IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 51 OF 2022

(Originating from Labour Dispute No. CMA/DSM/ILA/162/21/53/21)

BETWEEN

AMI AFRICA TANZANIA LIMITED ..... APPLICANT

VERSUS

NAFFIZ RATTANZA ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The application beforehand was lodged under the provisions of Section 91(1),(a),(b) and (c), Section 94(1)(b)(i) of the Employment and Labour Relations Act Cap 366 R.E of 2019 ("ELRA"), Rule 24(1), 24(2)(a),(b),(c),(d),(e) and (f); 24(3)(a),(b),(c) and (d) and 28(1),(c),(d) and (e) of the Labour Court Rules GN. No. 106/2007 ("The Rules"). The applicant moves this court for the following orders:

1. That, this Honourable Court be pleased to call for records and examine the proceedings of the Commission for Mediation and Arbitration at Ilala in Labour Dispute Number CMA/DSM/ILA/162/21/53/21 with a view to satisfy itself as to legality, propriety, rationality, logic and correctness thereof.

2. That, the Honourable Court be pleased to revise and set aside the CMA Arbitral Award made on the 17th January, 2021 by Honourable Igogo, M. Arbitrator, on the following grounds;-

(a) That the Arbitrator erred in law and fact in holding that the Complainant was not negligent in his conduct for failure to timely execute assigned duty.

(b) That the Arbitrator erred in law and fact in holding that, the Complainant was not guilty for failure to comply with the Respondent's business rules.

(c) That the Arbitrator erred in law and fact in failure to analyse evidence tendered by the Respondent and hence arrived at a wrong decision.

(d) That the Arbitrator erred in law and fact by awarding excessive compensation of 36 months without valid justification.

(e) That the Arbitrator erred in law and fact by failing to consider terms and conditions of employment which required the Respondent to work diligently.

The application is supported by an affidavit of Ms. Julieth Saro, an adult, Christian who is a Branch Manager of the Applicant's Company, dated a counter affidavit deponed by the applicant in person on the 22nd day of

March, 2022. Before this court, the applicant is represented by Ms. Caroline Mageni, learned advocate while the respondent was represented by Mr. Juma Maro, Personal Representative. The application was disposed by written submissions.

Brief background of the matter is that the Respondent, Naffiz Rattanzi was the Applicant's employee, employed since 1st October 2020 as Operational Manager. On what was alleged by the applicant to be negligence and failure to exercise diligently and expediently duty assigned to him by his superior without a reason, and intentionally procuring services of a third party contrary to Employer's business rules; disciplinary proceedings were initiated against the respondent whereby he was found guilty of the two offences he was charged with. He was eventually terminated from employment. Aggrieved by the termination, the Respondent referred a Dispute No. CMA/DSM/ILA/162/21/53/21 ("the Dispute") to the Commission for Mediation and Arbitration at Ilala ("CMA") alleging unfair termination of the contract. On the 17th January, 2022 the CMA issued an award in favor of the respondent holding that the Respondent's termination of his employment contract was substantively unfair, ordering the Applicant to pay the Respondent compensation equivalent to 36 months' salaries which amounts

to Tshs. 546,981,120. Aggrieved by the award, the applicant has lodged the current revision raising the following legal issues:

(a) Whether the Arbitrator was correct in holding that the Respondent was not negligent in his conduct while there was considered delay in executing assigned duty.

(b) Whether it was correct for the Arbitrator to hold that the Respondent was not guilty for failure to comply with the Applicant's business rules while the Respondent did not comply with the Applicant's business rules.

(c) Whether the Arbitrator properly analysed the evidence on record.

(d) Whether the Respondent is entitled to the excessive compensation awarded by the Arbitrator.

(e) Whether the Arbitrator properly analysed and considered the terms and conditions of employment applicable to the Respondent.

Having considered the submissions of the parties and the records of this revision, I find that the issues raised can be narrowed into two issues, one is on the fairness of the substance of the respondent's termination and two is on the legality of the compensation awarded to the respondent in

relation to both the law and the terms and conditions of employment applicable to the respondent.

Starting with the substance of the termination, Ms. Mageni submitted that the clause 10 of the EXD1 required the respondent to be diligent, punctual and timely when his employer assigns him work. Pursuant to clause 10 referred to above and given the position that the Respondent held at the time of his termination, he was required to put effort to ensure that the work assigned to him is diligently executed on time and without any delays. That the Respondent failed to adhere to this duty despite several reminders as evidenced by the emails tendered and admitted by the Commission as **Exhibit D2.** She then referred to Section 37 (2) of ELRA which requires termination to be based on valid reasons. She then submitted that the arbitrator failed to consider the position held by the Respondent at the time of his termination, the duty of care that the Respondent owed his employer the Applicant especially given the position he held in the company, and how negligent he was for not diligently working on his assigned duty on time. She then referred to the holding of the arbitrator on page 15 of the Award stated that: -

> *"it is the naked truth that Exhibit D2 reveals no period was provided for submitting the valuation report ... Relating the above scenario*

with the elements to prove negligence as mentioned earlier, it is clear that the complainant had no duty of care for writing an evaluation report rather than finding the auctioneers to evaluate them hence outsources as ordered....."

She then argued that the Respondent delayed in submitting the valuation report for 2 months whilst he had been engaged to do so on an urgent basis considering the emergency of the situation of the Applicant Company, which the Respondent, as the branch manager, was well aware of. That the Respondent knew that the Applicant company was struggling financially and that there was an urgent need to raise funds through the sale of Applicant trucks and at the best price available in the market, in order to cushion the company against adverse effects of the Covid-19 pandemic. Even though there was no mention of the time frame for the completion of the valuation task, the economic circumstance, and the financial situation of the company, surrounding the instructions, and several reminder emails, demanded urgent action. That the Arbitrator misled herself by failing to hold that the Respondent had a duty of care to ensure that the valuation report is presented in good time even though no period was specified. Two months

delay for a valuation report needed in order to help salvage the financial situation of the company is inordinate.

On the elements to prove negligence in labour disputes, Ms. Mageni referred the court to the case of **Twiga Bancorp (T) Ltd versus David Kanyila, Revision No. 346 of 2013** (unreported), her Ladyship Rweyemamu (as she then was) held as follows: -

"In my understanding of the general principle of the law on negligence, liability arises where: -

(i) There is a duty of care and a person breaches that duty as a result of which other person suffers loss or injury/ damage

(ii) A person acts negligently, when he fails to exercise that degree of care that a reasonable man/ person of ordinary prudence, would exercise under the same circumstances

(iii)Negligence is the opposite of diligence or being careful."

She then pointed out that the testimony of the Respondent at page 8 of the Award as AW1 under oath testified of his key and fundamental duties as operation manager to include ensuring the streamlining of the operations of the company, turning the loss entities to profit entities by making efficient operations and reduction of costs. These were also his key duties as the

Applicant's Branch Manager, and they imposed a crucial duty of care to ensure that he diligently acted in a manner that would alleviate the financial woes of the Applicant. She argued that the situation required that he expediently procures the valuation report in order to serve the company. Failure by the Respondent to conduct himself expediently and diligently breached a duty of care and made him liable for negligence against the Applicant. Even though the Respondent was not a final decision maker, he was a key person in ensuring that a decision in the best interest of the company is timeously reached, relying on the information availed by him.

In reply, Mr. Juma Maro who represented the respondent submitted that the evidence adduced during Arbitration clearly showed that the negligence referred to concerns the delay in submitting the evaluation report. That there was no delay whatsoever amounting to negligence on the part of the Respondent as indicated by the Applicant's in their submission. He argued that it was the testimony of both parties that the evaluation report was requested on 18th February 2021 Exhibit D2 and that the same was submitted on the 14th April 2021. The testimony of the Respondent (AW1) showed clearly that there was no delay as alleged because the first step was

to source the vendor and get the quotation for approval and that the quote was approved on the 9th March 2021.

He submitted further that the Respondent's testimony also showed that there was a requirement to pay the evaluator before starting to do the work which took time but also the evaluator lost her phone and data gathered for the valuation report and that the work had to be repeated as per Exhibit A3. This testimony was not disputed anywhere by the Applicant and so it remains intact. Counting from the date when the quote was approved on 9th March 2021 up to 14th April 2021 when the report was submitted there is a difference of one month and 5 days which the Respondent showed clearly in his testimony that it was a reasonable time given the nature of the assignment and what happened in between. That the Respondent's duty was confined to sourcing an evaluator as per Exhibit D2 clearly reflected at page 15 of the Award and not to do the assignment himself. He pointed out that as correctly submitted by the Applicant, there was no time frame within which the valuation report was required to be submitted making the alleged delay entirely arbitrary. That the stated urgency and follow up reminder emails are not reflected anywhere in the evidence adduced before the Commission as the only follow up submitted by the Applicant's witness (DW1) is Exhibit D3 which is an email dated 14th

April 2021 the same date the valuation report was submitted concluding that the applicant failed to show that the time frame was stated earlier was or included in the follow up reminders to show the urgency.

On the cited case of Twiga Bancorp (T) Ltd vs David Kanyila, Rev No. 346 of 2013 (unreported) whereby the applicant attempted to show that the elements required to prove negligence are met in the instant case, Mr. Maro argued that the Arbitrator applied the same elements required to prove negligence and was satisfied that the same don't apply in the instant case.

He submitted further that the Arbitrator was correct in holding that the Respondent was not guilty of failure to comply with the Applicant's business rules. That according to the evidence the alleged failure to comply with the business rules concerns the engagement of EDPAC as a vendor and that the Respondent cannot be held responsible for engaging a vendor contrary to CEVA business rules while he was not aware of such rules at the time EDPAC was engaged as a vendor. As correctly submitted by the Applicant, he argued, the EDPAC was engaged as a vendor in October 2020 as per the testimony of DW1 reflected at page 17 of the Award. This testimony concurs with that of the Respondent (AW1) who also testified that EDPAC was engaged as a vendor in 2020. DW1 testified as reflected at page 5 of the

Award and tendered Exhibit D6 to show that the Respondent became aware of CEVA business rules for evaluating new vendors during training in Nairobi in January 2021. That AW1 also testified as indicated at page 11 of the Award that he became aware of CEVA business rules in January 2021 when he travelled to Nairobi where he received training on the application of CEVA business rules in registering vendors. He emphasized that there is no offence at all of failure to comply with CEVA business rules whereas evidence clearly shows that EDPAC was registered as a vendor even before the Respondent became aware of such rules.

Having considered the submissions of parties, I will start by analysing the admission made by Ms. Mageni that at the time of the happening of the events, there was some adverse effects of the Covid-19 pandemic in the economy. She also admitted that there was no mention of the time frame that the applicant was given for the completion of the valuation task. Her argument being that under the economic circumstance, and the financial situation of the company surrounding the instructions, and several reminder emails, demanded urgent action. At this point, if Ms. Mageni admits that the country was in economic hardship and they were rescuing the situation be selling off property, one would not have expected the price of the property to be higher or the response to be as quick. After all, if there was no time

frame set for the applicant to complete the task, and having completed after two months, what was the justification of using that as a reason for termination. If no time was set, then it was on rule of reason to determine whether the delay was too much. This in my view would not suffice to be held as a reason for terminating the applicant on grounds of negligence as it did not fall under the reasons for termination under the Code.

The test under Rule 12(1)(a) of the Code falls into play, this is whether the employer contravened a rule or standard regulating conduct of employment. As it is admitted by Ms. Mageni, there was no specific time provided for under the task in question therefore the applicant thought the delay was unreasonable. The next would be under the circumstances, should this call for termination? That is when as argued by the respondent the role of Rule 12(2) if the Code will come into being, that first offence should not justify termination unless it serious to make continued employment intolerable. Since the rule is not coded, time not fixed and the period under scrutiny was a period of Pandemic Covid-19, then the seriousness of the delay did not warrant termination. I therefore agree with the arbitrator that termination of the respondent was substantively unfair.

Coming to the second issue, the legality of the relief in the award. At the onset, I find the compensation of 12 months' salary not to be disputed. I will therefore not dwell much on it. The issue is on the extra 24 months awarded according to the clause 10 of the EXD1.

It was Ms. Mageni's submission that the Arbitrator erred in granting the said compensation because Clause 10(2) of the Employment contract was a consensual agreement between the parties at commencement of the Contract which was reasonably incorporated to guide the interests of the parties. That the term is not contrary to any labour law but due to the job position of the Respondent, which granted access to sensitive and confidential information on the business practice of the Applicant, it is a reasonable practice to coin such term in the contract to safeguard risk of losing business to competitors in the market.

She continued to submit that the clause may be interpreted by reading the whole provision of Clause 10(2) and you will find that it is a contractual term more than a labour issue. More so, she argued, the clause did not bar the Respondent from seeking employment but only required him to notify the Applicant and obtain its consent. The Applicant humbly submits that it has never been notified by the Respondent of any employment opportunity

that he is pursuing or considering with a competitor, and neither has the Respondent ever sought consent from the Applicant to work or to even apply for an employment opportunity with a competitor. Neither was there a request for consent has been received and no consent has been delayed, withheld or denied. That the Arbitrator lacked jurisdiction to grant such compensation under labour laws. An Arbitrator is empowered to grant compensation only as per provision of section 40(1) of the Ac

She concluded that the excessive compensation awarded by the Arbitrator of 36 months amounting to Tshs. 546, 981,120/= is nothing but a severe punishment to the Applicant which is not the objective of the Labour Laws as provided under section 3 of the ELRA.

In reply, Mr. Maro submitted that the payment of 364,654,080 awarded by the Arbitrator as reflected at page 21 of the Award, is to compensate the Respondent for being denied the right to work as per clause 10 (2) of the employment contract. That since clause 10(2) is in the contract of employment which binds both parties, as rightly submitted by the Applicant was coined in the contract of employment to protect the interest of the Applicant because the Respondent held a senior position and if he crossed over to the competition it would harm the business of the Applicant.

On the Applicant's attempt to show that the Respondent had an avenue to ask for a waiver of such clause but we fail to understand as to why the Applicant failed to grant such waiver as from the time CMA F1 was served to them. His reply was that the value attached to this clause as far as protecting their business interest is concerned is what caused the Applicant not to waive the same clause right from the time when CMA F1 was served to them and such position was maintained during the entire period this labor dispute was pending before the Commission.

On my part, I am of the view that since the termination of the applicant was found to be substantively unfair, the award of compensation of 12 months' salaries is well justified under the provisions of Section 40(1)(c) of the ELRA. Therefore this part of the award is upheld.

Going to the award of 24 months under Clause 10(2) of the Employment contract, according to the arbitrator, the applicant denied the respondent right to work as per clause 10(2) of the EXD1. I find this to be the wrong interpretation of the clause of the contract. What the contract prohibited the respondent was to enter service/employment of a person operating the same or similar business as the applicant, 2 years after termination of the agreement and it is was subjected to the consent of the

employer. This means the applicant should have shown proof that he attempted to enter into another business and the employer denied him. After all, the terms of the contract were clear at the inception of the contract and the respondent subjected himself to those terms. He cannot deny them now and further that the respondent could have procured employment from another company not engaged in similar business as that of the applicant. Therefore the employer was not under obligation to compensate the employee anything. This part of the award, where the respondent was awarded 24 months compensation is hereby revised and set aside.

As for the remaining part of the award whereby the CMA found the termination of the respondent to be substantively unfair is hereby upheld. The applicant is still ordered to pay the respondent a compensation equivalent to 12 months' salary calculated at Tshs 15,193,920/- X 12 months which equals to Tshs 182,327,040/-. Therefore the applicant shall pay the respondent a sum of Tshs. **182,327,040/-** as compensation for unfair termination. The application is partly allowed to the extent explained.

Dated at Dar es Salaam this 20th day of October, 2022.

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S.M. MAGHIMBI
JUDGE