IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 123 OF 2023

(Arising from an Award issued on 02/05/2023 by Hon. Wilbard, G.M, Arbitrator, in Labour Dispute No. CMA/DSM/ILA/682/20/17/21 at Ilala.)

WASAFI FM CO. LTD ..... APPLICANT

VERSUS

KANKY P. MWAIGOMOLE ..... RESPONDENT

JUDGMENT

Date of last Order: 25/07/2023
Date of Judgment: 30/08/2023

B. E. K. Mganga, J

Brief fats of this application are that, in 2019, applicant employed the respondent as radio presenter for a fixed contract of two years with three (3) months' probation period. On 11th August 2020, applicant terminated employment of the respondent allegedly due to operation requirements. Aggrieved with termination of her employment, on 26th August 2020, respondent referred Labour dispute No. CMA/DSM/ILA/682/20/17/21 before the Commission for Mediation and

Arbitration (CMA) at Ilala claiming to be paid (i) TZS 18,200,000/= being salary compensation for the remaining 14 months period for the breach of the contract breach, (ii)TZS 100,000,000/= being punitive general damages, (iii) payment of gratuity, salary in lieu of notice, leave, salary for august 2020 without specifying the amount. Respondent filled part B of the Referral Form (CMA F1) that is for fairness of termination only. On fairness of reason for termination, respondent indicated in the said CMA F1 that, the reason for breach of the contract was not justified and that she was not given right to be heard. On fairness of procedure, respondent indicated that she was not consulted prior retrenchment and that there was no agreed package.

On 17th December 2020, Kanky Mwaigomole, the respondent and Bertha Kitambi Wilson on behalf of the applicant signed a certificate of non-settlement (CMA F6) before Hon. Lemwely D, Mediator, showing that the dispute that was unsuccessfully mediated relates to termination of employment. Due to failure of mediation, on the same date namely 17th December 2020, respondent filed the Notice to refer a dispute to arbitration (CMA F8). It is undisputed that on 23rd February 2021, the parties appeared before Hon. Masawe G.W, Arbitrator and drew three issues namely, (i) whether there was fair reason for breach of contract, (ii) whether procedures for breach were followed and (iii) reliefs if any.

Having heard evidence of Nelson Andrew Kisanga (DW1) and Neema Thomas Liberato(DW2) who testified on behalf of the applicant and Kanky Mwaigomole (PW1), the respondent, on 02nd May 2023, Hon. Wilbard G. M, arbitrator issued an award in which she discussed three issues namely (i) whether there were valid reason for termination of employment, (ii) whether procedures were followed and (iii) to what reliefs are the parties entitled to. In the said Award, the arbitrator found that there was no valid reason for retrenchment and that procedures of termination of employment of a probationer employee were not adhered to. With those findings, the arbitrator relied on the contract of employment (exhibit S1) and awarded respondent to be paid TZS18,200,000/= being salaries for 14 months remaining period of the contract.

Applicant was aggrieved with the said award hence this application for revision. In support of the Notice of Application, applicant filed the affidavit sworn by Nelson Kisanga, her Principal Officer. In the said affidavit, applicant raised five (5) issues namely: -

(i) *Whether it was proper for the arbitrator to hold that there was breach of contract while the respondent was a probationer employee yet to be confirmed.*

(ii) *Whether the arbitrator based her award on evidence tendered during hearing.*

(iii) *Whether the Abitrator erred in law and facts by considering and basing her decision on assumptions and documents not tendered and not admitted during hearing of the matter.*

(iv) *Whether it was lawful to award respondent fourteen months' salary amounting to TZS. 18,200,000/= while the respondent was yet to be confirmed.*

(v) *Whether the arbitrator erred in law by framing new issue(s) suo motto and abandoned the agreed issues and based her decision on new issues framed during writing of an award.*

In opposing the application, respondent filed the counter affidavit sworn by Mr. Sosten Mbedule, her advocate.

When the application was called on for hearing, applicant was represented by Ms. Bertha Kitambi, learned advocate while respondent was represented by Sosten Mbedule, learned advocate.

Arguing the 1st and 4th issue, Ms. Kitambi, counsel for the applicant submitted that on 22nd October 2019 applicant employed respondent as radio presenter for two years fixed term contract with a three months' probation period. Counsel submitted that respondent was terminated on 01st August 2020 while under probation because, after three months' probation, she was not confirmed, as a result, probation was extended for 6 months that was expiring on 22nd August 2020. Counsel for the applicant submitted that respondent was terminated based on economic hardship (retrenchment) due to Covid 19 pandemic that led applicant to operate under loss. She cited the case of ***David Nzaligo v. National***

Microfinance Bank PLC, Civil Appeal No. 61 of 2016, CAT (unreported) and ***WS Insight Ltd (Formerly known as WARRIOR SECURITY LTD) v. Dennis Nguaro***, Revision No. 90 of 2019, HC (unreported) to support her submissions that a probationary employee cannot file the dispute for unfair termination and enjoy the rights of the confirmed employee. She added that, respondent filed the dispute relating to unfair termination. Counsel for the applicant submitted further that, respondent being a probationer, was under a practical interview hence she cannot enjoy the award of 14 months salaries as compensation. She added that respondent worked under probation for for 9 months and her employment was terminated prior confirmation.

Arguing the 2nd and 3rd issues, Ms. Kitambi counsel for the applicant submitted that, the arbitrator did not consider evidence of DW1 and DW2 who testified on behalf of the applicant relating to non confirmation of the respondent and the issue of Covid 19 pandemic. She added that, in the award, the arbitrator stated that DW1 and DW2 did not testify on Covid 19 pandemic or confirmation while at Page 3 of the said award, she stated that they testified on those aspects. Counsel for the applicant submitted further that, at Page 10 of the award, the arbitrator referred to exhibit S1 that was not tendered and based the award on the said document. Counsel for the applicant added that,

applicant was prejudiced by the decision of the arbitrator to consider a document that was not tendered. With those submissions, counsel for the applicant prayed CMA proceedings be nullified, quash, and set aside the award and order trial *de novo*.

On the 5th issue, counsel for the applicant submitted that, in framing new issues during award writing and based her decisions on the new issues, parties were prejudiced because evidence that was adduced was based on the issues that were framed and not the new issues framed during award writing. Counsel for the applicant submitted further that parties were denied right to be heard on the new issues framed at the time of composing the award. Counsel submitted that, issues that were framed by the arbitrator during award writing are whether, there was valid reason for termination and whether procedures were adhered to. She went on that, issues that were framed by the parties are whether, there was breach of contract and whether there was a valid reason for termination.

Counsel for the applicant submitted further that, in the award, the arbitrator discussed the issue of retrenchment, while that was not an issue between the parties. She submitted further that, in CMA F1, respondent indicated that the nature of dispute is termination and breach of contract. She added that, on fairness of reason, respondent

indicated retrenchment but also indicated that reason for breach of contract was not justified. She went on that, on procedural fairness, respondent indicated that she was not given right to be heard and that, there was no consultation and agreement on package.

Counsel for the applicant submitted further that, Rule 10(8) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 provides procedures to be abided by the employer when terminating a probationer employee. She added that, DW2 testified on the procedure that applicant followed in terminating respondent. She went on that, according to termination letter, respondent was terminated due to economic hardship caused by Covid 19 pandemic. Counsel for the applicant submitted further that, when respondent was served with the notice for retrenchment, she rushed to file the dispute at CMA while the process for retrenchment had not been completed. She concluded her submissions praying the court to revise the CMA award.

Arguing the application on behalf of the respondent, Mr. Mbedule, advocate, started with the 5th issue submitting that, the issues that were framed by the parties are the ones that were discussed in the award. He submitted further that; parties were given opportunity to adduce evidence relating to the issues framed hence there is no denial of right to be heard. Counsel for the respondent submitted that, the issues that

were framed by the parties are (i) whether there was fair reason for breach of contract (ii) whether procedure for breach were followed (iii) what relief are the parties entitled to? He went on that, issues that were discussed by the arbitrator in the award are (i) whether there was reason for termination (ii) whether procedures were followed and (iii) to what relief are the parties entitled to. In his submissions, counsel for the respondent, conceded that the 1st issue that was discussed by the arbitrator in the award is different from the ones that was drafted by the parties. He further conceded that parties were not accorded right to be heard on the 1st issue that was discussed by the arbitrator in the award. With those submission, counsel for the respondent prayed the court to nullify CMA proceedings, quash and set aside the award and order trial *de novo*.

Submitting on the 2nd and 3rd issues, counsel for the respondent conceded that in the award, the arbitrator considered a document (S1) that was neither tendered nor admitted. Counsel for the respondent submitted that, that irregularity is fatal and vitiates the whole CMA proceedings. With those submissions, counsel for the respondent refrained to submit on the remaining issues. He concluded his submissions by praying the court to nullify CMA proceedings, quash and set aside the award and order trial *de novo.*

Ms. Kitambi, advocate for the applicant had nothing to rejoin.

At the time of composing the judgment, I perused the CMA record and find that on 09th September 2020, applicant raised a preliminary objection that the matter was filed prematurely before CMA. Parties made their submissions thereof before Hon. Lemwely, D, Mediator. In her submissions, applicant argued that respondent was a probationer hence not entitled to file the dispute relating to unfair termination and that CMA had no jurisdiction. On the other hand, respondent submitted that, that issue is not a preliminary objection because it requires evidence. I also noted that there is no ruling that was issued to clear what was argued by the parties. I further noted that, in the CMA F1, on the nature of the dispute, respondent indicated termination of employment/breach of contract. I also noted that, in CMA F6, i.e. certificate of non-settlement, the dispute that was mediated is termination of employment only. I also noted that, when the matter was referred to the arbitrator for arbitration, issues that were drafted are (i) whether there was fair reason for breach of contract, (ii) whether procedures for breach were followed and (iii) reliefs if any.

Having noted as pointed above, I formed an opinion that there may be issues relating to propriety and competence of the application at CMA. I therefore summoned the parties to address the Court (i) whether

the dispute was properly filed and heard at CMA, (ii) whether issues were properly drafted.

Responding to the issues raised by the court, Ms. Kitambi, learned counsel for the applicant, on the issue whether the dispute was properly filed at CMA, submitted that respondent indicated in CMA F1 that the nature of the dispute was termination/breach of contract and filled also Part B of CMA F1 that relates to termination of employment only hence respondent was not sure whether the dispute was termination or breach of contract. Counsel submitted that CMA F1 was defective hence the dispute was incompetent.

Learned counsel for the applicant submitted further that, the dispute that was mediated and failed, is termination of employment while CMA F1 shows that the dispute was termination of employment/breach of contract. She went on that, at the time of drafting issues, parties directed their mind on breach of contract, which was not mediated, and the arbitrator proceeded to hear evidence of the parties relating to breach of contract. Counsel submitted further that, under Rule 4(2) of the Employment and Labour Relations (code of Good Practice) Rules, GN. No. 64 of 2007, mediation is mandatory. She added that it was not proper for the arbitrator to hear the dispute relating to breach of contract that was not mediated and that it was not proper to

draft issues relating to breach of contract. She went on that, but in the award, the arbitrator drafted issues relating to fairness of termination of employment. She concluded that the effect of all these is that, proceedings were vitiated.

Responding to the issues raised by the court, Hellen Ngelime, learned counsel for the respondent, on competence of CMA F1, conceded that it was defective. Counsel for the respondent submitted further that, it was not proper for the arbitrator to act on a defective CMA F1. She added that, the dispute was improperly heard and decided by the arbitrator. Counsel for the respondent submitted further that, the respondent indicated in CMA F1 that, the nature of the dispute was termination of employment/breach of contract implying that it was in alternative. She concluded that it was not proper for the respondent to file the dispute of employment in alternative. Learned counsel for the respondent submitted further that, the dispute that was mediated is termination but the issues that were drafted by the parties relates to breach of contract which was not mediated. Ms. Ngelime concluded that, these irregularities vitiated the whole CMA proceedings.

In disposing this application, I will start with the issues raised by the court. It was correctly in my view, submitted by the parties that CMA F1 was defective because respondent indicated that the dispute

relates to termination of employment/breach of contract. In my view, in so indicating in the CMA F1, as correctly submitted by the parties, respondent filed the dispute in alternative namely termination of employment or breach of contract. In other words, respondent was not sure of the nature of the dispute. Worse, respondent filled part B of the CMA F1 that is reserved only for fairness of termination. By indicating that the dispute was relating to breach of contract, respondent was not supposed to fill part B of CMA F1. Since CMA F1 was defective, it was improper for the arbitrator to hear and determine the dispute. In fact, the dispute was incompetent hence the arbitrator was not supposed to proceed with hearing evidence of the parties based on the said defective CMA F1. See the case of ***Bosco Stephen vs Ng'amba Secondary School*** (Revision 38 of 2017) [2020] TZHC 390, ***Ngorongoro Conservation Area Authority vs Amiyo Tlaa Amiyo and Another*** (Labour Revision Application 28 of 2019) [2022] TZHC 3078 and ***Marie Stopes Tanzania (mst) vs Bernard Paul Mtumbuka*** (Revs Appl No. 368 of 2022) [2023] TZHCLD 1136. Proceedings that were conducted based on a defective and incompetent CMA F1 was a nullity.

It was correctly submitted by the parties that the dispute that was mediated is termination of employment but the issues that were drafted relates to breach of contract and the parties adduced their evidence

relating to breach of contract that was not mediated and not termination of employment. It was improper for the arbitrator and the parties to draft issues relating to breach of contract while the dispute that was mediated is termination. In other words, the dispute relating to breach of contract was not mediated. It was correctly submitted by counsel for the applicant that, under Rule 4(2) of the Employment and Labour Relations (code of Good Practice) Rules, GN. No. 67 of 2007, mediation is mandatory and that it was not proper for the arbitrator to hear the dispute of breach of contract that was not mediated. See the case of ***Lucas Abel Bumela and Another vs CRC Groupe Ltd K.N.Y Desert Eagle Hotel*** (Revision Application No. 41 of 2023) [2023] TZHCLD 1294, ***Nelson Mwaikaja vs Gemshad Ismail & Usangu General Traders*** (Revs Appl No. 382 of 2022) [2023] TZHCLD 1 and ***Madonna Hospital Limited vs Tamali Stephano Mtengwa*** (Revision Application No. 155 of 2023; Revision Application No. 155 of 2023) [2023] TZHCLD 1398. In ***Mwaikaja's case*** (supra) this court held: -

> *"In labour disputes, mediation is compulsory as provided for under Rule 4(2) of GN. No. 67 of 2007(supra). Therefore, all disputes filed at CMA must be mediated prior going to the arbitration stage."*

From the foregoing, since proceedings were based on unmediated dispute of breach of contract, those proceedings were a nullity.

It is my further opinion as correctly submitted by the parties that since the dispute that was mediated and a certificate of non-settlement issued thereof was termination, both the parties and the arbitrator were not supposed to draft issues relating to breach of contract. In short, the parties departed from the pleadings namely termination that was mediated. Even the arbitrator fell in the same trap. There is a litany of case laws that neither the parties nor the court can depart from pleadings filed. See the case of ***Martin Fredrick Rajab vs Ilemela Municipal Council & Another*** (Civil Appeal 197 of 2019) [2022] TZCA 434, ***Jonathan Kalaze vs Tanzania Breweries Limited*** (Civil Appeal 360 of 2019) [2022] TZCA 312, ***Yara Tanzania Limited vs Ikuwo General Enterprises Limited*** (Civil Appeal 309 of 2019) [2022] TZCA 604, ***Registered Trustees of Islamic Propagation Center (ipc) vs The Registered Islamic Center (tic) of Thaaqib Trustees*** (Civil Appeal 2 of 2020) [2021] TZCA 342, ***Barclays Bank T. Ltd vs Jacob Muro*** (Civil Appeal 357 of 2019) [2020] TZCA 1875 and ***Salim Said Mtomekela vs Mohamed Abdallah Mohamed*** (Civil Appeal No. 149 of 2019) [2023] TZCA 15 to mention just a few.

In my view, in drafting issues, both the parties and the arbitrator were supposed to be guided by the certificate of non-settlement (CMA

F6) which shows the nature of the dispute to be arbitrated. In the application at hand, the parties and the arbitrator, drafted issues outside what was in dispute. I advise arbitrators not to act casually by formulating issues ignoring the matter in dispute namely what is contained in CMA F6.

As pointed out hereinabove, there is no ruling that was issued in relation to the preliminary objection that was raised by the applicant on competence of the dispute and jurisdiction of CMA. In my view, that was an error. Had the arbitrator determined properly that preliminary objection, in my view, that could have served time both of the parties and CMA. I am of that view because, respondent could have amended the CMA F1 and filed a proper and competent dispute, of course subject to the provisions of Rule 10(1) and (2) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007. Once a preliminary objection is raised, must be determined first either by upholding or dismissing it. See the case of ***Deonisia Onesmo Muyoga & Others vs Emmanuel Jumanne Luhahula*** (Civil Appeal No. 219 of 2020) [2023] TZCA 124, ***Khaji Abubakar Athumani vs Daud Lyakugile Ta D.C Aluminium & Another*** (Civil Appeal 86 of 2018) [2021] TZCA 32 and ***Thabit Ramadhani Maziku & Kisuku Salum***

Kaptula v. Amina Khamis Tyela & Mrajis wa Nyaraka Zanzibar, Civil Appeal No. 98 of 2011 (unreported) to mention but a few. In ***Kaptula's case*** (supra) the Court of Appeal held inter-alia: -

> *"...the failure by the learned magistrate with extended jurisdiction to deliver the ruling on the preliminary objection which he had scheduled to deliver on 16/9/2009 constituted a colossal procedural flaw that went to the root of the trial. It matters not whether it was inadvertent or not. The trial court was duty bound to dispose it fully, by pronouncement of the Ruling before dealing with the merits of the suit. This it did not do. The result is to render all subsequent proceedings a nullity."*

The above quoted paragraph has nailed the issue of failure to determine the preliminary objection to the fullest.

It was submitted by counsel for the applicant that at the time of composing the award, the arbitrator referred to exhibit S1 that was not tendered or admitted and based the award on the said document. It was further submitted by counsel for the applicant that, that was fatal irregularity and vitiated proceedings. It was correctly conceded, by Mr. Mbedule, counsel for the respondent that the irregularity vitiated the whole CMA proceedings and declined to submit on other grounds raised by the applicant. I have examined the CMA proceedings and find that the complaint by counsel for the applicant is merited. The said S1 was neither tendered nor admitted to form part

of evidence of the respondent. I should point albeit briefly that, we judicial officers and or quasi-judicial officers are not supposed to consider matters that are not part of evidence. The Court of Appeal, in the case of ***Mhubiri Rogega Mong'ateko vs Mak Medics Ltd*** (Civil Appeal No. 106 of 2019) [2022] TZCA 452 had an advantage of discussing a similar issue of considering a document that was neither tendered nor admitted in evidence and held: -

> *"…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..."*

In ***Mhubiri's case*** (supra), the Court of Appeal quoted its earlier decisionin the case of ***Shemsa Khalifa & Two Others v. Suleiman Hamed Abdallah***, Civil Appeal No. 82 of 2012 wherein in it held: -

> *"We out-rightly are of the considered opinion that, it was improper and substantial error for the High Court and all other courts below in this case to have relied on a document which was neither tendered nor admitted in court as exhibit. We hold this led to a grave miscarriage of justice."*

In ***Mhubiri's case*** (supra), which is also is a labour case like the application at hand, the Court of Appeal concluded: -

> *"Therefore, it is clear that the two courts below relied on 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…"

The Court of Appeal took a similar stance in the case of ***Zanzibar Telecommunication Ltd vs Ali Hamad Ali & Others*** (Civil Appeal No. 295 of 2019) [2020] TZCA 1919, ***Mwanaarafa Abubakar Basheikh Mikidadi & Another vs Kassim Kamtwanje& Another*** (Civil Appeal No. 151 of 2020) [2022] TZCA 157 and ***Mohamed A. Issa vs John Machela*** (Civil Appeal No. 55 of 2013) [2013] TZCA 490. In ***Machela's case*** (supra), the Court of Appeal having quoted its decision in ***Shemsa's case*** (supra) held: -

"In this case, we are of the firm view that determining the rights of the parties on the basis of documents which were not admitted in evidence during the course of the trial was fatal to the trial and occasioned a failure of justice. We think we need not overemphasize what we take to be tritelaw that the judgment of any Court or quasi-judicial tribunal must be grounded on evidence properly adduced during the trial, otherwise it is not a decision at all. The purported decision becomes a nullity."

What I have discussed hereinabove has disposed the whole application. I will therefore not discuss other issues raised by the applicant.

For the foregoing, I hereby allow the application, nullify CMA

proceedings, quash, and set aside the award arising therefrom and direct the parties to go to CMA so that the dispute can be heard de novo if they are still interested to pursue their rights.

Dated at Dar es Salaam on this 30th August 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on 30th August 2023 in chambers in the presence of Ms. Bertha Kitambi Wilson, Advocate for the Applicant and Sosten Mbedule, Advocate for the Respondent.

B. E. K. Mganga
JUDGE