Arbitration properly evaluated the whole evidence adduced by parties.

When this matter came for hearing on the 27th September, 2022; the applicant was represented by Mr. Richard Clemence, learned advocate while Mr. Mkama Msarama, learned State Attorney represented the respondent.

While making his submissions to support the application, Mr. Clemence initially prayed to adopt the affidavit of the applicant to form part of his submissions. His submissions were based on the issue of arrears of salaries where he submitted that the applicant was appointed

to be head of procurement management unit on 05/03/2010. That at all this time through from 2010-2014, he was also serving in that same position but he was being paid a salary lower than what the position that he was serving demanded. Mr. Clemence submitted further that according to the law of the respondent's institution, the head of unit was supposed to be paid a salary of Tshs 7,300,000/- but the applicant was paid Tshs. 1,700,000/- only. He argued that the issue was not disputed at the CMA, therefore the respondent re-appointed the applicant in the same position (A-7) on the 26/06/2014 but until then, he was paid Tshs. 1,700,000/- as salary.

He submitted further that according to the directive of Procurement and Supplies Professionals and Technicians Board (PSPTB) which regulates all procurement issues in Tanzania, it was directed that all heads of units be paid equally (Exhibit A-8) and that the exhibit A-8 also directed that a head of department does not report to another head of department but directly to the Director General (EX-A3). Further that Exhibit A-5 shows the applicant's salary and that he was head of procurement reporting to the Director General.

Mr. Clemence submitted further that the PMU was established under Section 34(1) of the PPA and according to sub-section 34(4), the

PMU is to be headed by a person with sufficient experience and academic qualifications in procurement functions. That at the CMA, the applicant tendered EXA4 to show that at the time of his appointment, he had the qualification required under Section 34(4) of PPA and because he had all the qualifications and he was performing his duty under Section 35 of Act No. 21/2004, then he was entitled to be paid his dues entitled as he claimed at the CMA.

Mr. Clemence pointed out that, the fact that the applicant was HPMU from 2010 is undisputed and if the respondent found that he was not qualified, then they should not have appointed him in that department. His argument was that absence of the scheme of service which talks of the position held by the applicant at the institution does not remove the fact that he was heading that department. He argued that the respondent could get directives from other departments in order to be able to pay the applicant his entitlements as the Exhibit A-3 does not say that the respondent will be acting in that position, but he was appointed as the head of that Unit. Further that if the letter said that he was acting in that position, then it would have been okay for the CMA to say that he was not entitled to the claimed arrears.

On those submissions, his conclusion was that the applicant is entitled to be paid the amount of Tshs. 236,488,660/- as the arrears of his salary, deficit from the year 2010-2014. His prayer was for this court grant the prayers sought in the Chamber Summons by revising and setting aside the decision of the CMA.

In reply, Mr. Mkama also started by praying to adopt the counter affidavit affirmed by Ms. Christina Sylvester, Legal Service Manager of the respondent, to be part of his submissions. He then submitted that in 2010 the applicant herein was the senior procurement and supplies officer (EXD1) and he was paid a salary of Tshs 1,700,000/-. He argued that in the same year there was no any promotion of the applicant, but there were recommendations by the PSPTB which came after the Board visited the respondent institution and found out that the procurement management unit is under the Finance and Administration Department and recommended that according to the law, the unit has to be an independent unit (EX-A8) whereby the respondent was to be guided by Section 34(1)&(4) and Section 35(a)-(q) of the PPA.

Mr. Mkama submitted further that in the said recommendations, it was agreed that the institutions should be guided by the Regulations of the Treasury Registrar whereby the payment of HPMU should be equal

to the payments made by other departments. He went on submitting that after those recommendations, the respondent was directed to comply with the law and regulations and the first thing the respondent did was to change the scheme of services because the Scheme of that time (2007 scheme) EXD3, did not have a position of Head of Procurement Unit, instead there was a Senior Procurement and Supplies Officer (EXD2 and EXA7). That the process of updating scheme of service was completed in 2014 when the Treasury Registrar approved the new scheme which included the qualifications and salary of the head of procurement unit because that unit was not there before the new scheme was made.

He then submitted that civil in service, ranks, qualifications and salary scheme of an employee are provided for under the Scheme of Service and it would not be easy or possible to have the applicant appointed as HPMU while at that time the position was not in the scheme of service. He added that the applicant could not be appointed as HPMU because the qualifications, education level and the salary thereto was not in the scheme of service. He argued that it is a legal requirement that a person cannot be promoted, appointed or transferred to any position unless he has the proper qualification as provided under

the scheme of service, referring the Court to the provisions of Regulation 17(5) of the Public Service Regulation, G.N. No. 168/2003 ("PSR") and Order D-6(2) of Standing Orders for Public Servants, 2009. His argument was that the applicant couldn't be appointed or promoted to the post of HPMU while it was not provided for in the scheme of service.

Replying on the cited EXA3 which the applicant alleges that it the letter appointed him to be head of HPMU, titled "Appointment of the Head of Procurement Unit", Mr. Mkama argued that the content of the said letter has two conditions, the first condition is that the applicant should sign and return an acceptance letter and the second condition was that he should have qualifications identified in the PPA and its regulations and other regulations proclaimed by the Public Procurement Regulatory Authority ("PPRA"). That that according to the PPRA and its regulations, the HPMU ought to have a Master's Degree and at that time the applicant had an advanced diploma in Materials Management.

Mr. Msarama submitted further that the EXA3 does not show that the applicant was appointed as HPMU as he got the qualifications to be HPMU in the year 2014 after he attained his Master's Degree in Business Administration at Mzumbe University in Morogoro. It is after he got the

qualification, on 26/06/2014 the appointing authority (Board of Directors of the respondent) promoted the applicant from the position of Senior Procurement and Supplies Officer to the position of Manager of PMU (EXA7) which is clear that he will start serving in that position on 01/07/2014 therefore by that letter the appointing authority recognized that between 2010-2014 the applicant was serving in the position of Sen. Procurement and Supplies Officer. He hence argued that it is undisputed the appointment of applicant to HPMU was o 26/06/2014 after he became qualified and the scheme of service was changed with Department of PMU be established as an independent department. Therefore the argument that the applicant was promoted in 2010 is not maintainable and because the applicant was promoted in 2014, he submitted.

On the issue that according to EXA3 the applicant should be paid the same as other Heads of Units, Mr. Mkama submitted that the other units were headed by a manager, but in order to become a manager then one should have a master's degree while in 2010 the applicant did not have such qualifications therefore even if he was so appointed, he could not have been paid the same because he did not have a Masters Degree. (see page 5 of EXD3). That the exhibit does not say that the

applicant is entitled to same privilege as Head of Department and there was evidence that he was and neither did the award say that the applicant was entitled to those arrears.

His conclusive submissions was that the application is without merits because at para 9 of the affidavit in support of the application, the applicant admits to have occurred some change which arose from recommendation of the board hence he agreed with the argument that the appointment came after a change in the scheme of service. He urged the court, while constructing the judgment, should also consider EXA1, 2 and 7 which are all letters of promotion which mentions the appointing/promoting authority for each position that the respondent was promoted to. He argued that the exhibit that the respondent is relying on does not show which position he is promoted to or the previous position and neither does it show the appointing authority. That the arbitrator satisfied herself that there was no evidence to show that the applicant was appointed as Head of PMU in 2010. He pointed that in this case, different from the provisions of Section 39 of ELRA which requires the employer to prove that termination was fair, the applicant had the burden to prove his claim. He concluded by a prayer that this

court upholds the decision of the CMA and dismiss the application without cost because this is a labor case.

In rejoinder, Mr. Clemence started with the argument that EXA3 requires a person promoted to have qualifications prescribed for in PPA and that the applicant ought to have a Masters Degree. His rejoinder submission was that there is no provision in that law which requires the head of procurement to have a Master's Degree. That according to Section 34(1) of the PPA, in every procuring entity there shall be established a procurement management unit staffed to an appropriate level and that sub-section 4 required that the PMU shall be headed by a person with sufficient academic qualifications and experience in procurement functions. Further that Section 3(1) of the same PPA has defined a procurement specialist or expert.

Referring to EXA4 which shows the academic qualifications, he argued that the applicant was registered with the National Board for Materials Management as authorized supplies officer/stock verifier on 27/10/1993 and on 29/04/2011 he was registered with the PSPTB as an authorized procurement and supplies professional. That according to the laws and EXA4 collectively, the applicant had all the qualifications under the PPA and that his qualifications were not connected with Scheme of

Service rather they were under the PPA. He argued that the Scheme of Service provides for minimum qualification and that the Scheme of Service cited by the applicant was approved in 2014 but became operational in 2015 therefore his second promotion was in 2014 before the scheme became operational.

On the issue of Regulation 17 of the PSR, his rejoinder was that the regulation has been revoked on 24/06/2022 through GN No. 444/2022 Regulation 136 therefore the qualification under EXD3 scheme of service are not regulated under the PPA hence could not be used to do a comparison. On the argument that the applicant was not in acting position, his rejoinder submission was that the PW1 said that there was a substantive post and duty post. Admitting that the substantive post will not change the salary, Mr. Clemence argued that the employee will be entitled to other allowances hence this is not a new thing before the court. Further that according to A-3 the applicant was appointed by the Director General and according to A-5, salary slip of the applicant of 2010 shows that he is reporting to the Director General.

On the issue that the applicant could not prove his claim, he submitted that according to A-3 and A-8 and on balance of probabilities, the applicant has proved his case. However, he argued, the CMA, in

making her decision, did not involve the EXA8. He therefore reiterated his prayer that the application should be allowed because the applicant has been claiming the arrears and all this time the respondent was telling him they were working on his claim. It is only after he retired that they told him they can't pay him.

Having heard the parties' submissions and having thoroughly gone through the records of this application, the applicant's two legal issues as raised in his affidavit revolve around misapprehension of the adduced evidence during arbitration. On my part, having heard the parties, I see no dispute on the fact that the applicant was employed by the respondent and that in 2010 he was promoted to the position of HPMU (EXA3). Although Mr. Mkama vigorously challenged the validity of the terms of the letter in relation to the entitlements of the applicant, he did not dispute that the letter was issued by the respondent. It is also undisputed that in 2014, the applicant was subsequently promoted to the same position of HPMU following a change in the scheme of service of the respondent in 2014, a scheme which came into operation in 2015 after approval of the Treasury Registrar.

Acquainted with those facts and having analysed what is in controversy, the main issue to be determined first is the exact time

when the applicant became the Head of the Procurement Management Unit with regard to appointment letters EXA3 and EXA7 taking into consideration Mr. Mkama argument disqualifying the EX-A3 on the ground that it was not an appointment. After determining when the appointment was done, then I shall determine whether the appointment in 2014 (EX-A7) had a different effect from the one in 2010 (EX-A3) and whether the applicant is entitled to the salary arrears.

I will start with the exhibit A2 then the A3 and exhibit A7 which are two appointment letters that the parties herein are at logger heads on. EXA2 was a letter that appointed the applicant to the post of Procurement and Logistics Officer. In the details of the said letter, the new salary to that position was mentioned as Tshs. 1,400,000/- Tshs which was a salary at the respondent's salary scale TEA 6. In the year 2010, to be more precise, by a letter dated 05th March, 2010 (EXA3) the applicant was appointed as Head of Procurement Management Unit pursuant to the Second Schedule to the PPA. The EXA3 further detailed that the applicant had to ensure that he abides by the requirements of the PPA and its regulations, the guidelines and other documentation issued from time to time by the PPRA. He was to report to the Director General and the appointment was said to be based on performance and

subject to conditions detailed in the PPA and its Regulations. The applicant accepted the duties and obligations described therein. As at October 2010, the applicant was being paid a basic salary of Tshs 1,440,000/-. There is also EXA6 which is the salary slip of the applicant showing that at February 2015, he was paid a basic salary of Tshs. 4,500,000/-.

It would appear that according to EXA8, on 03rd March, 2010 the PSPTB wrote a letter to the respondent answering their letter with Ref No. CAB 20/157/01/VP1 dated 26th February, 2010 asking about the structure of the Procurement Officers. In the said letter, the PSPTB explained to the respondent that under Section 34(1)-(4) and Section 35(a)-(q) of the PPA, the procedures for establishing a PMU and its functions are elaborated. The letter was very categorical that the HPMU reports to the Director General and his line of answerability is direct and should not be a subordinate of other departments. In terms of remuneration, the letter was also clear that the HPMU is equated to Heads of Department and that there should not be disparity in terms of salaries and fringe benefits between PMU and other Heads of Departments/Directorate. The letter was received by the respondent on 05th March, 2010.

So what does this letter (EX-A8) tell us? The letter shows that by the time the applicant was promoted to the position of HPMU (EXA3) on 05th March, 2010, the respondent was aware that **one;** the position's reporting relationship was directly to the Director General and **two;** that the remuneration of HPMU is equated to Heads of Department and that there should not be disparity in terms of salaries and fringe benefits between PMU and other Heads of Departments/Directorate. At this point therefore, Mr. Mkama's argument that the exhibit EXA3 does not say that the applicant is entitled to same privilege as Head of Department and there was evidence that he was, is defeated by the EXA8 which was very clear as to the entitlements of the HPMU. More importantly so, it was the respondent that requested the PSPTB to advise her on the structure of the PMU and it was after the said letter was received, that the applicant was promoted to be the HPMU.

On the cited Regulation 17(5) of PSR which prohibits a person to be appointed, promoted or transferred to any public service post unless he holds such a qualification as may from time to time be specified as a qualification necessary for an appointment to the post in any approved scheme of service; I find the argument to be off context because what the applicant is claiming in this case is arrears of salaries after his

appointment as HPMU. He is not trying to equate positions or promote himself, he was undisputedly promoted vide EXA3 and his claim is only on what was his entitled salary as the Head of Unit according to the EXA8. Had the issue been promotion of the applicant (which in this case it is not), then this argument would have held water.

I have also noted Mr. Mkama's argument that it was after the recommendations by the PSPTB that the respondent was directed to comply with the law and regulations and the first thing the respondent did was to change the scheme of services because the Scheme of that time (2007 scheme) EXD3, did not have a position of Head of Procurement Unit, instead there was a Senior Procurement and Supplies Officer (EXD2 and EXA7). However, I have stopped to ask myself as to why would the respondent promote the applicant to the position that did not exist? Or why should the applicant be deprived of the entitlement of the position he served after being appointed for a mere reason that it was not in the scheme of service? Didn't the appointing authority act diligently? It is not easy to get answers to these questions because he was actually so promoted by the respondent herself therefore whether or not the scheme provided for is not relevant to defeat the applicant's claim of his salary arrears. I have also asked myself the difference

between the EXA7 and EXA3, they were both letters promoting the applicant to the position of HPMU. Although the EXA3 did not detail the salary but read together with the EXA8, he was entitled to the salary of Heads of Units.

Further to the above, as I have explained earlier, vide EXA3, the applicant was on March, 05th 2010 promoted to the position of HPMU. Whether or not that position was in the scheme of service is something to be explained by the Management of the respondent as to why they could do such a grave mistake of promoting someone to a position that did not exist. On my part and what the ends of justice call for, my task is to look at the evidence adduced regarding its relevancy and see whether the facts and evidence come up with the conclusion that the parties wish the court to arrive at. It would be highly unfair to have someone promoted to a position which he actually served, only to deny him of his entitlement because the same were not mentioned in the appointment letter. The negligence and irresponsibility of the author of the letter that appointed him to the position of HPMU in 2010 (EX-A3) cannot be formulated to deny someone what should be rightfully his. As long as there was a letter from PSPTB that explained the entitlements of the HPMU and the applicant was actually appointed after the letter was

received, then he is entitled to remunerations equivalent to those holding the same position in other units or directorates (EXA8).

As correctly argued by Mr. Mkama, it was the duty of the applicant to prove the allegations in this case. As far as this court is concerned, the applicant successfully proved his case vide EXA3 which was his promotion to the post of HPMU in 2010 and the entitlement of the said Head as of 2010 which according the EXA8 was equivalent to a Head of Department/Directorate. The only issue is to see what the other employees in the same were rank were paid and that would be what the applicant is entitled to.

On the above findings, it is conclusive that the applicant was promoted to the position of HPMU in 2010. The next issue is the salary that the applicant was entitled to from the time of his promotion. I have noted that none of the parties disputed the fact that the others employee in the same managerial position was Tshs. 4,500,000/- (EXA7). The other benefits included utilities allowance and housing allowance. According to the EXA5, the salary slip of the Head Procurement Management Unit also attracted a Housing Allowance of Tshs. 1,350,000/-, fuel allowance of Tshs. 560,000/-, electricity Tshs. 130,000/-, water Tshs. 50,000/- and Security at Tshs. 225,000/- and a

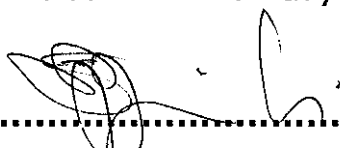
furniture allowance of Tshs. 416,667/- which makes a total of Tshs. 7,331,667/-.

I have also noted from 05th March, 2010 when he was promoted to the position of HPMU to the month of June, 2011 the applicant was paid a salary of Tshs. 1,400,000/- so the salary he was entitled to being Tshs. 7,331,667/- less Tshs 1,440,000/- he was paid, for this period the applicant's salary arrears was Tshs. 5,891,667/- times 15 months to June 2011, the total arrears at this period was Tshs. 94,266,672/-. There is also another period between July 2011 where he was paid tshs. 2,5000,000/- which made a salary difference of TShs. 4,831,667/- times 35 months making a salary arrear of Tshs. 169,108,345/-. Therefore in total the salary arrears is Tshs. Tshs. 94,266,672/- plus Tshs. 169,108,345/- making a total of Tshs. 263,375,017/-.

In conclusion therefore, this application has merits and it is hereby allowed. The award of the CMA is hereby revised. The respondent is ordered to pay the applicant his salary arrears at the tune of Tshs. 263,375,017/- which shall be subjected to statutory deductions of the difference in PAYE between the salary that the tax was deducted to the salary that was to be paid. The tax deductions shall be calculated only on the gross tax of Tshs. 1,129,800/- minus the tax of Tshs. 414,000/-

deducted at the old salary which is Tshs. 715,000/- times the 35 months of arrears which comes to Tshs. 25,053,000/-. This amount shall deducted from the total salary arrears and it to be paid to the relevant authority, the TRA. Having so deducted, the remaining total amount that the respondent shall pay the applicant is **Tshs. 238,322,017/- as net salary arrears.** It is so ordered.

Dated at Dar es Salaam this 10th day of October, 2022.



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S.M. MAGHIMBI
JUDGE

