IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 355 OF 2022

AL – RAHMA DEVELOPMENT COMPLEX..... APPLICANT

VERSUS

MIZA ABDALLAH UKASHA..... RESPONDENT

JUDGMENT

K.T.R, Mteule, J

15th February, 2023 & 03rd March, 2023

In the Commission for Mediation and Arbitration of Pwani (CMA), the Respondent lodged a complaint alleging breach of employment contract and claiming from the Applicant some remaining months salaries, one month's salary in lieu of notice and twelve months salaries as compensation for breach of contract.

The Respondent was employed by the applicant as a teacher. On 1/2/2022 the parties reduced their employment contract into a one-year term written contract which was to end on 31 January 2023. Due to an alleged nonperformance by the respondent, the applicant decided to terminate the contract.

Being dissatisfied with the way the employment contract was terminated, the respondent referred the dispute to the CMA. The CMA

found that the applicant was not fairly terminated on reason that the applicant did not follow the procedure of termination provided by the law. The arbitrator awarded the respondent **TZS 5,843,571.00** being the amount of salaries remaining from the contractual term.

Being dissatisfied with the award, the applicant preferred this application for revision. The affidavit in support of this application contains 4 grounds of revision. All these grounds of revision are challenging the holding of the arbitrator in finding the applicant to have terminated the respondent without complying with the procedure.

The respondent filed a counter affidavit in which all the material facts of the affidavit were disputed.

The application was heard by a way of oral submissions where the Applicant was represented by Mr. Said Ali Said, Advocate while the Applicant was represented by Mr. Majid Matitu, Advocate.

In arguing for the application, Mr. Said submitted that the applicant complied with the provision of **Section 37 (2) a, b, and c of the Employment and Labour Relation Acts, Cap 366** during the termination. According to him, the reason for termination was insufficient performance of the Respondent and this was witnessed by DW1 Shafii Salum who told the CMA that there were discussions about the poor performance prior to termination. He submitted that the

procedure of termination was met after being satisfied that the respondent was incompetent to deliver to the students.

Regarding aspect No. 2, that the arbitrator erred in deciding in favour of the respondent on alleged noncompliance with **Reg. 18 (2) of the Employment and Relations Act Code of Good Practice, Rule, G.N. No. 42 of 2007,** he submitted that according to this provision, if necessary, the employer can train an employee. In his view, it does not make it mandatory for an employer to train an employee because sub-section 3 of the same section allows reasonable time to be given to improve. Mr. Said is of further view that the time depends on the nature of the job. According to him, the respondent was employed for a specific period of one year only and therefore to give him a time for training will render the applicant suffer loss due to her non-performance. He submitted that the nature of the job itself does not give a room for employer to train.

Mr. Said submitted further that, poor performance in delivery cannot be cured by training. According to him, these arguments of arbitrator do not hold water and prayed for this Court to quash and set aside the decision.

On the other hand, Mr. Majid, Advocate, having adopted the counter affidavit as part of his submissions, stated that on 9/3/2022 the Applicant decided to terminate the respondent's employment contract on ground of poor performance. According to him, the applicant never issued any job description to the respondent. He submitted that it is a statutory obligation that each employer should give job description to each employee pursuant to **section 15 (1) (c) of the Employment and Labour Relations Act Cap 366 of 2019 R.E**.

It is the submission of Mr. Majid that the applicant is required to have employment policy which includes the aspect of developing the staff as per **Section 7(a) (c) of the Employment and Labour Relations Act**. According to him, the applicant has a legal duty to provide training before terminating an employee on grounds of poor performance with a reasonable time to improve. To support his argument he cited **Rule 18(2) (3) of Employment and Labour Relations Act, (Code of Good Practice, Rule) G.N. No. 42 of 2007**.

Mr. Majid submitted that no evidence adduced to show that there was such a training and time for improvement and there was no fair opportunity for the respondent to meet performance. According to him, the act of the employer contravened **Rule 17(1) (e) of the Employment and Labour Relations Act Code of Good Practice**

Rules G.N. No. 42 of 2007. He therefore prayed for the Court to uphold the award of the CMA.

Mr. Said made a rejoinder. According to him, **Section 15 (1) (c)** which is read by the respondent's counsel is not applicable and it was not a center of dispute. He insisted that it is undisputed fact that the Respondent was poor in performance.

He reiterated his submission in chief and stated that **Rule 18(2) and (3) of G.N. No. 42 of 2007** requires an employer to provide time to improve but it depends on the nature of the job. According to him it does not make it mandatory for the employer to do so.

The issue before me is whether the applicant has established sufficient grounds for this court to revise and set aside the decision of the CMA.

To answer the above reason, the aspects of procedural fairness and substantive fairness will be considered.

Starting with fairness of reason or substantive fairness, it is on record that the arbitrator found unfairness in the reasons of termination. The arbitrator considered the evidence on record and found the applicant to have been terminated because of an alleged non-performance but according to the arbitrator, there was no sufficient evidence given by the respondent to prove that there was actual poor performance apart from

the collection of information from students and poor examination results of the students.

Section 37 (2) of the Employment and Labour Relations Act, Cap 366 of 2019 R.E regards termination of employment to be unfair if the employer fails to prove that the reason for termination is valid and fair. This means, it is the duty of the employer to prove the fairness of the reason.

I have gone through the evidence of the respondent, what the arbitrator observed in actually what transpired. The only evidence which led to the employer's conclusion about poor performance in the information they gathered from the students and the unsatisfactory results of the examination. To what extent were the students capable to measure the performance of a teacher left so much questions to be desired. I would not subscribe to the style of making a conclusive decision on the performance of a teacher by consulting the students. Further to this, it was not explained as to whether the only reason of the student's failure was poor teacher's delivery. There was no explanation as to whether there was any agreement that the only performance measurement will be students' good examination results.

The Respondent's counsel argued that since there was no job description, the respondent could not have been properly measured. I

agree with this unchallenged assertion because, performance assessment must be done according to the job description and target offered and agreed. In the CMA, there was no any evidence to explain which system or policy for performance assessment was being used to measure the performance of the employees.

From the aforesaid, I agree with the arbitrator that there was no sufficient reason to justify performance failure by the respondent.

Regarding procedure of termination, the arbitrator found that the procedure was not followed. The arbitrator noted several legal procedures which were not taken into consideration by the applicant prior to termination of the respondent's employment. Among the legal procedures the arbitrator found to have been not adhered to, are the procedures enumerated under **Rule 18 of the Employment and Labour Relations (Code of Good Practice) Rules G.N. No. 42 of 2007. Sub Rule (6) of G. N. No. 42 provides:-**

> *"(6) Prior to finalising a decision to terminate the employment of an employee for poor work performance, the employer shall call a meeting with the employee, who shall be allowed to have a fellow employee or trade union representative present to provide assistance."*

The above subrule 6 requires a meeting with an employee to discuss about the poor performance. From the CMA record, this was not done and the arbitrator noted the same non compliance with the procedure.

I agree with the applicant's counsel that training may not always be suitable measure for some positions which require urgent action to rescue the degree of required professional standard in an organization. But at least there should have been a compliance with **Rule 18 (6)** to offer the employee a right to be heard.

From the above analysis, I agree with the findings of the arbitrator. All the grounds raised in the affidavit are not founded. As such, the issue as to whether the applicant has established sufficient grounds to warrant revision and setting aside of the decision of the CMA is answered negatively.

From the foregoing, this application lacks merit. The application is dismissed accordingly. The award of the CMA is hereby upheld.

No orders as to costs. It is so ordered.

KATARINA REVOCATI MTEULE

JUDGE

03/03/2023