IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 317 OF 2022

ASSEMBLE INSURANCE TANZANIA LIMITED ..... APPLICANT

VERSUS

INNOCENT TIGANO MASSINDE ..... RESPONDENT

(From the decision of the Commission for Mediation and Arbitration of DSM at Kinondoni)

(Mpulla, Arbitrator)

Dated 16th August, 2022

in

REF: CMA/DSM/KIN/121/2021

JUDGEMENT

10th & 22nd February, 2023

Rwizile, J

In this application, this Court has been asked to revise and set aside the award of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/KIN/121/2020 dated 16th August 2022.

Facts in brief, can be stated that the respondent was employed by the applicant on 01st March, 2019 as a Senior Underwriter and Reinsurance – General Business with a monthly salary of TZS. 4,218,720.00 (exhibit D6) until on 17th May, 2021 when he was terminated. His contract of unspecified period of time, was terminated due to breach of company policy, gross negligence and Gross misconduct.

He was not satisfied with termination. He filed a labour dispute at CMA, claiming for 60 months salaries and other statutory benefits due to unfair termination. Upon a full hearing, the CMA found that termination was unfair. The applicant was therefore ordered to pay the respondent TZS. 101,249,280.00 as a compensation for unfair termination, which is equal to 24 months remuneration. The applicant was not satisfied with the award, hence this application in protest.

The affidavit that supported this application advanced the following grounds-

1. *That the CMA erred in law and in fact to hold that there was no valid reason for termination in that: -*

    i. *The CMA erred in holding that the applicant has failed to prove the first and forth charges.*
    ii. *The CMA erred in holding that the respondent's termination was not valid because it was founded on a non-existence policy.*
    iii. *The CMA erred in holding that the Managing Director's decision to terminate the complainant departed from the recommendation of the disciplinary committee without assigning reasons for such departure.*
    iv. *The CMA erred in holding that no evidence was submitted to prove gross negligence.*

v. *The CMA erred in holding that not all elements of negligence were proved*

2. *For the holding that the termination was not procedurally fair in that: -*
   i. *The CMA erred in holding that the procedure was flawed for failure of the witnesses to tender documents in the disciplinary hearing.*
   ii. *The CMA erred in holding that the procedure was flawed because the disciplinary hearing was chaired by ATE i.e., the chairperson was not impartial to act as a chairperson.*
3. *By awarding the respondent 24 months salaries as compensation without assigning any reason for going beyond the threshold set by law.*
4. *That the honourable Commission did not put to test all the evidence of the respondent before it.*

In oral arguments before this court, MS Blandina Kihampa from ASYLA Attorneys was for the applicant, while Mr. Hamisi Katundu from Supremo Law Attorneys appeared for the respondent.

MS Blandina on the validity reason for termination submitted that; the insurance companies are regulated by law and the agency known as TIRA. She stated that the insurance business is governed by principles of utmost good faith and insurable interest. It was her view that, in the minutes of the disciplinary hearing- exhibit D7 the same were reflected.

She submitted that the respondent admitted during underwriting the motor vehicle in question, applied a different policy. It was insisted by the learned counsel therefore that the respondent breached the policy by not applying the utmost good faith principle and the insurable interest principle as well.

She stated further that the respondent when underwriting the vehicle did not disclose all necessary information. For instance, it was added, the vehicle registration card was not seen. It had, it was found, two different owners. On cementing the point, she referred cases of **Dr. Loy Job Mbwilo v Richard Mwera Matiko and Another**, Civil Appeal No. 07 of 2018 and **Alliance Insurance Corporation Ltd and Another v Tirima Enterprises Ltd**, Civil Appeal No. 290 of 2020.

She stated further that the policy holder has to show legal relationship over the subject of insurance. It was said, evidence of Dw1 and Dw2 as well as an investigation report- exhibit D4 proved so. It was shown by evidence, she argued that the owners of the motor vehicle were Innocent Massinde and Jubilee Insurance not Abet Co. Ltd. In that, she was of the view that the policy existed by the law governing insurance business. She added, the case relied upon by the CMA to find otherwise was out of context.

Miss Blandina submitted further that the arbitrator erred to hold that rule 13(5) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 was not adhered to. She stated that the investigation report contained extracts of the motor vehicle registration card, cover note and massages sent by the respondent to the broker in the underwriting process. In her view, the documents proved that there was non-disclosure of information and the policy was breached.

She continued to argue that the applicant was not bound by the disciplinary hearing recommendations, since the respondent's breach was fundamental. Termination, in the view of the learned counsel, was an appropriate sanction for the two charges proved.

She submitted further that the respondent as an underwriter was to observe the principle of the duty of care to the applicant. Ms Blandina was keen that the respondent knew and did not comply with the principles and as a result issues over the claim came by. She stated that exhibit D7 also proved elements of negligence. In her view, termination was fair and referred the decision of Tanzania Insurance Ombudsman which proved there were unethical issues in the underwriting practice by the respondent.

On validity of procedure, Ms Blandina submitted that the investigation report contained all relevant documents in relation to the motor vehicle in question as tendered at the disciplinary hearing. ie registration card and two cover notes (1st insurance of motor vehicle and insurance made through a broker).

It was as well argued that, it was not wrong for the chairperson from ATE to chair the disciplinary hearing. It was submitted that it is not enough to look at the relationship between the Chairperson and the employer. The learned counsel made it clear that, it is the duty of the employer to appoint the senior officer in the same institution or a third party. In this, she referred the case of **Tiger Brands Fields Services (PTY) Ltd v CCMA and 2 Others,** JR 2650/2010. In her view rule 13(4) of G.N. No. 42 of 2007 was followed and that procedure for termination was followed.

The learned counsel also attacked the reliefs in the award. Here, she held the view that compensation of 24 months in terms of salaries was illegal as there were no reason set by the arbitrator. She asked this court to apply the case of **Veneranda Maro and Another v Arusha International Conference,** Civil Appeal No. 322 of 2020.

In Reply, Mr. Khamis submitted that Dw1 testified that the applicant had no underwriting policy and no party of policy was proved to be admitted.

He stated that every insurance company should have its underwriting policy as required under rule 12(1)(a)(b) of G.N. No. 42 of 2007. In his view, breach of policy was not proved.

secondly, he submitted that neither at the disciplinary hearing nor at the CMA no documents were tendered. In his view, it could not be possible to figure out how the breach was made by the respondent. He stated according to rule 13(5) of G.N. No. 42 of 2007 evidence must be tendered.

He continued to argued that although it was alleged that there were extract messages to the broker from the respondent but they were not tendered. In his view, the applicant did not prove at the disciplinary hearing the offences charged. Further, Mr. Khamis was of the opinion that, since there were allegations of having two different owners of the motor vehicle under question, it was the duty of the applicant to produce documentary evidence to put that to light. That was not done, he added.

Mr. Khamis submitted that the case of *insurance ombudsman* is not a decision but a letter dated 09th June 2022 addressed to the respondent and not a decision or precedent to be relied upon. He stated also that the Chairman of the Committee admitted to be there to protect interests of the members. In his view, he was not worth to chair the hearing committee.

He submitted further that termination letter shows that the appellate body did not follow the recommendation of the disciplinary hearing committee (exhibit D5). In his view he ought to give reasons.

Dealing with reliefs, the counsel's firm opinion is that, it is the arbitrator's discretion to award beyond 12 months remuneration and that he is not bound by the law. To support his point, he referred the case of **Comprehensive Community Rehabilitation Tanzania v Jesca Rutta**, Revisison No. 135 of 2020. In his view the award was proper.

By way of a rejoinder, Ms Blandina submitted the case was proved and it was therefore an error for the CMA to hold otherwise.

Having considered submissions and grounds raised, I see only three contested issues as follows;

i. *Whether CMA was right to hold that the applicant had no valid reason to terminate the respondent,*
ii. *Whether CMA was right to hold that there was no procedural fairness in terminating the respondent and*
iii. *Whether reliefs were properly awarded.*

To start with, I have to say, it is true that the respondent was employed by the applicant as a senior underwriter as exhibit P1 shows. By the time,

the dispute arose, he was the head of the department. Not in dispute also is the fact that following his suspension, disciplinary hearing was followed and termination occurred as per exhibit D5.

Following his termination, a dispute arose and it has been the duty of the employer to prove fairness of termination as in terms of section 37 and 39 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019]. While the law provides for basic principles to apply for substantive termination, Rule 9(1) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 provides that an employer shall follow a fair procedure before terminating an employee's employment which may depend to some extent on the kind of reasons given for such termination. It can be deduced from the above that it is not only valid and fair reason that makes termination fair, but also there must be procedural fairness. Termination, as I under the law, is to be an exercise of fairness. The reason for doing so cannot be overemphasized. This is because the right to work is directly connect to the right to live.

In dealing with the first ground, it can be recalled that the CMA held that the first offence of breach of the company policy was not proved as charged at the disciplinary hearing. In so deciding, the CMA was convinced that the policy alleged breached was not tendered neither at

the disciplinary hearing nor before the CMA. But in record as well, there is evidence of Dw1 who is a human resource officer who admitted so.

It was submitted by the applicant before this court that the respondent departed from the principles applied in the insurance industry named as utmost good faith and insurable interest. In the view of Ms Blandina for the applicant, the respondent did not provide sufficient information in respect of the motor vehicle in the process of underwriting it. It was her view that the policy is in such terms as the industry so apply.

Rule 12 provides that an employer, arbitrator or judge who is required to decide as to whether termination for misconduct is unfair, has to consider if the rule or standard regulating conduct of employment has been contravened; whether it is reasonably clear and unambiguous and whether the employer was aware of it or could be reasonably be expected to been aware of it.

Under rule 13(5) of G.N. No. 42 of 2007, the employer is required to procure evidence in the presence of the employee who should be given time to make an account of it at the disciplinary hearing. Evidence as I understand the term, may denote the means by which an alleged matter of fact, the truth of which, is proved or disproved. That may be done orally or documentary or by presentation of both oral and documentary

evidence. It is not meant as the CMA tried to intimate that evidence has to be documentary in order to constitute sufficient proof.

At the disciplinary hearing, the alleged policy was not tendered and that was the basis of rejecting the evidence in that respect. It is my considered opinion that in the instant case, the breach of company policy contrary to the underwriting policy did not mean to refer to a term foreign in the business of insurance itself. The respondent being a senior underwriter and head of the department was expected to know the rules of the particular business. It was stated at the disciplinary hearing by the investigator (the 3rd witnesses) that, the motor vehicle was insured without the registration card contrary to the usual procedure. It had different names as in the policy and in the same card. This piece of evidence was not disputed by the respondent. There was no need therefore to require more evidence such as documentary. In this, I am convinced that there was fault in terms of the underwriting process which according to the report the respondent was at the centre.

The last offence of gross negligence, the CMA held it was not proved. The outcome of the disciplinary hearing exhibit D8 was clear that the respondent did not provide the registration card at the time of underwriting the motor vehicle is in its negligence.

It is clear to me that reasons assigned in this offence are the same as in the first one. The CMA was therefore right to hold that there is no sufficient evidence to prove negligence.

All said and done, one finds that even though the CMA held that there were no valid reasons for termination, this court has with respect a different opinion. The acts of the respondent, his capacity as the underwriter and the position he held in the applicant's company adversely and unduly affect the whole process of registering the motor vehicle. It is safe therefore to hold that there were valid reasons for termination.

In dealing with procedural issues, it has been held that the respondent did not comply with Rule 13(5) of GN No. 42 of 2007, for not providing documentary evidence. As I have said before, this is a misconstruction of the rule. To be precise, the rule does not in any way, out way the weight of the evidence in terms of oral or documentary. All what it enjoins the employer to do is 'to *provide evidence in support of the allegations against the employee at the hearing'.* Whether oral or documentary or both if clear and convincing may prove the allegation. I do not find this point was a fault of procedural fairness.

On the second point, it was held that chairing the disciplinary committee by the officer from the Association of Tanzania Employers (ATE) -Dw2,

was contrary to Rule 13(4) of GN No. 42 of 2007. The reason advanced by the arbitrator is that ATE admittedly represents the interest of the employers. In the arbitrator's view the same committee was chaired by the impartial person.

I also think, with respect, the arbitrator errored in so believing. I think that was also his belief, but not what transpired in the proceedings.

First, at the start of the hearing, the respondent did not raise any objection on the chairperson from ATE. This did not happen at the beginning only. There was no complaint throughout the proceedings on the incidence of bias. I agree with MS Blandina that regard should be not on the relationship between the chairperson and the employer but the conduct of the chairperson before, during or after the hearing. I think, the employer was in this instance very smart. The law provides that the person who may chair the committee may be a senior officer in the organization who has not been involved in the process. I see outsourcing a person conversant with the law and from ATE is better placed to avoid bias than even appointing a member of the same organization, who earns his living from the same employer. I find this point very weak as to feature at the CMA when it was not raised anywhere before.

Lastly, the there is a crucial issue which I consider the CMA was right. The committee found out, the respondent was to be warned, it recommended so. I think, it believed that, it was the first offence and perhaps considered the nature it was committed and the intricate nature of the industry itself. To depart from the recommendation, as the arbitrator held, the appellate body had to atleast have reasons for that departure. Failure to do was a procedural fault.

In terms of reliefs, since I have held that there were valid reasons for termination but with procedural fault. I therefore quash the 24 months award as compensation and reduced it to 14 months instead, the sum of 59,062,080.00TZS. That being the case, I hold that this application is partly allowed to the extent explained. I order no costs.

A. K. Rwizile

JUDGE

22.02.2023