IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 147 OF 2023

(Arising from the award of the Commission for Mediation & Arbitration of DSM at Ilala)
(L. Chacha: Arbitrator) Dated 12th May 2023 in Labour Dispute
No. CMA/DSM/ILA/436/2022/257/2022)

EQUITY BANK TANZANIA LIMITED.....APPLICANT

VERSUS

ERICK MGOSI SHAO.....RESPONDENT

JUDGEMENT

Date of Last Order: *06st September, 2023*

Date of Judgement: *20th September, 2023*

MLYAMBINA, J.

The Applicant is seeking for this Court to call for the record of *Labour Dispute No. CMA/DSM/ILA/436/2022/257/2022* from the Commission for Mediation and Arbitration of Dar es Salaam (herein CMA). The object is to revise and set aside the CMA Award. He further prayed for this Court to make any other orders as it may deem just and convenient in the circumstances of the case.

The brief background of this application is extracted from the record of CMA, the affidavit of the Applicant, the counter affidavit of the Respondent and parties' submissions. It appears that on 7th January, 2019 the Applicant employed the Respondent as General Manger on permanent basis. On 05th February, 2019 vetting was initiated against the Respondent

as requested by the Applicant to the Bank of Tanzania, after vetting Respondent employment was terminated on 23rd May 2020, subject to BOT directives that the Applicant is required to search for a suitable person to fill the position of a General Manager.

Believing to have been unfairly terminated (unfair labour practices), the Respondent referred his dispute to the CMA. The CMA Arbitrator CMA confirmed that the Applicant initiated unfair labour practices in ending Respondent's employment contract. Hence awarded twelve months compensation to the tune of TZS 240,000,000/=. Being resentful with the CMA Award, the Applicant filed the present application. Through the affidavit supporting this application, the Applicant advanced 5 legal issues of revision:

i. Whether CMA has the jurisdiction to entertain the matter filed out of prescribed time by the law without first passing through condonation.

ii. That, the honorable Arbitrator erred in law and in fact for failure to reasonably asses parties' evidence and erroneously concluded that the Respondent was solicited to quit his job from FNB.

iii. That, the Honourable arbitrator erred in law and in fact by ignoring the fact that the Respondent was accorded with the right to be heard as evidenced by the correspondences between

the Applicant and BOT which the Respondent was also aware as per termination letter.

iv. Whether the Respondent managed to establish element of unfair labour practice as decided by the Arbitrator, and;

v. Whether it was proper to award the Respondent TZS 240,000,000/= despite the fact that the Applicant manged to prove that there was no any element of unfair labour practices.

The application was challenged by the Respondent's sworn counter affidavit. He vehemently disputed the Applicant's assertion that his employment was fairly terminated. He further disputed the fact that he was a part of discussion in ending his employment unfairly.

The application was disposed of by a way of written submissions. The Applicant was represented by Mr. Emmanuel Miage, Advocate, while the Respondent was represented by Mr. Rahim Mwambo, Advocate.

On the first ground, Mr. Miage submitted that *Rule 10 (1) and (2) of the Labour Institutions (Mediation and Arbitration) GN 64 of 2007* provides for time frame to refer the matter to the Commission, 30 days for the disputes about fairness of the employment termination and other dispute to be referred within sixty days from the date when it raised respectively. He stated that the claims of unfair labour practice fall under *subsection 2* of the above cited provision. The claim of unfair labour practice stems

from the employment contract signed on the 7thJanuary, 2019. On that basis, he was of the view that the dispute between the parties herein arose on the day the employment contract was signed, as the claims of unfair labour practice cannot exist when there is no employer-employee relationship.

As regards the CMA Form No. 1, Mr. Miage submitted that the form was supposed to be filled the date when the employment relationship was still subsisting. On that stand, he requested this Court to declare that the dispute was filed out of prescribed time under the law and the CMA referral form No. 1 was improperly filled for failure to indicate the date when the dispute arose.

On second, fourth and fifth grounds, the Applicant's Counsel submitted that it is the trite law that, he who alleges must prove. He said that at CMA, the Respondent alleges to have been solicitated by the Applicant to leave his former employment with FNB to join the Applicant, while in cross examination, the Respondent admitted to have no proof on his allegation. But the Arbitrator erroneously and, on the reason best known to herself, shifted such a burden to the Applicant. This is seen in paragraph 2 of page 16 of the Award. Shifting a burden of proof is against *section 110 and 111 of the Tanzania Evidence Act [Cap 6 Revised Edition 2019].* In support of his stand, he cited the case of **Security Group Limited v. Livingstone**

Lyanga Michael, Labour Revision No. 56 of 2017, High Court Labour Division, Mbeya Sub Registry (unreported), in which it was held that:

> *It is a cardinal principle of fair hearing that who alleges must prove the allegations by producing evidence proving the same.*

According to him, the Arbitrator misdirected herself in her reasoning, hence the whole decision became illegal and unlawful, as the Respondent herein failed to prove existence of unfair labour practice. Hence, the order for payment of 240,000,000/ = as compensation for unfair labour practice is illogical and unsubstantiated.

On the third ground, Mr. Miage argued that the Respondent herein prior to termination was sufficiently accorded with the right to be heard, unfortunately, the Arbitrator grossly failed to appreciate that the Respondent was aware of the vetting procedures. He was involved in the processes, and that is why, he was able to attend the interview with the BOT.

It was further submitted by Mr. Miage that everything was done in a transparent manner and the Respondent was involved throughout the process, he stated that the Respondent was not taken by surprise, also, the termination letter indicates, that the Respondent had a discussion with the Applicant on the 18th May, 2020 to discuss the outcome of vetting

processes. He added that during cross examination, the Respondent admitted having such a meeting, only disputed that there was no such meeting on the reason that it was not documented. On that stand he believes that the Respondent was never taken by surprise but was involved throughout the process and he was given his right to be heard. They thus urged for this Court to set aside the CMA award.

On first issue, as to whether the matter was time barred, opposing the application, Mr. Mwambo argued that this assertion need not detain this Court as it is simply misguided. The employer-employee relationship between the parties subsisted up until the same was unjustly terminated on the 23rd of May 2020. Further, the Respondent promptly lodged an application to the *CMA with reference No. CMA/DSM/ILA/508/2020* which was filled in two categories, the first one was termination of employment and the second one was unfair labour practice.

Further, Mr. Mwambo submitted that the Respondent successfully prosecuted the claim of unfair labour practice after dropping that of unfair termination and was awarded 12 months compensation by Hon. Wambali, Arbitrator. The Applicant herein was aggrieved and applied for revision vide *Revision No. 250 of 2021* where this Court on 22nd July, 2022 granted leave to the Respondent for filing an unfair labour practice claim to the CMA within 30 days to which the Respondent duly complied to that order,

as such the assertion that the claim was time barred is unfounded. In support of his point, Mr. Mbwambo submitted that it should be noted that the Respondent testified that he came to know about his non approval by the BOT on May, 2020 when he was called by the Applicant and given a termination letter and the Applicant acted promptly by filing the dispute at CMA within 30days. This testimony was never challenged, if the Applicant wishes to do so, the same ought to have been proved before the CMA that the Respondent was informed early about his non confirmation by the BOT, as was testified at page 3 last paragraph of the Award where the Respondent stated that he was not informed before termination that his employment was pending to approval from BOT.

In addition, Mr. Mbwambo submitted that the unfair labour practice was a result of continuous breach/acts by the Applicant. He stated that the breach begun when the Respondent was solicited to leave his previous job without a prior approval from the BOT as per the law and culminated when he was taken by surprise on the decision of the BOT regarding his status. He was terminated without being afforded the right to be heard.

He further added that the unfair labour practice was repeated each day, as the Applicant was assigned duties and allowed to work, while he was not approved by the regulator contrary to the law and without his knowledge. In support of his authority, he cited the South Africa case, the

case of **SABC Ltd. v CCMA & Others** 2010 (3) BLLR 251 (LAC) as cited and approved by the Supreme Court of Zimbabwe *in Civil Appeal No SC 845/18 at paragraph 13.* In this case it was held that:

> *...The problem however is that the argument presented by the appellant is premised upon the belief that the unfair practice or unfair discrimination consisted of a single act. There is however no basis to justify such belief. While an unfair labour practice or unfair discrimination may consist of a single act, it may also be continuous, continuing or repetitive. For example, where an employer selects an employee on-the basis of race to be awarded a once-off bonus, this could possibly constitute a single act of unfair labour practice or unfair discrimination because like a dismissal, the unfair labour practice commences and ends at a given time. But where an employer decides to pay its employees who are similarly qualified with similar experience performing similar duties different wages based on race or any other arbitrary grounds, then notwithstanding the fact that the employer implemented the differential on a particular date, the discrimination is continual and repetitive. The discrimination in the latter case has no end and is therefore ongoing and will only terminate when the employer stops implementing the different wages. Each time the employer pays one of its employees more than the other, he is evincing continued discrimination.*

Basing on the above authorities, the Respondent was of the view that the Applicants act initiated to the Respondent amount to continuous breach.

On second, fourth and fifth grounds, it was the Applicant's contention that the Arbitrator erroneously shifted the burden of proof from the Respondent. Mr. Mbwambo argued that the Arbitrator adhered to the principles of evidentiary standards. PW-1 testified that he never applied for the role of a General Manager with the Applicant, following a fruitful negotiation he resigned from FNB and joined Equity Bank. He therefore produced Resignation letter dated 18th December 2018 (Exhibit P2) after receiving letter of appointment from the Applicant herein dated 13th December 2018 (Exhibit PI). As such, from this sequence of events and basing on the credence afforded to the testimony of PW1, the Arbitrator on the balance of probability inferred that the Respondent was solicited and the said evidence was not countered either by way of testimony or documentation from the Applicant.

He stated that from the second paragraph of page 16 of the Award, it is evident that there is no a letter signifying that the Respondent Applied for the job, otherwise would have been enough to prove that there was no solicitation. Since the Respondent satisfied the CMA by evidence, the burden that the onus had shifted. In the case of **Crescent Impex (T)**

Limited v. Mtibwa Sugar Estates Limited, Civil Appeal No.455 of 2020, the Court of Appeal of Tanzania (unreported) on page 10 had this to say:

> *It is also elementary that the standard of proof, in civil cases, is on a balance of probabilities which means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved. Likewise, it is the law that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his/her burden to prove and the said burden is not discharged or diluted on account of the weakness of the opposite party's case.*

On the third ground, the Applicant faults the Award of the CMA for finding that the Applicant was not afforded with the right to be heard, and has gone further to claim that the Respondent admitted to have discussed with the Respondent prior to his termination. Mr. Mbwambo faulted it, as it is contrary to the testimony of PW1 on the last paragraph of page 3 of the Award. Thus, he was never heard before his termination. He was merely informed that his position was not approved by the BOT and he was not even given the chance to read the letter from the BOT. He reinforced this position on page 5 of the Award by stating that he was not involved in writing the termination letter and he could not change it.

He further added that the Termination letter cites *section 4.6.6 of the HR Manual* in terminating Respondent's employment. However, the HR Manual (Exhibit P4) does not have the said section which validated the termination of the Respondent. He insisted that since there was no consultation on alternatives and benefits in terminating the Respondent, the Respondent's employment was unfairly ended. He expounded the principle of right to be heard, by citing the case of **Abbas Sherally& Another v. Abdul S.H.M. Fazalboy,** Civil application No.33 of 2002 (unreported) in which it was held:

> *The right of a party to be heard before adverse action or decision is taken against such a 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.*

Mr. Mbwambo submitted that, even if the Respondent did not categorically deny this knowledge repeatedly during his testimony, it was incumbent for the Applicant to prove this assertion by demonstrating how the Respondent was aware despite admitting that they were involved in all the correspondences in BOT and the Respondent was never privy to these communications. Thus, the point that the Respondent's right to be

heard was abrogated would still stand as he was never given a chance to discuss on alternative job and termination was not the best option.

Mr. Mbwambo added that the restriction of the right to be heard was the final blow to the continual unfair labour practices of the Applicant who solicited the services of the Respondent who had the legitimate expectations that his employment would be indefinite thereby abandoning his previous job unaware that his new job was yet to acquire approval from the BOT (last paragraph page 3 of the Award).

Mr. Mwambo submitted that, having worked for over a year and four months, the unilateral termination so occasioned by the Applicant did not afford the Respondent with an option to discuss on alternative employment given the fact that they are in multiple jurisdictions, nor discussion on the terminal package. He added, the letter from BOT did not *ipso facto* terminate the contract of the Respondent, nor did it indicate to that conclusion. According to him, the Applicant as an employer was left with a duty to adhere to labour laws even if BOT did not approve of the Respondent.

It was further submitted by Mr. Mbwambo that the root of the matter lies in *Regulation 19(1) of the Banking and Financial Institutions (Licensing) Regulations, 2014* which directs that:

> A bank or financial institution shall not appoint any person as senior manager or board member and assign that person responsibilities unless it has obtained prior approval of the Bank.

Basing on the above provision, Mr. Mbwambo was of the view that the duty to seek approval and to make all the necessary follow up rests with the Employer, the Applicant herein as was affirmed by the Applicant's witness DW 1 and reflected on page 6 of the CMA Award. He further stated that the Respondent herein was hired and assigned duties and he was not told that his employment was still dependent on vetting as per Exhibit P1, coupled with a testimony of the Applicant DW1 confirming this (page 6 last paragraph of the Award).

According to the evidence Mr. Mwambo, the letter from BOT (Exhibit D4) did not direct the Applicant to terminate the employment of the Respondent, yet the Applicant went along and terminated him as per Exhibit P3, without being afforded with an opportunity to be heard on possible alternatives, these infringements were made to an employee who sacrificed his livelihood by resigning his previous employment and joining an employer who solicited his service with the promise of permanent job (page 4 para 2 of the Award).

Finally, DW1 admitted to the fact that the decision of the Bank of Tanzania was unchallenged by them, or at the very least an inquiry as to

the reason for the decision not to approve the appointment of the Respondent especially given the fact that they were the only one who could have communicated with BOT on behalf of the Respondent, leaving the decision unchallenged taints the image of the Respondent and it hurts his chances of ever being hired in a Senior Managerial role in the Industry. Strengthening his position, he cited the case of **Stanbic Bank (T) LTD v. Iddi Halfani,** Revision No 858 of 2019 High Court Labour division at Dar es Salaam (unreported).

Being guided by the submissions made by both parties, as well as the Applicant's affidavit, the Respondent counter affidavit and CMA record, this Court is called upon to determine two issues: *First, whether the Applicant have provided sufficient ground for this Court to exercise its revisional power against the CMA award. Second, what reliefs are parties entitled to.*

In approaching the above issues, all grounds identified in the affidavit will be considered all together focusing on *fairness of labour practices* as contested by the parties.

To start with the first issue; *whether the matter was time barred.* The Applicant cotended that the dispute of unfair practices arose on the day the Respondent signed employment contract. He further added that the claims of unfair labour practice cannot exist when there is no

employer-employee relationship. Having a disputed question as to when the dispute arose regarding unfair labour practices, it must be noted that the labour law is not silent on that field. Being a dispute of other claim, it is well captured under *Rule 10 (2) of G.N No. 64 of 2007* which directs that other disputes must be referred to the CMA within 60 days from the date when the dispute arose. This provision gives time limit of filing application before the CMA basing on nature of dispute. Since it is undisputed that the first application with *Reference No. CMA/DSM/ILA/508* was filed within a time at CMA, the same was revised by this Court in *Revision 250 of 2021* with a directive of lodging a fresh dispute of unfair labor practices, after being wrongly initiated, as the CMA Form No. 1 was improperly filled by having two distinct claims (unfair termination and unfair labour practices).

From the above legal reasoning, since the leave was granted by this Court to refile the application, the Applicant's allegation regarding time limitation lacks legal stance.

On second issue, *whether the Respondent was solicited,* before venturing into the disputed question, I find wise to give the meaning of the word solicit. According to Oxford Dictionary, the word *"solicit"* means to ask somebody for something, such as support, money or information; to try to get something or persuade somebody to do something. In

answering the disputed question, the record available including Exhibit P1(Letter of Appointment) issued on 13th December, 2018 and Exhibit P2(Letter of Resignation) issued on 18th December, 2018 justify that the Respondent quitted the former employer after being appointed with the Applicant. This validate the Respondent's allegation that he was solicitated by being offered a higher position on permanent basis, with a full package of remuneration. Since the Respondent failed to dispute the same by not tendering evidence as to whether the Respondent requested for employment, or his position was advertised, I have no hesitation to say that the evidence was properly assessed on this aspect, therefore the Respondent was solicitated.

As regards the right to be heard, the Applicant contended that the Respondent was afforded with an opportunity of being heard via vetting process, while the Respondent challenged it on the reason that he was not given a chance to discuss in terminating his employment in relation to alternative position so as to recue his employment. The principle of fair hearing before making decision is well expounded in the case of **Abbas Sherally & Another v. Abdul Sultan Haji Mohamed Fazalboy,** Civil Application No. 33 of 2002 (unreported), in which it was stated that:

> *The right of a party to be heard before adverse action is taken against such party has been stated and emphasized*

by 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 5 heard, because the violation is considered to be a breach of natural justice.

Considering the status of this Court, being the Court of equity and the circumstances of this case, I agree with vetting process initiated by Bank of Tanzania as requested by the Applicant. But this Court find worth for the employer to draw a demarcation between employer's internal affairs and employer employee affairs. In this matter, the record reveals that after vetting process and recommendations, the Respondent was neither afforded with an opportunity to debate on those recommendations nor given a chance or option on alternative position regarding the status of his employment, this is justified after the Bank of Tanzania issued directives to the Applicant that she had to search for a suitable person to fill the position as per Exhibit D4 (Response letter from BOT).

From the above legal findings, I am of the view that the Applicant generalized her internal affairs with employer employee issues. Therefore, the Respondent right to be heard was violated, as adverse action is taken against the Respondent without being afforded with a solution regarding the BOT's concern.

On allegations regarding unfair labour practices, the Applicants alluded that the vetting was fairly initiated by involving the Applicant. On the other hand, the Respondent sustained that the way Respondent's employment ended, amount to unfair labour practices. However, it is an accepted cardinal principle of law that in terminating employment contract, both laws; *municipal* and *international laws* must be considered. This position is well enclosed under *Article 4 of ILO Termination of Employment Convention, 1982 (No. 158)* which states:

> *The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operation requirements of the undertaking, establishment or services.*

At national level, in determining substantive fairness, reference is made to *Section 37 of the Employment and Labour Relations Act [Cap 366 Revised Edition 2019]* which makes unlawful for an employer to terminate the employment of an employee unfairly.

Being a matter of labour practices falling under ambit of probationer employee, I am of the view that the relevant provision is *Rule 10(7) of the Employment and Labour Relations (Code of Good Practices) G.N No. 42 of 2007* which provides that:

> Where at any stage during the probation period the employer is concerned that the employee is not performing to standard or *may not suitable for the position the employer shall notify the employee of that concern and give the employee an opportunity to respond or an opportunity to improve.*

The highlighted words are relevant in this matter. After BOT issued recommendations that the Respondent is not suitable for the position of Managing Director, the question is: *Did the Applicant comply with the law in ending the Respondent's employment?* The answer is in affirmative, as no evidence reveals the Respondent was offered with an opportunity to respond or to improve. The principle of unfair labour practices is well explicated in the case of ***Stanbic Bank's (supra),*** High Court of Tanzania, Labour Division at Dar es Salaam (unreported). Later on, it was confirmed by the Court of Appeal, whereby in this case it was held that:

> *From the records, specifically letter from the BOT, did not give Applicant directive to terminate Respondent. Assuming it gave directives which is not the case, yet Respondent was to be given right of audience which Applicant admitted not to comply as he had no any issue with him.*

The above authority applies in this matter, as the BOT did not give the Applicant directive to terminate Respondent, rather to find another person to fill the position of Managing Director, the Applicant ought to act

wisely without forgetting the position faced by the Respondent, by complying with the law in terminating Respondent's employment. Apart from the above legal findings, as the employment contract did not disclose that his position was subject to approval of BOT as per *Section 19-(1) of the BOT Act,* which directs that a bank or financial institution shall not appoint any person as senior manager or board member and assign that person responsibilities unless it has obtained prior approval of the Bank. In the case of **Stanbic Bank (T) LTD v. Iddi Halfani**, Civil Appeal No. 139 of 2021, Court of Appeal of Tanzania, at Dar es Salaam (unreported), it was held that:

> *In light of the above, it is necessary to consider the legal implications when the Bank of Tanzania in the course of discharging its statutory duties, give orders or directions to a bank or financial institutions which it considers of national interest, to the extent of changing the statutory principles of labour law such as freedom of an employer to terminate an employment contract in line with the contractual terms.*

The above case directs employers to observe contractual terms. But that was not honoured by the employer in this matter as per exhibit P3(notice of termination). The section used in justifying reason for termination is not contained in employer's manual. Therefore, the contract itself did not disclose that the Respondent position was subject approval.

As pointed out herein above, I am of the view that the Applicant act of terminating Respondent amount to ***unfair labour practices*** in both aspects of termination, reason and procedurally.

Having found that there were unfair labour practices, the next question to be addressed is about relief, in CMA Form No. 1 the Respondent prayed for the compensation of 24 months, However the arbitrator in his findings reduced the same to 12 months compensation. In the case of **Tanzania Cigarette Company Ltd v. Hassan Marua,** Revision No. 154/2014 the Court of Appeal stated, thus:

> *It stems out clearly that, first; an order for payment of compensation is discretionary and, secondly; is awardable to an employee only when the arbitrator or the Labour Court finds that his or her termination was unfair. The two conditions apply conjunctively or must cumulatively exist. To say it in other words, an order of payment of compensation is discretionary and is consequential to unfair termination.*

The above award being awarded in unfair termination, I find its relevance on this matter as the reason for termination was not fair, and procedures were not followed, since the Respondent reduced compensation by awarding 12 months, in observation of *Section 3 of the ERLA [Cap 366 Revised Edition 2019]* and the same being discretional power, then I find no need to fault the CMA Award.

On the above reasoning, I hereby upheld the award of the Commission for Mediation and Arbitration. The application has no merit, and it is dismissed accordingly. Each party to take care of its own cost.

It is so ordered.

Y. J MLYAMBINA

JUDGE

20/09/2023

Judgement pronounced and dated 20th September, 2023 in the presence of Isaya Thomas, Legal Officer from ATE and the Respondent in Person.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) DIVISHENI YA MAHAKAMA YA KAZI (Labour Division)

Y. J MLYAMBINA

JUDGE

20/09/2023