

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

REVISION APPLICATION NO. 447 OF 2022

*(Arising from an Award issued on 13/10/2022 by Hon. Abdallah M, Arbitrator, in Labour dispute No.
CMA/DSM/ILA/446/181/2021 at Ilala)*

LA GLOIRE DE DIEU TRADING & TRANSPORT LTD APPLICANT

VERSUS

ALOYCE METHREW MTUI RESPONDENT

JUDGMENT

*Date of last Order: 07/03/2023
Date of Judgment: 24/03/2023*

B. E. K. Mganga, J.

Brief facts of this application are that, on 13th October 2021, Aloyce Methew Mtui, the respondent, filed the dispute at the Commission for Mediation and Arbitration at Ilala complaining that he was unfairly terminated by the La Gloire De Dieu Trading & Transport Ltd, the abovementioned applicant. In the Referral Form(CMA F1)respondent indicate that there was no valid reason and that procedures for termination were not followed. In the said CMA F1, respondent indicated that he was claiming to be reinstated without loss of remuneration and further that be

paid TZS 800,000/= being 2 months' salaries, TZS 400,000/= being one month salary in lieu of notice, TZS 800,000/= being 2 months' leave pay, TZS 323,101 being severance pay, TZS 7,200,000/= being 18 months' salary compensation and be issued with a certificate of service. He also indicated that his employment with the applicant commenced on 21st March 2019 and that the dispute arose on 16th September 2021.

The dispute was unsuccessfully mediated by Hon. Kalinga, Mediator who, on 10th November 2021, issued a certificate of non-settlement (CMA F6) that was signed by the respondent and Gidion Godfrey on behalf of the applicant. Due to failure of mediation, the matter was referred to arbitration stage before the arbitrator. In compliance with Rule 24 of the Labour Institutions(Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007, parties filed their respective opening statements. In her opening statement, applicant stated that respondent was employed by Congo Oil Business and that there was no termination, rather, he was suspended for failure to submit his driving certificates.

Based on what was stated by the parties in the opening statements, on 2nd March 2022, by consent of the parties, five issues were drafted namely, (i) whether there was employment relationship

between the parties, (ii) whether the complainant was suspended or terminated, (iii) whether there was reason for suspension or termination, (iv) whether procedures for suspension or termination were followed and (v) to what relief(s) are the parties entitled to.

On 13th October 2022, Hon. Abdallah M, Arbitrator, having heard evidence and submissions from both sides issued an award that respondent was an employee of the applicant. The arbitrator held further that respondent was suspended for unspecified period without pay and that procedures were not adhered to. Based on those findings, the arbitrator held that respondent was entitled to be paid salary from August 2021 up to the date applicant will make a different decision in relation to suspension. Having so held, the arbitrator proceeded to award the respondent to be paid TZS 6,000,000/= and that the said amount will continue to increase up to the date applicant will make a final decision in relation to employment of the respondent.

Applicant was aggrieved with the said award hence this application for revision. Dieudonne Mukendi, the Director of the applicant filed his affidavit in support of this application containing raised three issues namely:-

1. *Whether it was proper for the Commission to determine the dispute of fairness of suspension while the dispute referred to it by the respondent according to CMA Form 1 was for unfair termination of employment.*
2. *Whether it was proper for the Commission to grant unclaimed reliefs to the respondent.*
3. *Whether it was proper for the Commission to issue an award in favour of the respondent after finding out that the respondent was not terminated by the applicant.*

On the other hand, respondent filed both the Notice of Opposition and his Counter Affidavit resisting this application.

When the application was called on for hearing, applicant was represented by Keneth Mwangoka and Joseph Basheka, her Legal officers while respondent was represented by Jimmy Mnkeni, from CHAWAMATA, a Trade Union.

Arguing in support of the application, Mr. Basheka submitted on the 1st issue that in CMA F1 respondent indicated that the dispute related to termination and that he did not file the dispute relating to suspension. He submitted further that the arbitrator was bound by pleadings of the parties and confine herself to what was pleaded in CMA F1. To support his submissions, he cited the case of ***Mexon's Investments Ltd v. DTRC Trading Co. Ltd***, Civil Appeal No. 91 of 2019 CAT (unreported). Mr. Basheka went on that in his evidence, respondent testified that he was

unfairly terminated and that he did not testify that he was suspended but the arbitrator issued an award for unfair suspension under Section 40 of the Employment and Labour Relations Act[Cap. 366 R.E. 2019].

In regard to the 2nd issue Mr. Basheka submitted that it was not proper for the arbitrator to grant respondent unclaimed relief of salaries for the period he was suspended. He cited the case of ***Tanzania Cigarette Company Ltd v. Reuben Carlo***, Revision No. 746 of 2019 HC (unreported) and ***Melchiades John Mwenda V. Gizelle Mbaga (Administratrix of the Estate of John Japhet Mbaga - deceased) & 2 Others***, Civil Appeal No. 57 of 2018 CAT (unreported) to support his submissions.

In arguing the 3rd issue, Mr. Basheka submitted that it was not proper for the arbitrator to issue an award in favour of the respondent after finding that he was not terminated but he was suspended. In his submissions, Mr. Basheka conceded that while under suspension, respondent was not paid salary. He conceded further that respondent filed the dispute after one month of suspension and that the dispute was concluded after 13 months but at all that time respondent was not paid his salaries. He conceded further that, a suspended employee continues to enjoy his rights including salaries and that since respondent has not been

terminated, he is employee of the applicant. He concluded his submissions that the arbitrator was supposed to strike out the dispute.

Mr. Mnkeni for the respondent submitting on the 1st issue, conceded that in CMA F1, respondent indicated that the dispute relates to unfair termination but in his evidence, respondent testified that he was suspended for unspecified period and that he was claiming to be paid unpaid salaries. Mr. Mnkeni submitted further that respondent took the unspecified period suspension as unfair termination.

On the 2nd issue, Mr. Mnkeni submitted that respondent indicated in the CMA F1 and the list attached thereto, the relief he was claiming. He therefore argued that the reliefs were properly awarded. Upon being shown the list, Mr. Mnkeni conceded that a certificate of service cannot be issued while there is no termination.

On the 3rd issue, Mr. Mnkeni submitted that failure of the applicant to pay the respondent salary amounted to termination. He added that it was not proper for the applicant to suspend respondent without pay.

In rejoinder, Mr. Mwangoka, also the legal officer of the applicant submitted that in his evidence, respondent testified that he was claiming to be paid 2 months' salaries. Mwangoka conceded that it was not proper for

the applicant to suspend respondent without pay and that applicant is not entitled to forfeit salary of the respondent while on suspension.

I have examined evidence in the CMA record and considered submissions made on behalf of the parties in this application and wish to point out that, there is no dispute that respondent filed the dispute relating to fairness of termination as indicated in the CMA F1. It is also undisputed that respondent did not file the dispute relating to fairness of suspension. Therefore, it was wrong for the parties and the arbitrator to draft issues attracting determination of fairness of suspension. In short, in drafting issues relating to fairness of suspension, the arbitrator started with a wrong footing hence a wrong conclusion. The arbitrator and the parties were supposed to confine themselves on what was pleaded by the respondent. See. [The Registered Trustees of Islamic Propagation Centre \(Ipc\) v. The Registered Trustees of Thaaqib Islamic Centre \(Tic\)](#), Civil Appeal No. 2 of 2020, CAT (unreported) and [Yara Tanzania Limited V. Ikuwo General Enterprises Ltd](#), Civil Appeal No. 309 of 2019, CAT(unreported). In the [IPC's case](#), supra, the Court of Appeal held that: -

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... For the sake of certainty

and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties”.

In [Yara Tanzania Limited case](#) (supra) the Court of Appeal quoted its earlier decision in [Barclays Bank T. Ltd vs Jacob Muro](#), Civil Appeal No. 357 of 2019 [2020] TZCA 1875 that:-

*"We feel compelled, at this point, to restate the time-honored principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored- See **James Funke Ngwagilo v. Attorney General** [2004]T.L.R. 161. See also **Lawrence Surumbu Tara v. Hon.Attorney General and 2 Others**, Civil Appeal No.56 of 2012; and **Charles Richard Kombe t/a Building v. Evarani Mtungi and 3 Others**, Civil Appeal No. 38 of 2012 (both unreported)".*

It is my conclusion therefore that since respondent did not indicate in the CMA F1 that the dispute also relates to fairness of suspension, it was an error on the part of the arbitrator to include issues relating to fairness of suspension and proceed to determine those issues.

It was submitted on behalf of the respondent that respondent took the unspecified period suspension as unfair termination. It is my view that, that argument would have been valid if respondent could have testified that upon being suspended without pay, he took it as termination. Unfortunately to the respondent, that is not in his evidence. He cannot therefore claim that he was constructively terminated. It is settled law that the court will grant only a relief which has been prayed for as it was held in the case of *Melchiades John Mwenda vs Gizelle Mbaga & Others* (Civil Appeal 57 of 2018) [2020] TZCA 1856. Since respondent did not plead in the CMA F1 fairness of suspension or claim unpaid salary due to unspecified period of suspension, it was an error on part of the arbitrator to award him based on suspension.

I have carefully read the suspension letter dated 16th September 2021(exhibit P3) and find that respondent was suspended without pay for unspecified period. The said letter was written by **La Groire De Diue Trading and Transport Limited**, the applicant. As I have pointed hereinabove, initially applicant indicated that respondent was not her employee as a result, one of the issues that was drafted was whether, there was employment relationship between the parties. I have read evidence of the parties and find that, based on exhibits that were tendered

by the respondent there was employment relationship as was correctly held by the arbitrator but there was no termination. Since respondent was suspended for unspecified period without pay, and since applicant has not terminated employment of the respondent, then, respondent is still an employee of the applicant. Respondent can, if he wishes, claim his rights based on unspecified period suspension without but he may only do so after complying with the law.

For the foregoing, I hereby allow the application and set aside the CMA award.

Dated at Dar es Salaam on this 24th March 2023.



B. E. K. Mganga
JUDGE

Judgment delivered on this 24th March 2023 in chambers in the presence of Jimmy Mnkeni, from CHAWAMATA, a Trade union for the Respondent but in the absence of the Applicant.



B. E. K. Mganga
JUDGE