IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 3522 OF 2024

(Arising from the Ruling delivered on 30/10/2023 by Hon. Johnson Faraja, L., Arbitrator, in Labour Dispute No. CMA/DSM/KIN/466/2023 at Kinondoni)

ABDUEL EMMANUEL..... APPLICANT

VERSUS

MEDICINS SANS FRONTIERS..... RESPONDENT

JUDGEMENT

Date of Last Order: 21/03/2024
Date of Judgement: 04/04/2024

B. E. K. Mganga, J.

Brief facts of this application are that, Abduel Emmanuel, the abovementioned applicant filed Labour Dispute No. CMA/DSM/KIN/466/2023 before the Commission for Mediation and Arbitration (CMA) at Kinondoni complaining that Medicins Sans Frontiers, the abovementioned respondent terminated his employment unfairly. On 07th August 2023 a notice to attend mediation was issued to the respondent. Upon receiving the said notice, on 01st September 2023 respondent raised two preliminary objection that: -

1. *The application is res judicata to labour dispute No. CMA/DSM/KIN/242/2023 and*
2. *That, the application by the applicant is frivolous and vexation therefore should be dismissed for lack merit.*

In order to dispose the aforementioned preliminary objections, the parties appeared before Hon. Johnson Faraja, L, Arbitrator. Having heard submissions by the parties on the two preliminary objections, on 30th October 2023, Hon. Johnson Faraja, L. arbitrator, delivered his Ruling overruling the two preliminary objections. But, in the said ruling, having overruled the preliminary objections, the arbitrator struck out the dispute that was filed by the applicant on ground that it lacked facts to be judged or ruled out. Applicant was dissatisfied with the said ruling hence this application for revision. In his affidavit in support of the Notice of Application, applicant raised two grounds namely: -

a) *That the trial arbitrator erred in law and fact in striking out labour dispute No. CMA/DSM/KIN/466/2023 while the preliminary objection so raised by the respondent was overruled.*
b) *That the trial arbitrator erred in law and facts by striking out labour dispute No. CMA/DSM/KIN/466/2023 on the reason that the same lacks facts to be judged or ruled out without affording the applicant the right to be heard.*

Respondent opposed this application by filing both the Notice of Opposition and the Counter Affidavit that was Oliver Mkanzabi, her advocate.

When the application was called on for hearing, Mr. Victor Kikwasi, advocate appeared and argued for and on behalf of the applicant while Mr. Geofrey Paul, advocate appeared and argued for and on behalf of the respondent.

Arguing the two grounds on behalf of the applicant, Mr. Kikwasi, submitted that, the arbitrator erred to struck out the dispute without affording applicant the right to be heard. He submitted further that, the preliminary objection that was raised by the respondent relating to *res judicata* was overruled. He added that, after overruling the said preliminary objection, the arbitrator went on and struck out the dispute on ground that there are no facts to be adjudged. He argued that after overruling the preliminary objections, the dispute was supposed to be heard on merit. Learned counsel for the applicant submitted further that, the Arbitrator was supposed to hear the parties on whether there are facts to be adjudged or not.

Learned counsel for the applicant submitted further that, the arbitrator erred to hold that there are no facts to be adjudged without faulting the CMA F1 that had all information required. He added that, in the impugned ruling, the arbitrator did not state the facts that were lacking. He went on that, there is no preliminary objection that was raised by the respondent in relation to absence of facts to be adjudged.

Learned counsel for the applicant strongly submitted that, parties were not heard on whether there were facts to be adjudged or not and that, right to be haerd is fundamental. To support his submissions that right to be heard is fundamental, learned counsel for the applicant cited the case of ***Mrs. Fakria Shamji vs. The Registered Trustees of the Khojia Shia Ithnasher (MZA) Jamaat***, Civil Appeal No. 143 of 2019, CAT (unreported). He concluded that, there was no justification for the dispute to be struck out and prayed the application be allowed, an order be issued returning the file to CMA so that the dispute can be heard by a different arbitrator.

Resisting the application, Mr. Geofrey Paul, learned counsel for the respondent submitted that, respondent raised the preliminary objection that the dispute was *res judicata*. He went on that; the arbitrator determined the preliminary objection and find that it lacked merit and thereafter struck out the dispute for lack of facts to be adjudged. Counsel for the respondent submitted that, the arbitrator stated that there was nothing tangible submitted. When probed by the court, learned counsel for the respondent conceded that, the arbitrator did not state what was not tangible. He further conceded that, at that stage, parties had not filed opening statements. In the same submissions, learned counsel for the respondent submitted that, parties were afforded

right to submit presence or absence of facts to be adjudged. When further probed by the court, learned for the respondent conceded that, in the ruling the arbitrator did not state the facts that were missing for the dispute not to be adjudged. With those submissions, learned counsel for the respondent prayed that the application be dismissed for want of merit.

In brief rejoinder, Mr. Kikwasi, learned counsel for the applicant submitted that, the arbitrator did strike out the dispute prior to determination of the preliminary objection.

I have examined the CMA record and considered submissions made on behalf of the parties and find that respondent raised preliminary objections at the earliest before even conclusion of mediation process. In other words, the dispute was at mediation stage. In the impugned ruling, the arbitrator found that the preliminary objections that were raised by the respondent had no merit but proceeded to strike out the preliminary objection and the dispute on ground that there were no facts to be adjudged.

It is my considered view that the arbitrator having found that the preliminary objections that were raised by the respondent had no merit, was supposed to overrule them, and direct the parties to go to the mediator for mediation because the dispute was not yet mediated. I am

of that view because, in terms section 86 of the Employment and Labour Relations Act, Cap. 366 R.E. 2019, Rule 20(1) of the Institutions (Mediation and Arbitration Guidelines) Rules, G.N. No. 67 of 2007 and Rule 12(1) of Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007, mediation is compulsory.

The dispute was supposed to be referred to the arbitrator after failure of mediation and after the mediator has issued a certificate of none settlement. It was only after that stage; applicant was supposed to refer the complaint to the arbitrator for arbitration as provided by section 86(7)(b)(i) of Cap. 366 R.E.2019 (supra). After referring the complaint to the arbitrator for arbitration, the parties are required to file opening statements in terms of Rule 24(1)(a), (b) and (c) of GN. No. 67 of 2007 (supra) after the arbitrator has complied with the provisions of Rule 23(1), (2), (3),(4), (5), (6), (7), (8), (9) and (10) of GN. No. 67 of 2007 (supra). It is only after conclusion of the opening statement; the arbitrator can narrow down issues in dispute between the parties as it is clearly provided by Rule 24(4) of GN. No. 67 of 2007 (supra). It was therefore an error on part of the arbitrator to struck out the complaint by the applicant prior to conclusion of mediation and further prior to filing of the opening statements.

It was submitted by counsel for the applicant that applicant was not afforded right to be heard on whether there are facts to be adjudged or not. I agree with him because that only came out in the impugned ruling of the arbitrator. It is my view that, if the arbitrator felt that there were no facts to be adjudges at that stage, of which in my view, as I have pointed out herein above, he was supposed to summon the parties and ask them to make submissions thereon. It is my view therefore that the decision by the arbitrator affected fundamental right of the applicant namely right to be heard. It has been held several times by this court and the Court of Appeal that any decision arrived at in violation of right to be heard is a nullity. See for example the case of ***Wegesa Joseph M. Nyamaisa vs Chacha Muhogo*** (Civil Appeal 161 of 2016) [2018] TZCA 224 (27 September 2018), ***Said Mohamed Said vs Muhusin Amir & Another*** (Civil Appeal 110 of 2020) [2022] TZCA 208 (25 April 2022) and ***CRDB Bank PLC vs The Registered Trustees of Kagera Farmers Trust Fund & Others*** (Civil Appeal No. 496 of 2021) [2024] TZCA 94 (23 February 2024) to mention but a few. In CRDB's case (supra) the Court of Appeal held *inter-alia* that: -

"It is trite law that, any decision affecting the rights or interest of any person which is arrived at without such person being afforded a right to be

heard, is a nullity even if the same decision would have been arrived at had the effected party been heard."

For all what I have discussed hereinabove I find that the application is merited. I therefore hereby revise, quash, and set aside the CMA ruling that struck out the complaint by the applicant. I hereby remit the CMA file to CMA so that the parties can proceed with mediation before the mediator and if mediation will fail, then, the complaint shall be referred to arbitration and it shall be assigned to and heard by a different arbitrator.

Dated in Dar es Salaam on this 4th April 2024.

B. E. K. Mganga
JUDGE

Judgment delivered on this 4th April 2024 in chambers in the presence of Abduel Emmanuel, the applicant and Chali Juma, Advocate for the applicant on one hand and Helena Ignas, Advocate holding brief of Oliver Mkanzabi, advocate for the respondent on the other hand.

B. E. K. Mganga
JUDGE