IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 171 OF 2023

(Arising from an Award issued on 12/7/2023 by Hon. Johnson Faraja, L, Arbitrator in Labour dispute No. CMA/DSM/KIN/990/18/303 at Kinondoni)

HTT INFRACO LIMITED ..... APPLICANT

VERSUS

FRANCIS KIAGA ..... RESPONDENT

JUDGMENT

Date of last Order: 18/09/2023
Date of Judgment: 25/9/2023

B. E. K. Mganga, J.

In August 2016, Francis Kiaga, the above-mentioned respondent entered unspecified period of contract of employment with HTT Infraco Ltd, the above-named applicant. In the said contract, respondent was employed as Head of Human Resources. The contract of employment of the respondent shows that parties agreed that monthly salary of the respondent was TZS 21,083,329. 50. On 25th September 2018, the herein respondent filed Labour dispute No. CMA/DSM/KIN/990/18/303 before the Commission for Mediation and Arbitration henceforth CMA against Helios Tower Tanzania Limited complaining that he was unfairly

terminated. In the Referral Form (CMA F1) respondent indicated that he was forced by the said Helios Tower Tanzania Limited to resign. Based on that, respondent was claiming to be paid TZS 830,604,600/=.

Having heard evidence of both sides, on 12th July 2023, Hon. Johnson Faraja, L, arbitrator issued an award that there was constructive termination, and that termination was unfair. The arbitrator therefore awarded respondent to be paid TZS 830,604,400/= being 36 months salaries compensation.

Applicant was aggrieved with the said award hence this application for revision. In the affidavit of Michaela Marandu, applicant raised 15 grounds of revision namely: -

1. *That the Commission erred in law and fact in holding illogically that applicant constructively terminated employment of the respondent and proceeded to issue an award in absence of proof.*
2. *That the Commission erred in law for shifting the burden of proof to the applicant to prove constructive termination instead of the respondent who alleged to have been constructively terminated.*
3. *The Commission erred in law by proceeding with arbitration against a party who was not involved in mediation and /or was not pleaded in the Complaint Form.*
4. *The Commission erred in law to proceed with the respondent's dispute against the applicant without jurisdiction and at the same time being barred by rules of limitation.*
5. *That the award of the Commission has been improperly procured as the arbitrator failed to properly understand evidence of the applicant as a*

result erred in law and fact in concluding that applicant constructively terminated employment of the respondent.

6. *That the award of the Commission has been improperly procured as the arbitrator proceeded with material irregularity and awarded respondent reliefs which were not pleaded or/ and supported by evidence.*
7. *That the award of the Commission has been improperly procured as the arbitrator erred in law in holding that the issue of jurisdiction and limitation was decided when granted leave to the respondent to amend the Complaint Form.*
8. *That the award of the Commission has been improperly procured as the arbitrator erred in law and exceeded its jurisdiction by deciding on matters that were neither brought by the complainant nor proved on balance of probability.*
9. *The arbitrator erred in law and fact in awarding illogically and excessive compensation to the respondent without legal and factual basis.*
10. *The arbitrator erred in law and fat in ignoring evidence of the applicant that termination was by mutual agreement without coercion.*
11. *The Commission exceeded its jurisdiction by deciding on matters which were time barred hence proceeded to decide the complaint without jurisdiction as there was no condonation application.*
12. *That the Commission's decision is illogical and full of contradictions and does not disclose analysis of evidence and reasons for the decision.*
13. *That the Commission's award is questionable for lack of legal basis and that there are errors material to the merit of the decision including guess work.*
14. *The arbitrator erred in law and fact for failure to consider what was paid to the respondent at the time of termination.*
15. *That the arbitrator erred in law and fact in exercising a lopsided evaluation of evidence ignoring potential useful evidence adduced by the applicant.*

On the other hand, Francis Kiaga, the respondent filed both the Notice of Opposition and the Counter affidavit to oppose this application.

When the application was called on for hearing, Mr. Jeremia Tarimo, Advocate, appeared and argued for and on behalf of the applicant while Mr. Remmy William, Advocate, appeared, and argued for and on behalf of the respondent.

During hearing, Mr. Tarimo, learned counsel for the applicant condensed the said 15 grounds into five grounds only. In the 1st ground, counsel for the applicant submitted that the Hon. Arbitrator erred to hold that applicant constructively terminated respondent. It was submissions by counsel for the applicant that there was no evidence to prove constructive termination. He argued that, termination was a result of an agreement to terminate employment (exhibit D2) and that, that was in conformity with Rule 4 of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007. He submitted further that, prior to the said agreement (exhibit D2) there were correspondence between the parties (exhibit D7) and that based on exhibit D2, respondent resigned letter (exhibit D8). Counsel for the applicant submitted that, after the said resignation, respondent was paid TZS 440,681,531/= as terminal benefit as agreed (exhibit D9). Counsel referred the court to the case of ***Kobil Tanzania Ltd v. Fabrice***

Ezaovi, Civil Appeal No. 134 of 2017, CAT (unreported), ***Mrisho Omary & Another v. Raheem Nathoo***, Civil Appeal No. 354 of 2019, CAT (unreported) to bolster his submissions that there was no constructive termination. Counsel for the applicant submitted that it is the duty of the employee to prove that there is constructive termination, and that respondent did not discharge that duty. He added that, respondent did not prove that he was forced to sign and that he did not call Tabia Malekela who witnesses exhibit D2 as his witness. He concluded that, respondent did not prove that employment was intolerable.

On the 2nd ground, Mr. Tarimo submitted that the arbitrator erred in law in shifting burden of proof to the applicant to prove constructive termination instead of the respondent who alleged that there was constructive termination. Counsel submitted that the arbitrator erred to hold that it was the duty of the applicant to prove that exhibit D2 was signed by the respondent with consent. He strongly submitted that it was the duty of the respondent to prove that exhibit D2 and D8 were signed under undue influence.

On the 3rd ground, Mr. Tarimo submitted that the arbitrator erred in law by proceeding with arbitration against a party who was not involved in mediation and not pleaded in CMA F1. He submitted further

that, in CMA F1, respondent indicated that the employer was Helios Tower Tanzania Limited but during arbitration, respondent's Counsel prayed to amend the name of the employer from Helios Tower Tanzania Limited into HTT Infraco Ltd, the applicant. He submitted further that; the arbitrator granted the prayer even though applicant objected that prayer. He added that, in CMA F1, the employer was Helios Tanzania Tower Limited, mediation and certificate of non-settlement was issued against Helios Tower Tanzania Limited. He contended that it was illegal for the arbitrator to issue an order substituting the name of the employer after mediation has failed and proceed to arbitrator the dispute against a different legal entity. To elaborate more on this point, counsel for the applicant submitted that Certificate of incorporation of applicant was admitted as exhibit D1 and certificate of incorporation of Helios Tower Tanzania Limited was admitted as exhibit D3 as these are two different legal entities.

Mr. Tarimo submitted further that, CMA was barred to exercise its jurisdiction in arbitration against an entity that was not pleaded in CMA F1 by the employee, and which did not go through mandatory stage of mediation. He argued that, respondent was supposed to file a new CMA F1, and that, the parties were supposed to go back to mediation stage because it is mandatory and not as it was done in this application. He

submitted further that, CMA was barred by the Rules of Limitation to proceed against the applicant unless the matter was brought afresh by filing amended CMA F1 and an application for condonation. It was submissions by Mr. Tarimo that CMA lacked jurisdiction to grant reliefs that were sought by the respondent against Helios Tower Tanzania Limited but were issued against the applicant. With those submissions, counsel for the applicant prayed the Court to nullify CMA proceedings, quash and set aside the award.

On the 4th ground, counsel for the applicant submitted that arbitrator erred to grant illogical and excessive compensation to the respondent without legal and factual basis and failed to consider the amount that respondent was paid after his resignation. He argued that, had the respondent proved that there was constructive termination, CMA was supposed to consider the amount that respondent was paid earlier by the applicant. Counsel for the applicant submitted that, Exhibit D7 shows what respondent demanded to be paid 15 months' salary and he was paid TZS 440,681,531/=. He submitted that respondent was awarded TZS 830,604,400/= being 36 months salaries compensation making the total amount that respondent will be paid to be more than TZS 1,200,000,000/=/=. Mr. Tarimo submitted that, the arbitrator was supposed to deduct the amount that respondent was paid and referred

the court to the case of ***Stanbic Bank (T) Ltd V. Sophia Majamba***, Civil Appeal No. 31 of 2020, CAT (unreported) to that position.

On the 15th ground, learned counsel for the applicant submitted that the award lacks legal basis for inclusion of guess work or assumptions as reasons for the decision. He submitted that, the assumptions by the arbitrator are that, there was undisclosed reason for the respondent to resign despite that his salary was high. He added that, the arbitrator assumed that there was no profitable consideration in exhibit D2 and that, there was no signed minutes that led to the signing of exhibit D2 hence possibility of lack of consent of the respondent. Counsel for the applicant submitted that there was no need of minute to prove voluntariness of the parties in signing exhibit D2. He concluded by praying the Court to allow the application by quashing and seting aside the award.

Resisting the 1st ground of application, Mr. William, learned counsel for the respondent submitted that, section 36(a) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] and Rule 7(1) of GN. No. 42 of 2007 (supra) defines the term constructive termination. He added that, this Court gave a broader definition of the term constructive termination in the case of ***Jirango Security Group V. Rajab Masud Nzige***, (2014) 1LCD 60. In the application at hand,

respondent was given a conditional statement to terminate the contract (exhibit D5, D6 and D7 and that respondent was put in performance improvement plan (PIP) while he has worked for more than 15 years. He argued that respondent signed termination agreement after he was told that if he will not sign the said agreement, he will be put into PIP. He argued that based on that condition, respondent was forced to resign. Mr. William submitted further that respondent was not given enough time to read the separation agreement and further that, he was not consulted at the time of drafting separation agreement. Counsel for the respondent submitted that, respondent was supposed to participate in drafting the said separation letter (exhibit D2) and that applicant was supposed to tender inutes to prove mutual agreement. To support his submissions, he cited ***Majamba's case*** (supra).

Responding to the 2nd ground, counsel for the respondent submitted that, constructive termination like any form of termination, is unfair termination and the duty of proving that termination is fair is on the employer. He further submitted that, Tabia Malekela is an employee of the applicant hence not easy and common for the employee to testify against the employer which is why respondent did not call him as his witness. During submissions, counsel for the respondent conceded that in his evidence, PW1 testified that the said Tabia Malekela was not

available, but he did not testify that the said witness was unwilling to testify against his/her employer. He strongly submitted that, the burden of proof was not shifted to the applicant and concluded that respondent proved his case at the balance of probabilities.

On the 3rd ground, Mr. William learned counsel for the respondent submitted that, respondent prayed to correct the name of the employer from Helios Tower Tanzania Ltd to read HTT Infraco Ltd (applicant) and the prayer was granted. He submitted further that, the power of the arbitrator to substitute or correct the name is provided under Rule 25 of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 2007. He argued that the said Rule does not require the dispute be returned to mediation stage. Counsel for the respondent submitted further that, in CMA F1, respondent indicated that the employer was Helios Towers Limited which has its own incorporation certificate hence a different legal entity. He submitted further that, HTT Infraco Ltd, the applicant, is also a different legal entity with its own incorporation. Mr. William learned counsel for the respondent submitted that, the contract of employment (exhibit D4), the employer was between the respondent and HTT Infraco Ltd, applicant. He added that, in exhibit D2, the employer who signed termination agreement on 31st August 2018 is HTT Infraco Ltd (applicant) but on 25th September 2018, respondent filed

CMA F1 against Helios Towers. Learned counsel for the respondent submitted further that, on 11th August 2020, respondent prayer to amend the name of the employer while 30 days has already expired. With those submissions, counsel for the respondent conceded that it was not proper for the arbitrator to grant the prayer and proceed to determine the dispute against the applicant out of time. He concluded that, CMA had no jurisdiction to entertain the dispute and prayed CMA proceedings be nullified.

On the 4th ground, counsel for the respondent submitted that the award of 36 months as compensation was not excessive considering the age of the respondent. He submitted further that, submission that arbitrator did not consider TZS 440,681,531/= paid to the respondent by the applicant was not raised at CMA. He went on that, respondent received only TZS 275,267,538/= and that the arbitrator did not consider that amount. He strongly submitted that ***Majamba's case*** (supra) cannot apply in the circumstances of this application.

On 5th ground, counsel for the respondent submitted that, there is no guess work or assumption in the award. He added that, the award is based on evidence of PW1 and not assumptions. He went on that, Rule 27(3) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007, provides that the award should contain *inter*

alia summary of evidence and reasons and that, the arbitrator was questioning the reason for decision of the applicant that led to resignation of the respondent. He added that, the arbitrator complied with what was held by the Court of Appeal in ***Majamba's case*** (supra). Learned counsel for the respondent concluded his submissions by praying that the application should be dismissed for want of merit.

On rejoinder, Mr. Tarimo, learned counsel for the applicant submitted that there were series of discussions between the parties that led to signing exhibit D2 hence the said exhibit was signed with free will. Learned counsel for the applicant submitted that respondent did not prove the issue of PIP. Mr. Tarimo submitted further that, in ***Majamba's case*** (supra) there was not agreement while in the case at hand there is hence the case is distinguishable. He submitted further that in his evidence, PW1 did not testify as to why Tabia Malekela was not called as a witness. He maintained that the dispute against the applicant was time barred hence proceedings must be nullified and that the dispute was not mediated.

I have carefully examined evidence of the parties in the CMA record and considered their submissions made in this application. In disposing this application, for obvious reason, I will start with the ground relating to limitation of time and jurisdiction of CMA as argued by the

parties. It is undisputed by the parties that on 25th September 2018, the herein respondent filed Labour dispute No. CMA/DSM/KIN/990/18/303 before the Commission for Mediation and Arbitration henceforth CMA against Helios Tower Tanzania Limited complaining that he was unfairly terminated. It is also undisputed that, in the Referral Form (CMA F1) respondent indicated that he was forced by the said Helios Tower Tanzania Limited to resign. It is further undisputed by the parties that in the contract of employment for unspecified period (exhibit D4), respondent was employed by HTT Infraco Ltd and not Helios Tanzania Limited. It is further undisputed by the parties that an agreement to terminate employment (exhibit D2) was between HTT Infraco Ltd, the applicant and the respondent and not between Helios Tanzania Limited and the respondent. It is also undisputed that HTT Infraco Ltd was incorporated on 2nd December 2007 with certificate of incorporation No. 80224 (exhibit D1) while Helios Tanzania Limited was incorporated on 16th December 2009 with certificate of incorporation No. 73177(exhibit D3). It is further undisputed that on 22nd October 2018, Hon. Mahindi, P.P, Mediator issued a certificate of non-settlement (CMA F6) showing that the dispute of termination of employment between the respondent and Helios Tanzania Limited failed. Based on certificate of non-

settlement, on 24th October 2018, respondent filed the Notice to Refer a Dispute to Arbitration (CMA F8) against Helios Tanzania Limited.

The CMA record shows that on 11th August 2020 after Elena Ngalo (DW1) has testified in chief and has tendered certificate of incorporation No. 80224 of HTT Infraco Ltd (exhibit D1) and agreement to terminate employment (exhibit D2), when counsel for the respondent was asked to cross examine DW1, cited Rule 29(1) of the Labour Institutions (Mediation and Arbitration) Rules GN. No. 64 of 2007 and prayed to substitute the name of the employer from Helios Tanzania Limited to HTT Infraco. In his prayer, counsel for the respondent submitted that he noted that evidence of DW1 shows the name of the employer is HTT Infraco Ltd. CMA proceedings shows that counsel for the applicant objected the prayer and submitted that respondent did not comply with the provisions of Rule 29(2), (3) and (4) of GN. No. 64 of 2007 (supra). The CMA record shows that the arbitrator relied on the provisions of section 88(4)(a) the Employment and Labour relations Act [Cap. 366 R.E. 2019], Rule 25(1) of GN. No. 64 of 2007(supra) and the overriding objective principle and allowed the application. The arbitrator ordered that the dispute would proceed against HTT Infraco Limited, the applicant.

I will start with section 88(4)(a) the Employment and Labour relations Act [Cap. 366 R.E. 2019] and Rule 25(1) of GN. No. 64 of 2007(supra) relied on by the arbitrator to substitute the name of the employer in the CMA F1 from Helios Tanzania Limited to HTT Infraco Limited. It is true that Rule 25 of GN. No. 64 of 2007 (supra) allows a party to correct errors but an application must be made in terms of Rule 29(1) of GN. No. 64 of 2007(supra). Rule 25 of GN. No. 64 of 2007 (supra) provides: -

> *25(1) Where a party to any proceedings has been incorrectly or defectively cited, any party may apply to the Commission and* ***give notice to the parties concerned*** *for correction of error or defect.*
>
> *(2)* ***Subject to sub-rule (1), the application shall be made in accordance, with Rule 29****.*
>
> *(3) The Commission may correct the error or defect on its own accord, after giving notice to all parties concerned."* (Emphasis is mine).

It is clear from the above quoted Rule that the application must be by notice and must be subject to the provisions of Rule 29 of GN. No. 64 of 2007. In other words, for the provisions of Rule 25 of GN. No. 64 of 2007(supra) to apply, there must be an application in terms of Rule 29 of GN. No. 64 of 2007(supra). In the application at hand, respondent did not comply with the provisions of Rule 29 of GN. No. 64 of

2007(supra). Rule 29(1), (2), (3) (4) and (5) of GN. No. 64 of 2007 clearly provides *inter-alia* that: -

29(1) Subject to Rule 10, this Rule shall apply to any of the following: -

(a) Condonation, joinder, substitution, variation or setting aside an award;

(b) Jurisdictional disputes;

(c) Other applications in terms of these Rules.

(2) ***An application shall be brought by notice to all persons who have an interest in the application****.*

(3) ***The party brining the application shall sign the notice of application in accordance with Rule 5 and shall contain****-*

(a) the title of the matter;

(b) the case number;

(c) the relief sought;

(d) the address for service and delivery of documents and proceedings;

(e) that any party that intends to oppose the matter shall deliver a notice of opposition and an affidavit within fourteen days after the application has been delivered to it;

(f) that the application may be heard in the absence of s party that does not comply with sub-paragraph (e); and

(g) that a schedule is included listing the documents that are material and relevant to the application.

(4) The application shall be supported by an affidavit setting clearly and concisely the following: -

(a) The name, description and addresses of the parties;

(b) a statement of the material facts in chorological order on which the application is based and sufficient details to enable any person opposing the application to reply to the facts;

(c) a statement of legal issues that arise from the material facts, sufficiently to enable any party to reply to the document;

(d) grounds for condonation in accordance with rule 10 where the application is filed out of time; and

(e) certificate of urgency if filed, shall state reasons why the matter cannot be dealt with in accordance with the time frame prescribed in these Rules. Expediate

(5) Any party opposing the application may deliver-

(a) A notice of opposition and a counter affidavit within fourteen days from the day on which the application was served on that party; and

(b) A notice of opposition and a counter affidavit shall contain the information required by sub-rule (3) and (4) respectively."

In the application at hand, respondent did not comply with the afore quoted Rule. In short, there was no application legally speaking. Therefore, the assumption by the arbitrator that respondent made an application to substitute the name of the employer from that of Helios Tower Tanzania Limited to HTT Infraco Limited, the applicant cannot be valid.

Not only that, but the application was also subject to Rule 10 of GN. No. 64 of 2007 relating to limitation of time of filing the dispute at CMA. The dispute that was filed by the respondent against Helios Tanzania Limited was relating to fairness of termination and in terms of Rule 10(1) of GN. No. 64 of 2007(supra), was supposed to be filed within 30 days from the date of termination. It is undisputed by the parties that, the agreement to terminate contract (exhibit D2) between applicant and the respondent was signed on 10th August 2018. It is also

undisputed that on 11th August 2020 when respondent made a prayer to substitute the name of Helios Tanzania Limited to HTT Infraco limited, the herein applicant, 30 days had already expired. Therefore, respondent was supposed to file an application for condonation as it was correctly submitted by counsel for the applicant. In other words, in substituting the name of Helios Tanzania Limited to HTT Infraco Limited, on 11th August 2020, respondent was out of time. In short, the dispute against the applicant was time barred and Mediator had no jurisdiction to proceed to hear and determine it. Since the dispute was time barred and CMA had no jurisdiction, all proceedings are a nullity.

Apart from the foregoing, the dispute of termination that was mediated and a certificate of non-settlement (CMA F6) issued was against Helios Tanzania Limited and not against HTT Infraco Limited, the herein applicant. Therefore, the arbitrator proceeded to hear and determine the dispute against HTT Infraco Limited, the applicant without the said dispute being mediated. In short, the dispute was heard and determined in violation of Rule 4(2) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 67 of 2007, which provides that mediation is mandatory. It was not proper for the arbitrator to hear the dispute of termination against the applicant while that dispute was not mediated. On several occasions this court has held

that proceedings conducted in relation to the unmediated dispute is a nullity. 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."*

The arbitrator relied on the provisions of section 88(4) of Cap. 366 R.E. 2019 (supra) to dismiss the preliminary objection opposing the prayer by the respondent to substitute the name of his employer from the name of Helios Tower Tanzania limited appearing on the CMA F1 to HTT Infraco Limited, the herein applicant. It is my view that arbitrator wrongly relied on that section which is not applicable in the circumstances of the application at hand. Section 88(4)(a) of Cap. 366 R.E. 2019 (supra) provides:-

> *88(4) the arbitrator-*

(a) May conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly."

It is my view that section 88(4)(a) of Cap. 366 R.E. 2019 (supra) applies only when the dispute is properly before the Commission. That section, in my view, was inapplicable in the circumstances of this application.

I should point out that respondent prayed orally to substitute the name of Helios Tanzania Limited to that of HTT Infraco Limited, the herein applicant, as an afterthought as reflected in submissions made by counsel for the respondent. That prayer was intended to circumvent the defence by the applicant. That cannot be allowed. Respondent was supposed, as it was correctly submitted by counsel for the applicant to pray to amend the CMA F1 subject to the provisions of Rule 10(1) of GN. No. 64 of 2007(supra) that is to say, he was supposed to pray to amend CMA F1 and file an application for condonation because the dispute that was filed while in time was not against HTT Infraco Limited, the herein applicant but was against Helios Tower Tanzania Limited. As pointed out hereinabove, the dispute against HTT Infraco Limited was time barred and CMA had no jurisdiction.

For all discussed herein above, I allow this ground, nullify CMA proceedings, quash, and set aside the award arising therefrom.

What I have discussed hereinabove have disposed the whole application. I will therefore not consider other grounds raised by the applicant.

Dated at Dar es salaam this 25th September 2023

B. E. K. Mganga
JUDGE

Judgment delivered on 25th September 2023 in chambers in the presence of Mr. Jeremia Tarimo, Advocate for the Applicant and Davis Majige Vedastus, Advocate for the Respondent.

B. E. K. Mganga
JUDGE