IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

APPLICATION NO. 27666 OF 2023

CASE REFERENCE NO. 20231214000027666

BETWEEN

HOT BUNS LIMITED ..... APPLICANT

VERSUS

DEOGRATIUS MAKENE ..... RESPONDENT

JUDGEMENT

Date of last Order: *11/03/2024*
Date of Judgement: *22/03/2024*

MLYAMBINA, J.

By way of revision, the Applicant challenged the decision of the Commission for Mediation and Arbitration (herein CMA). The contested decision emanates from the following brief background; the Respondent was employed by the Applicant as a General Manager in unspecified period contract which commenced on 15/05/2017. For the reasons which will be apparent in this decision, the Respondent was terminated from employment on 27/05/2019. Aggrieved by the termination, he referred the matter to the CMA claiming for unfair termination both substantively and procedurally. After considering the evidence of both parties, the CMA found that the Respondent's termination was unfair as claimed. Following such finding, the Applicant was ordered to pay the Respondent a total of

TZS. 15,600,000/= being twelve months salaries compensation for the alleged unfair termination.

Unhappy with the CMA's decision the Applicant filed the present application requiring determination of the following issues:

1. Whether the CMA erred in law and fact by ruling that the Applicant failed to advance sufficient reason for termination of the Respondent cum Complainant.
2. Whether the CMA erred in law and fact by ruling that there was no mutual understanding between the parties to wind up their labour relation.
3. Whether the CMA erred in law and fact by ruling that the proper termination procedure were not complied.
4. Whether the CMA erred in law and fact by not considering point of fact crucial in determination of the Applicant's dispute i.e. the Applicant did advance sufficient supporting documents at the CMA.
5. Whether the CMA erred in law and fact by not considering a point of fact crucial in determination of the Applicant's dispute i.e. there was ongoing negotiation between the parties which resulted to the fair termination of employment.

When the application was called on for hearing, Mr. Carlos Cuthbert appeared and argued for and on behalf of the Applicant and Mr. Felix Makene appeared and argued for and on behalf of the Respondent.

When arguing the application, Mr. Cuthbert submitted on the first, second and fifth grounds jointly that; this revision is based on the ground that there is an error in the Award. He said, there is a point of law on whether the contract was terminated fairly or unfairly both substantively and procedurally. The finding of the CMA was that the termination was unfair both substantively and procedurally. He was of the argument that the contract was terminated by mutual agreement between the parties. Thus, Mr. Makene being the employee of the Applicant was involved in the negotiation between him and the management. Taking into account that Mr. Makene was the General Manager of the Applicant and in his capacity, he was the only person after the management.

Mr. Cuthbert went on to submit that; there were negotiation going on 20/05/2019 to 26/05/2019 between Mr. Makene and the Management on terminating the contract by mutual agreement. That the negotiation was proved by Exhibit D3. It was the minutes of the meeting between the Management and Mr. Makene. Those minutes were prepared by the Human Resource Manager one Mr. Christopher Mmanyi. The minutes

were signed by all the persons who attended that meeting including the Respondent. He added that there was an agreement for the payments and those payments were duly effected. He stated that the payment can be found in the termination letter (exhibit D2).

It was further argued by Mr. Cuthbert that Mr. Makene agreed by signing the contents of Exhibit D3. He said, if the procedures are fair, those payments would be acceptable, and he accepted the payments. It was Mr. Cuthbert strong position that there were sufficient reasons to accept that the termination was by way of agreement. He maintained that the parties engaged in negotiation and signed the agreement. There were fair reasons and there were no any force or misrepresentation or any other vitiating factor. The actions taken by Mr. Makene going to CMA seeking for unfair termination remedies were after thought because he was aware of the negotiations.

Mr. Cuthbert was of submission that, Mr. Christopher Mmanyi who prepared Exhibit D3 for no reasons refused to go to the CMA to adduce reasons. That the said Mr. Christopher Mmanyi and the Respondent were close friends and on the balance of probabilities there some reasons which made him not to appear before CMA. However, the exhibit in question was not objected at the CMA. He stated that they decided to ask the CMA

to give them opportunity to refresh DW1 Mr. Mark Kitali. Unfortunately, the evidence of DW1 when recalled was not considered by the CMA. To sum up the first ground it was strongly submitted by Mr. Cuthbert that the Applicant followed the law which allows termination by mutual agreement and the same was proved before the CMA.

On the issue of procedure, Mr. Cuthbert submitted that the procedures for termination were dully followed and going through the law, *Rule 3(a) of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007 (herein GN. No. 42 of 2007),* termination of employment by agreement is regarded as lawful termination. The procedure is set clearly. He argued that there is no procedure clearly provided to that effect, the Applicant was properly guided by calling the Respondent, doing several discussions on termination of the employment and concluded to end up the employment contract on 26/05/2019. Thus, the procedure used was fair. Mr. Cuthbert clarified that going back to the minutes of the meeting to terminate the agreement, Mr. Makene accepted to terminate the contract by agreement. Unfortunately, the Arbitrator failed to consider the facts proved by evidence from the record.

The fourth ground was whether the CMA erred in not advancing sufficient supporting documents. It was submitted by Mr. Cuthbert that such documents were provided to the CMA, particularly Exhibit D2 and D3.

In sum, he urged the Court to revise and set aside the CMA's award for being improperly procured and illogical due to the material irregularities explained above.

In response to the application, Mr. Makene submitted generally to the grounds raised. He submitted that the reasons for termination advanced was on poor performance and loss of trust. However, the Applicant never proved before CMA that he had fairly terminated the Respondent based on poor performance and loss of trust. He argued that *Rule 16 (1) of GN. No. 42 of 2007* provides clearly for managing work performance standard. The Applicant never produced any document upon which performance standard could be compared to. He was of the view that if an employee is condemned on poor work performance, the employer is bound by the law to abide to the criteria stipulated under *Rule 17(1) (a) (b) (c) (d) and (e) of GN No. 42 of 2007.*

Mr. Makene went on to submit that; the Respondent in the course of employment has not been given the work standard that the Applicant requires her employees to be. He was not aware if such standards exist. He can therefore not measure if the standards are reasonable. If the Applicant observed that there was poor working performance rendered by the Respondent, then the Applicant was bound under *Rule 17 (1) (d) (supra)* to afford a fair opportunity to meet the performance standard. He argued that; since the Applicant never observed if there were poor performance and never gave time to assist the Respondent to improve the situation, therefore the Respondent cannot be condemned for poor performance.

Mr. Makene continued to argue that *Rule 18 (1) of the GN No. 42 of 2007,* gives fairness of the procedure. He stated that the issue of poor performance was discussed by the Court of Appeal in the case of **Tanzania Breweries Ltd v. Leo Kobelo**, Civil Appeal No. 147 of 2021, at Dar es Salaam, pp 16-29. On the allegation of mutual agreement by parties, it was strongly refuted by Mr. Makene. He submitted that the allegations are not true because it was not proved before CMA and not an issue before CMA, it just came by

chance during cross examination and re-examination. He strongly added that it was not an issue for determination.

Additionally, Mr. Makene submitted that even if it was an issue, the question before this Court is that; if there was an agreement by parties to terminate the employment, why then the Applicant turned back to terminate the Respondent based on poor performance and loss of trust as evidenced by exhibit D2 (letters of termination issued on 27/05/2024?

Further, Mr. Makene submitted that there was no any document filed or tendered before the CMA to justify a dully signed agreement referring to Mutual termination by agreement. He stated that exhibit D3 admitted before CMA was a purported minute of the meeting. He invited the Court to go through such document. It has no Title, rather it has shown the attendances of some persons alleged to form part of the negotiation. There were about six persons including the Respondent. Mr. Makene was of the view that the first page of the exhibit in question sounds awkward where it is stated that *"Tumekuita hapa ili kuweza kumalizana kwa mjibu wa Mkataba na Sheria za Kazi"* To the surplus, this is substantively and procedurally unfair because the Respondent could not be taken by surprise.

In addition, it was submitted by Mr. Makene that, one cannot say there was negotiation under the quoted words. To back up his submission, he cited the case of **R.K. Chudasama Ltd v. Sinai Stephano**, Application for Revision No. No. 32 of 2009, High Court Labour Division (unreported).

Mr. Makene went on to submit that going through the employment contract exhibit P1. under clause 12 it stipulates the termination by either party where it gives either day, weeks, months explaining reasons for termination. Based on the fact that the Respondent was employed on monthly basis, so his contract was on unspecified contract. The Applicant should have given a notice of 30 days.

He argued that *Rule 4(1) of GN No. 42 of 2007* could be a guidance where it provides for termination of employment by agreement. Exhibit D3 cannot carry the weight to be regarded as an agreement by the parties. There is no any point showing to the effect that Makene had agreed.

On whether such a minutes of the meeting under exhibit D3 qualifies to be an agreement in the eyes of the law, Mr. Makene was of the position

that minutes of the meeting cannot qualify to be an agreement in the eyes of the law.

On the issue of payment, it was submitted that there was nothing paid to the Respondent and there was no proof to that effect before the CMA. Mr. Makene argued that the Applicant was duty bound under *Section 110 of the Evidence Act, [Chapter 6 Revised Edition 2019]* to prove the payment.

He further admitted that it is quite true that upon conclusion of the defence evidence, the Counsel recalled DW1. The CMA gave such chance. Though the recall was illegal because DW1 came to give evidence of Christopher Mmanyi.
He was of the view that, the absence of Mmanyi was of no value because other Directors testified before CMA. In conclusion, he maintained that the findings of CMA was correct rational and followed the law and procedure, therefore, the application be dismissed for lack of merits.

Rejoining the application on the payment, Mr. Cuthbert submitted that there was a proof admitted as exhibit D2 and D3. He further maintained that there was an agreement. That the definition of an agreement is based on *Section 10 of the LCA (supra)t* He added that

there was lawful consideration. He disputed the award of 12 months salaries. He added that; minutes amounts to an agreement in law in terms of *Section 10 of the LCA.* That, the 30 days' notice was paid, hence the procedure was duly followed. He further reiterated his submissions in chief.

Having carefully considered the rival submissions of the counsel for and against the application, CMA and Court records as well as relevant laws, I find the Court is called upon to address the following issues: *First, whether there was termination by agreement in this case. Second, whether the Respondent was fairly terminated from employment. Lastly, what reliefs are the parties entitled.*

To begin with the first issue; it is Mr. Cuthbert's strong position that there was termination by agreement in the case at hand. On the other hand, Mr. Makene vehemently refused such argument.

As rightly submitted by Mr. Cuthbert, termination by agreement is one of the ways of ending employment relationship recognized by the labour laws. The same is provided under *Rule 4(1) of GN. No. 42 of 2007* which states as follows:

> An employer and employee shall agree to terminate the contract in accordance to agreement.

I join hands with Mr. Cuthbert's argument that though the law recognizes termination of employment by agreement, the procedures for such termination are not stipulated in the Act. This is also the Court's position in the case of **Asma Said Kumbuka v. Resort World t/s Palm Beach Casino**, Labour Revision No. 381 of 2022, High Court Labour Division, Dar es Salaam (unreported) where it was held that:

> The Labour Laws do not provide the mode in which the said agreement should be reached between the parties. However, an agreement being a contract, it is expected that all elements for a valid contract must be in such particular agreement. This is the law position under *Section 10 of LCA* which is to the effect that:
>
> > All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

In the application at hand, Mr. Cuthbert insisted that there was a mutual agreement entered by the parties to terminate the contract. That, the agreement was entered free from fraud, undue influence or any other vitiating factors. I have gone through exhibit D3 which is the alleged minutes of the meeting for the agreement to terminate the contract. The

purported agreement is not reflected in the relevant document. The exhibit in question shows that the Applicant made unilateral decision to terminate the Respondent even before the said meeting. The Applicant's reply in the discussion in question indicates that he was not satisfied with the decision to terminate him from employment but he had to agree with the same. I hereunder quote part of the parties' discussion in the last page of the contested minutes:

S; kilichoandikwa wewe unaonaje?

J; Utaratibu ukiwa sawa kisheria malipo haya ni sawa

Reading the above quotation, the Respondent was asked if he was agreeing to the terminal benefits listed thereat. His reply was that; if the lawful procedures will be followed, he had no objection to those payments. The said statement clearly indicates that there was no agreement between the parties. If they had a mutual agreement to terminate the contract, the Respondent would have not demanded the Applicant to follow stipulated procedures in terminating him.

The circumstances of this case invited the Court to consider the Court's position in the case of **McAlwane V. Boughton Estates Limited**

[1973] 2 All ER 299 cited in the book titled **Employment Law Guide for Employers by George Ogembo** where it was held that:

> An agreement to terminate an employment contract, if the initiatives arises from the employer, must be interrogated to confirm whether the employee freely consented to the termination. Hence, the Court would not approve an agreement to terminate employment unless it is proved that the employee really did agree with full knowledge of the implications it had for him.

In the instant matter, the decision to terminate was not only initiated by the employer but the employee did not agree to the said termination. As rightly analysed by the Arbitrator, the evidence of the Applicant's witnesses contradicted each other. DW1 stated that the Respondent was terminated for poor performance while DW2 testified that his employment contract came to an end. Even the Applicant's conduct proves that the decision to terminate the Respondent was made before the discussion between the parties. This is proved by exhibit P3 the WhatsApp conversation where on 21/05/2019 it was stated that the Respondent was excused off his duties for the remaining days of the month and he should hand over his responsibilities because he completed his 2 years employment. Such message was contrary to the employment contract (exhibit P1) where the parties entered into unspecified period contract.

Additionally, the message was sent on 21/05/2019 while the purported meeting to terminate the contract was held on 25/05/2019.

If the parties agreed to terminate the contract, the termination agreement would have been put into place with such effect. In absence of any agreement, it is mare allegation which remains unproved. I therefore join hands with the Arbitrator's findings at page 33 paragraph 1 of the impugned award where he stated as follows:

> Kwa kurejea Ushahidi uliotolewa na upande wa mwajiri mashahidi wake wote kwanza wamejikanganya mno kuhusu sababu iliyopelekea mlalamikaji kuachishwa kazi na zaidi kila sababu iliyotolewa haikuwa na uthibitisho wowote. Mfano, shahidi DW1 aleleza kuwa uachishwaji kazi ulikuwa wa makubaliano lakini hakuna makubaliano yoyote yaliyoletwa mbele ya Tume, hata muhtasari wa kikao cha tarehe 23/05/2019 (kielelezo D3) ambacho upande wa mlalamikiwa wanadai kuwa ndio uthibitisho wa makubaliano hauna sifa ya kuitwa makubaliano ya kusitisha ajira ...

I have noted the Respondent's counsel submission that the allegation of mutual agreement was an afterthought and not an issue before the CMA. such submission is contrary to the records available. Before the CMA, in the opening statement, the Applicant clearly raised the issue of mutual agreement, even some of the witnesses, as indicated

above testified on the same. Equally, the Arbitrator considered the issue of mutual agreement to terminate the contract and concluded that there was no such agreement. Thus, the argument of an afterthought is of no basis.

Turning to the second issue, the termination letter (D2) indicates that the Respondent was terminated for poor performance. Looking at the record at hand it is not proved how he failed to perform his duties as alleged. Even the termination procedures on the ground of poor performance as provided under *Rule 17 and 18 of GN. No. 42 of 2007* were not observed. Thus, the Respondent was unfairly terminated from employment as rightly found by the Arbitrator.

Lastly, to the circumstances of this case where it is found that the Respondent was unfairly terminated from employment, I find no justifiable reasons to depart from the Arbitrator's findings. The Award of TZS 15,600,000/= being 12 month's salaries compensation for unfair termination is hereby upheld. Consequently, the application is dismissed for lack of merits accordingly.

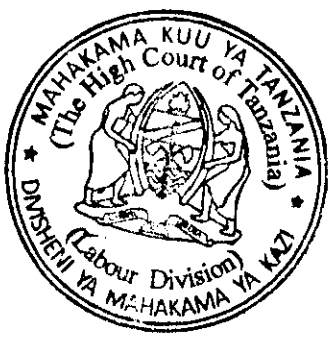
It so ordered.

Y. J. MLYAMBINA

JUDGE

22/03/2024

Judgement pronounced and dated 22nd March, 2024 in the presence of Counsel Carlos Cuthbert for the Applicant and Felix Makene for the Respondent. Right of Appeal explained.



Y. J. MLYAMBINA

JUDGE

22/03/2024