IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 76 OF 2023

SMART INDUSTRY LIMITED ..... APPLICANT

VERSUS

RAJABU RAMADHANI MBONDE & 11 OTHERS ..... RESPONDENTS

RULING

Date of last order: 22/05/2023
Date of Ruling: 29/05/2023

B. E. K. Mganga, J.,

On 10th February 2021, Rajabu Ramadhani Mbonde and 11 others, the herein respondents, filed Labour dispute No. CMA/DSM/KIN/77/21/82/21 before the Commission for Mediation and Arbitration (CMA) at Kinondoni alleging that on 2nd February 2021, Smart Industry Limited, the herein applicant unfairly terminated their employment. In the Referral Form (CMA F1) respondents indicated that they were claiming to be paid TZS 34,320,000/= being compensation for terminal benefits including one-month salary in lieu of Notice, leave allowance, eleven months salary as compensation and be issued with certificate of service and any other relief. At CMA, applicant argued that she did not terminate employment of the respondent, rather, respondents were absent from office for more

than five days without notice and that they were claiming for hours of work to be changed.

The dispute between the parties was heard on merit as a result, on 28th February 2023, Hon. Kiangi, N. Arbitrator, issued an award that termination was unfair both substantively and procedurally. Having so found, the arbitrator awarded respondents be paid 11 months' salaries each according to their respective contracts the whole award amounting to TZS. 25,355,000/= and that respondent should be issued with certificate of service.

Applicant was aggrieved by the said award hence this application for revision. Applicant filed the Affidavit of Hassan Fayad, her principal officer to support the Notice of Application. In the said affidavit, the deponent raised five grounds namely:-

1. *That, the arbitrator erred to in fact in holding that applicant terminated employment of the respondents without proof thereof.*
2. *That the Honourable Arbitrator erred in fact in hold that the dispute was on unfair termination while in CMA F1 respondents claimed that it was breach of contract which does not require disciplinary hearing to be conducted.*
3. *That the Nonourable Arbitrator erred in fact by ignoring admissions by the respondent that applicant met their employment needs.*
4. *That the Honourable Arbitrator erred in fact by entertaining a dispute that was neither on breach of contract nor unfair termination but on working hours.*

5. *That the Honourable Arbitrator erred in law and fact in awarding respondent 11 months salary compensation*

In resisting the application, respondents filed their joint counter affidavit.

When the application was called on for hearing, Ms. Norah Marah and Mr. Obeid Mwandambo, learned advocates appeared for and on behalf of the applicant while Mr. Mashiku Sabasaba appeared for and on behalf of the respondents.

Before the learned counsel have conversed the grounds of revision filed by the applicant, I went through the CMA record and find that exhibits D1, D2 and D3 were tendered by DW1 and that no opportunity was given to the respondents to comment thereof prior reception of those exhibits as evidence. I also found that, when PW2 was testifying, after cross examination, arbitrator asked witness questions and thereafter re-examination continued. With those observations, I asked both counsel to address the court whether, that procedure was proper and the effect thereof.

Responding to the issues raised by the court, Mr. Mwandambo learned counsel for the applicant submitted that the omission to ask respondents to comment whether they had objection or not before those documents were admitted as exhibit is fatal. Counsel for the

applicant submitted that, those exhibits are supposed to be expunged. He was quick to submit that, if exhibits D1, D2 and D3 are expunged, there will be no evidence to be relied upon by the applicant. He therefore prayed that CMA proceedings be nullified and order trial de novo before a different arbitrator.

On evidence of PW2, learned counsel for the applicant submitted that Rule 25(3) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007 was violated. Counsel for the applicant submitted that, applicant was denied right to be heard because she was not afforded right to cross examine after questions by the arbitrator. He added that, if evidence of PW2 is expunged, that will also affect the case for the respondents.

In responding to the issues raised by the court, Mr. Sabasaba, learned counsel for the respondents submitted that it is true that exhibits D1, D2 and D3 were improperly admitted in evidence. He was quick to submit that, the omission did not affect the award. He added that, had the respondents been asked, they could have not objected to admission of those exhibits.

Submitting in relation to evidence of PW2, counsel for the respondents submitted that Rule 25(3) of GN. No. 67 of 2007 (supra) was not complied with. He went on that, the omission did not affect the

award. When probed by the court as whether evidence of PW2 was considered in the award, he readily conceded that it was. Upon further reflection, counsel for the respondents submitted that the omission denied applicant right to be heard. He therefore prayed that CMA proceedings be nullified and order trial *de novo* before a different arbitrator.

I entirely agree with submissions by both counsel that the omission in both situations is fatal. On the first place, exhibits admitted in evidence without asking the other party whether there is objection or not cannot be said was properly admitted. Those exhibits were admitted in violation of right to be heard. See the case of of ***Mhubiri Rogega Mong'ateko vs Mak Medics Ltd*** (Civil Appeal 106 of 2019) [2022] TZCA 452 and held *inter-alia*:-

> *"It is trite law that, a document which is not admitted in evidence cannot be treated as forming part of the record even if it is found amongst the papers in the record… Therefore it is clear that the two courts below relied on the evidence which was not tendered and admitted in evidence as per the requirement of the law. This omission led to miscarriage of justice because the appellant was adjudged on the basis of the evidence which was not properly admitted in evidence…"*

See also the case of ***M.S SDV Transami Limited vs M.S Ste Datco*** (Civil Appeal 16 of 2011) [2019] TZCA 565, **Japan International**

Cooperation Agency vs. Khaki Complex Limited [2006] T.L.R 343 and *Imran Murtaza Dinani vs Bollore Transport & Logistics Tanzania Ltd* (Rev. Appl 253 of 2022) [2023] TZHCLD 1170.

Apart from that, evidence of PW2 was recorded in violation of Rule 25(3) of GN. No. 67 of 2007 (supra). It is clear that in terms of Rule 25(2) of GN. No. 67 of 2007(supra) the arbitrator can ask a witness some questions. But, after asking questions to the witness, the arbitrator must comply with the provisions of Rule 25(3) of GN. No. 67 of 2007 (supra) by giving an opportunity the person who was cross examining the witness to ask further questions taking into account questions asked by the arbitrator. The said rule 25(3) of GN. No. 67 of 2007 (supra) provides: -

> *"25(3) The Arbitrator shall give the party cross-examining, a further opportunity to ask questions arising from the Arbitrator's questions and the party conducting the re-examination may take into account all questions asked by the party or the Arbitrator."*

In the application, after asking questions, the arbitrator did not give opportunity the applicant to cross examine PW2, instead, gave opportunity to the respondents to continue with re-examination. That procedure, as was correctly submitted by both counsel, offended the law and denied applicant right to be heard. There is a litany of case laws both by this court and the Court of Appeal that, any decision arrived at

in violation of right to be heard, cannot be left to stand even if the same decision would have been arrived at without violation of that right. See for example the case of ***Abbas Sherally & Another vs Abdul S. H. M. Fazalboy***, Civil Application No. 33 of 2002, *Danny Shasha vs Samson Masoro & Others* (Civil Appeal 298 of 2020) [2021] TZCA 653, *Margwe error & Others vs Moshi Bahalulu* (Civil Appeal 111 of 2014) [2015] TZCA 282, *Tabu Ramadhani Mattaka vs Fauzia Haruni Saidi Mgaya* (Civil Appeal 456 of 2020) [2022] TZCA 84, *Alpitour World Hotels & Resorts S.P.A. & Others vs Kiwengwa Ltd* (Civil Application 3 of 2012) [2012] TZCA 138, *North Mara Gold Mine Limited vs Isaac Sultan* (Civil Appeal 458 of 2020) [2021] TZCA 755 and *MANTRAC Tanzania Limited vs Raymond Costa* (Civil Appeal 90 of 2018) [2022] TZCA 75 to mention but a few. In the cited cases, the Court of Appeal cited and quoted its earlier decision in the ***Fazalboy case*** (supra) that:-

> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

For the fore going, I hereby agree with both counsel and nullify CMA proceedings, quash and set aside the award arising therefrom. I hereby return the CMA record to CMA so that the dispute between the parties can be properly heard *de novo* by a different arbitrator without delay.

Dated at Dar es Salaam on this 29th May 2023.

B. E. K. Mganga
JUDGE

Ruling delivered on this 29th May 2023 in chambers in the presence of Norah Marah, Advocate for the Applicant and Rajabu Ramadhani Mbonde, David Elly Dallas, Farida Osebius Matei, and Anna Martin Mwaipiana, the 1st, 2nd, 3rd and 4th respondents.

B. E. K. Mganga
JUDGE