IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

CONSOLIDATED LABOUR REVISION NOs. 68 & 69 OF 2020

GEITA GOLD MINING LIMITED ..... APPLICANT

VERSUS

SAMSON RWECHUNGURA FULGENCE ..... RESPONDENT

JUDGMENT

9th March & 12th July, 2021

ISMAIL, J.

This consolidated matter stems from the decision of the Commission for Mediation and Arbitration (CMA), in respect of Labour Dispute No. CMA/GTA/133/2018, in which the respondent challenged termination of his employment on the grounds that the procedure and reasons for the termination were not fair. The respondent's contention is that the allegations levelled against him were imaginary and confusing; and that the procedural aspects governing the termination were flouted. These included failure to furnish him with the charges at least two working days from the date of the hearing; suspension from employment by a person who did not have powers to do so; failure to carry out investigation into the allegations; and failure to notify him of the disciplinary hearing. The respondent prayed for

compensation for 36 months, payment of salary in lieu of the notice, payment of damages in the sum equivalent to 222 months' salaries, severance allowance and subsistence allowance to the date of repatriation.

The respondent was employed by the applicant on 2nd November, 2015, and served in different capacities in the Human Resource Department. Until his termination, his rank was that of a Senior Officer HR, and his duties included posting of employees details, preparation of organizational structures, posting and supervising posting of staff salary entries and similar other duties. After a stint of three years, the respondent's employment with the applicant was terminated, on account of assorted counts of misconduct. These offences were a culmination of the respondent's decision to use employees' information, considered to be confidential, in support of his claims for wage increment in the CMA. This information was allegedly obtained in the cause of the respondent's duties and that such use was for his personal interest. This act was considered to be a serious breach of trust and a violation of the provisions of Clauses 12.3.5, 12.3.12, 12.4.2, 12.4.8, 12.9.2 and 12.16.1 of the applicant's Disciplinary Policy.

Following this allegation, the respondent was charged and called upon to appear before the Disciplinary Committee for a disciplinary hearing which was set on 25th October, 2018. It is alleged that on the hearing day, the

applicant requested for an adjournment of the matter to await the conclusion of the CMA proceedings, but this request was refused by the applicant, as a result of which the disciplinary hearing proceeded in the absence of the respondent. In consequence of all this, the respondent's employment was terminated. The decision to terminate him triggered the arbitral proceedings which were concluded in the respondent's favour, as his termination was roundly condemned as being unfair, procedurally and substantively. Instead of ordering reinstatement, the CMA took the view that termination was the most feasible option, together with payment of compensation for the unfair termination and other accrued benefits.

In one of the rare cases, the CMA award was not to both parties' liking. Feeling hard done, each of them preferred separate revisional proceedings, punching holes in the award and moving the Court to revise the proceedings, quash them and set aside the arbitral award, on account of several irregularities listed in the applications and their respective supporting affidavits. To expedite their disposal, the Court, on the parties' consensual basis, ordered that the two matters be consolidated, argued together to allow for delivery of a consolidated decision.

On the part of the applicant, the prayer is to have the Court revise and set aside the CMA's award on numerous grounds, key among them being:

(i) Failure to analyse the evidence thereby reaching a wrong conclusion to the effect that there was no evidence to support breach of confidentiality, while termination of the respondent's employment was based on major breach of trust in performance of duty by accessing confidential information and using the same for personal gains;

(ii) Holding that the respondent was denied the right to be heard in the disciplinary proceedings while the respondent was accorded that right but he chose not to exercise it;

(iii) Holding that termination was procedurally unfair on account of irregularities in filing the hearing forms while the available evidence was to the effect that the disciplinary committee was properly constituted;

(iv) Ordering reinstatement without loss of remuneration while there was proof that termination was substantially and procedurally fair;

(v) Ordering of payment of severance pay while termination was due to misconduct; and

(vi) Issuing of contradicting decision with respect to the award of compensation.

The application is supported by an affidavit sworn by Charles Francis Masubi, the applicant's Senior Human Resource Manager, in which grounds for the prayers sought in the application are adduced.

This application has been ferociously challenged by the respondent. Vide a counter-affidavit sworn by the respondent himself, the applicant's grounds of application have been disputed. The respondent urged the Court to uphold the arbitrator's award, save for the award of compensation in respect of which an increment is prayed.

On the other hand, the application by the respondent (in respect of Revision No 69 of 2020), the prayer is for revision of the arbitral proceedings with a view to setting aside the award on the ground that the same is tainted with errors material to its merits, thereby causing injustice to the respondent (the applicant therein). His further contention is that the said award is unlawful, illogical or irrational. In the affidavit that supports the application, the respondent's averment is that the unlawfulness and irrationality of the award is allegedly based on the fact that payment of six months' salary as compensation is perceived to be insufficient as is the award of severance allowance for three years of the respondent's service. The issues proposed for determination relate to the fairness or justification of payment of the sums constituting the award.

When the matter came up for orders, the applicant (Geita Gold Mining Ltd) was represented by Messrs Libent Rwazo and Kyariga Kyariga, learned advocates, while the respondent (Samson Fulgence) enlisted the services of Mr. Eric Lutehanga, learned counsel. At this session, the counsel for the parties acceded to the Court's proposal to have the consolidated matter argued by way of written submissions, the filing of which conformed to the schedule for filing of the submissions.

Mr. Rwazo fired the first bullet, with respect to the applicant's claims, by taking the issues in the sequence they were preferred. With regards to the arbitrator's alleged failure to analyze evidence, the counsel submitted that exhibit D1 clearly shows that the respondent was terminated for offences with which he was charged. He held the view that the termination was in line with section 37 (2) of the Employment and Labour Relations Act, Cap. 366 R.E. 2019 (ELRA) and Rule 9 (4) of the Employment and Labour Relations (Code of Good Practice Rules) GN. No. 42 of 2007 (Code), and that, based on exhibit 10, the offences in respect of which the respondent was f0ound guilty constituted a serious misconduct which would lead to termination. Mr. Rwazo further contended that, besides the respondent's admission that he accessed confidential information which he used to claim a salary increment, there was also a testimony of DW1, DW2 and DW3 who

testified on the respondent's culpability. In so doi0ng, the applicant discharged its burden of proof of fairness of termination.

Matching the considerations for fairness of reasons as provided in Rule 12 (1) of the Code, the applicant argued that offences with which the respondent was charged constituted a breach of standards which were clear and unambiguous, and that the respondent breached the trust bestowed on him, thereby justifying the termination. The learned counsel cited the decisions in ***Rapoo v. Metropolitan Botswana (Pty) Ltd*** (IC. 437/2004) (2006) BWIC 2; and ***U.T.T Project & Infrastructure Development Plc v. Yusuph Nassor***, HC-Consolidated Revision No. 903 of 2019 (unreported) in which dishonest was defined to include failing to disclose an interest and other information.

The applicant argued that the offences with which the respondent was charged were serious enough to constitute a serious breach within the meaning stated Rule 12 (1), (4) and (5) of the Code, and consistent with the holding in ***National Microfinance Bank Plc v. Aizack Amos Mwampulule*** [2014] LCCD No. 20. The applicant argued that using the information to demand salary increment was a major breach of trust which also contravened the Disciplinary Policy and other laws.

On the denial of an opportunity to be heard, the applicant argued that the respondent was invited to a disciplinary hearing but he requested for an adjournment for grounds on which he did not have any evidence that justified his inability to appear before the disciplinary committee. The respondent was said not to have preferred proceedings to the High Court and CMA but no evidence was given to justify the requested adjournment. It was the applicant's argument that the decision by the committee was based on Rule 13 (6) of the Code, and the holding in ***Oswald Chenyenge v. Pangea Minerals Limited*** [2015] LCCD Part I No. 81. The applicant further argued that in terms of the reasoning in ***Majige M. Makolo v. Pangea Minerals Limited***, HC-Labour Revision No. 46 of 2021 (unreported); and ***Medscheme Limited v. Venessa Pillay & 2 Others*** [2012] JR 1483/2012, in which it was held that the employer is not barred from mounting an investigation into any criminal undertaking by the employee. The counsel argued that the respondent waived his right (if any) to be heard.

Submitting on the alleged irregularities in the hearing form, Mr. Rwazo contended that there is no law that stipulates the quorum other than Guideline 4 (1) – (6) of the Guidelines in which the requirement is for the Chairperson to convene a meeting of the disciplinary committee which was

done as gathered from item 11 (a) of exhibit D4. It was erroneous, in his view, to conclude that the meeting was not convened. On the absence of the respondent's name, the argument by the applicant is that only names of those that were in attendance would be reflected in the hearing form. The applicant urged the Court to ignore this contention.

With regards to the regularity of ordering reinstatement without loss of remuneration, the applicant's argument is that this is not as fit case for ordering reinstatement since the circumstances of the case are such that the relationship is intolerable, rendering reinstatement practically impossible. This was in view of the fact that honesty and trust had been destroyed and the applicant had lost confidence in the respondent. This was exacerbated by the respondent's decision to institute proceedings in the CMA and in this Court, alleging unfair labour practice and discrimination. The case of ***Majige M. Makoko*** (supra) was cited again as the basis for the contention. The applicant urged the Court to revise this finding.

On the contradictory orders within the award, the argument by the applicant is that the concurrent orders of reinstatement and payment of compensation were contradictory and confusing. The counsel's argument is that these reliefs operate in alternatives, and he fortified his contention by

citing the case of ***National Microfinance Bank v. Leila Mringo & Others***, CAT-Civil Appeal No. 30 of 2018 (unreported) in which it was held:

> *".... The words "in addition to" used in section 40 (2) of the ELRA did not mean to refer to awarding compensation in addition to reinstatement, rather, it meant to refer to other entitlements of the employee under a different legislation or agreement, such as severance pay, and payments agreed upon by the employer and employee. The subsection did not mean to include remedies already specifically provided for as alternatives in subsection (1)."*

It was the applicant's contention that the arbitrator was erroneous in his decision to order both. He urged the Court to revise the award.

With regards to severance pay, the applicant's consternation is that the same ought not to have been paid in the circumstances where termination of employment was on ground of misconduct, making the termination fair and valid. The counsel for the applicant prayed for revision of the award to address this anomaly.

In conclusion, the applicant urged the Court to set aside the award and order that termination of the respondent's employment was fair in substance and in procedure.

The respondent's reply to the applicant's submission in chief was equally insistent on the fact that the arbitrator's decision with respect to unfairness of the termination was spot on. Mr. Lutehanga associated the respondent's tribulations to his decision to fight for equity in the remuneration scheme. Responding on whether the arbitrator analyzed the evidence, the respondent's quick response was in the affirmative. He argued that the testimony of the applicant's witnesses failed to demonstrate how the respondent used the applicant's confidential information. He argued that the witnesses testified to the effect that there was nothing confidential in the documents tendered in CMA, and that there was nothing wrong with using the said documents in a legally established forum. The same was said with respect to using his position for personal gain. The respondent cited DW2, Adrian Joubert, as saying that no confidential document was found during investigation, and that there was nothing wrong with demanding a salary increment. He refuted the contention that other employees' salaries were disclosed in the course of the proceedings in CMA.

Referring to exhibit D8, the investigation report, the learned counsel argued that, the fact that it was remarked that no other evidence was found on the respondent's computer means that the allegation of accessing and using confidential information was unfounded. On the contrary, the counsel

argued, the respondent's journey was actually a pursuit of his constitutional right under Article 23 of the Constitution of the United Republic of Tanzania. On the cases cited, Mr. Lutehanga argued that none of them was of any relevancy to the matter, as the case at hand does not fit in the definition of dishonesty stated in ***Rapoo v. Metropolitan Botswana (pty) Ltd*** (IC.437/2004) (2006) BWIC 2. It was the respondent's contention that the applicant failed to prove that termination of the respondent's employment was fair.

With respect to whether the respondent was denied the right to be heard, the respondent's contention was that, while DW1 was aware of the respondent's request for adjournment on account of absence of his representative, the committee went ahead with the hearing in the absence of the respondent. It was his contention that the refusal to adjourn the matter was unreasonable, while proceeding with the hearing in his absence was against the provisions of Rule 13 (3) of GN. No. 42 of 2007. The counsel argued that such refusal constituted a breach of natural justice and fundamental rights, safeguarded by Article 13 (6) (a) of the Constitution. The respondent's counsel fortified his contention by citing the decisions in ***D.P.P v. Sabinis Inyasi & Raphael J. Tesha*** [1993] TLR 237; ***Ndesamburo v. A.G.*** [1997] TLR 137; and ***Sylvester Cyprian & 210***

others v. The University of Dar es Salaam, HC-Misc. Civil Application No. 68 of 1994 (unreported), in which it was held that condemning a party unheard constituted a breach of the principle of natural justice. In the latter decision, the emphasis was that a decision making body should act fairly.

With regards to the conduct of the disciplinary proceedings, the respondent contended that the available evidence is to the effect that only the chairperson and the secretary attended the proceedings, and that none of the parties was in attendance. This, the respondent contended, was in contravention of exhibit C4, the applicant's Disciplinary Policy and Procedure. It was further contended that no hearing was conducted, *ex-parte* or otherwise. On the suspension, the respondent argued that the suspension letter was signed by a person who did not have powers to do so.

Relying on exhibit D7, the respondent submitted that termination on allegation falling under Code 12.16.2 was irregular because the offence under it relates to criminal allegations which were never initiated against the respondent. He cited exhibit D1 (complaint form) as the basis. The respondent took the view that the arbitrator was right in his judgment on the fairness of termination.

With regards to the fourth and fifth issues, the contention by the respondent's counsel is that the arbitrator was right in ordering

reinstatement without any loss of remuneration. He argued that this decision was in line with CMA F1 from which reliefs were extracted. This, he argued, was in line with the decision in ***Salkaiya Seif Khamis v. JMD Travel Services (SATGURU)***, HC-Labour Revision No. 658 of 2018 (unreported), in which it was held that prayers granted flow naturally from the grounds of claims stated in the statement of the claim. On the alleged breach of trust, the respondent contended that based on the testimony of DW3, it was clear that the applicant company had no problem with the respondent as the latter's demand for salary increment had no impact on the applicant.

Replying on the alleged contradiction, the respondent's counsel refuted this contention. He argued that the only contradiction is that which relates to payment of compensation for 6 months instead of 12 months. To aid his cause, the respondent cited the decision of the Court in ***Standard Chartered Bank (T) Limited v. Linas Simon***, HC-Revision No. 378 of 2019 (unreported), in which termination was ordered where the relationship was hostile.

With respect to severance allowance, the contention by the respondent is that, since the termination was unfair, award of the said pay was justified. The respondent concluded by submitting that the termination of the respondent's services failed the test of a fair termination as spelt out in the

case of ***Bati Services Company Limited v. Shargia Feizi***, HC-Revision No. 106 of 2019 (unreported).

He prayed that the award be upheld, save for the payment of compensation that he prayed that it be revised upwards to 12 months' worth of salaries instead of six months.

In another needlessly voluminous rejoinder, the applicant maintained that the arbitrator's reasoning and conclusion were flawed. With respect to analysis of evidence, the applicant argued that the testimony adduced, especially exhibits D4 and D6, proved the respondent's wrong doing in the offences charged. While acknowledging that the respondent was charged with assorted counts of misconduct, the counsel for the applicant argued that proof of one count out of the charged offences was enough to lay off the respondent. This is in line with the decision of the Court in ***U.T.T Project & Infrastructure Development Plc v. Yusuph Nassor***, (supra). The contention by the applicant is that the respondent admitted to have accessed confidential information that came to his knowledge by virtue of his position, and that the disciplinary proceedings proved that the respondent's use of the said information for his personal gain was contrary to the Disciplinary Policy and labour laws, an offence which rendered the relationship intolerable, justifying the termination.

With regards to the right to be heard, the applicant's counsel argued that, while this right is guaranteed, an employee who refuses to attend to the disciplinary proceedings risks facing adverse findings, and he cannot be heard to complain that he was not afforded the right to be heard. This is in terms of the reasoning in ***Medscheme Ltd v. Venessa Pillay & Another***, Case No. JR 1483/2012. While relying on exhibits D4 and D6, the respondent contended that hearing was conducted after it became evident that the respondent had failed to produce an evidence on the whereabouts of the personal representative, or existence of the proceedings in the High Court and in the CMA. The counsel contended that no restraint order was produced to put on hold the disciplinary hearing. The applicant contended that reasons for the adjournment were flimsy and obstructive of the hearing, and that these justified the application of Rule 13 (6) of GN. No. 42 of 2007.

On the alleged irregularities in the Hearing Form, the argument by the applicant is that, the fact that DW2 features in exhibit D4 means that hearing was conducted and the employer was represented, while on the allegation with respect to suspension, the counsel's argument is that the complaint did not feature in the respondent's counter affidavit.

Regarding the reinstatement, the applicant's argument was that the respondent was not entitled to any reliefs, since the applicant proved the

fairness of the termination. The counsel argued that, since the violation was a major breach of trust, then the relationship was intolerable, and that ordering reinstatement was erroneous. With regards to the alleged contradiction in the decision, the applicant was insistent that, in terms of the decision in ***Mantra Tanzania Limited v. Daniel Kisoka***, HC-Labour Revision No. 267 of 2019 (unreported), reinstatement without loss of remuneration and payment of compensation cannot run conjunctively. He urged the Court to address this anomaly.

With regards to severance pay, the applicant submitted that, since the termination was fair, the claim of severance pay falls by the wayside. He urged the Court to hold so and revise the award.

The respondent's submission in support of his application was relatively brief. While expressing his full concurrence with the arbitrator's reasoning and findings, he expressed his disagreement with the reliefs granted. With respect to award of compensation, equivalent to six months' salary, the contention is that such award is in contravention of the provisions of section 40 (1) (a) of the Employment and Labour Relations Act, Cap. 366 R.E. 2019 (ELRA), which provides for remedies available to an arbitrator once he holds that the termination was unfair. Mr. Lutehanga argued that, where

compensation is ordered, then the arbitrator's order in that respect must conform to section 40 (3) of the ELRA, which states as hereunder:

> *"Where an order of reinstatement or reengagement is made by an arbitrator or Court and the employer decides not to reinstate or re-engage the employee, the employer shall pay compensation of twelve months' wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment."*

The respondent's counsel argued that award of the sum above 12 months' salary is not a matter of the arbitrator's discretion, as the use of the word "shall" is intended to show that the doing of it is mandatory. Mr. Lutehanga fortified his contention by citing the decision of the Court in ***Standard Chartered Bank (T) Limited*** (supra).

With regards to severance pay, Mr. Lutehanga's contention is that the substance of section 42 (1) of the ELRA allows payment thereof, for a maximum of 10 years. He argued that, where an order of reinstatement is ordered, the employer is under obligation to pay for the entire period, including the time during which the employer was mulling over the action to take subsequent to the order of reinstatement. He argued that in the instant case, the respondent's severance pay ought to cover six years, inclusive of three years during which the respondent was waiting to execute the

reinstatement order. The counsel took the view that the arbitrator was erroneous in her conclusion in this respect. He urged the Court to vary the award to that extent.

The applicant's rebuttal submission was expectedly forceful on the fact that termination of the respondent's employment was fair and that the re-instatement order was as wrongful as the order for payment of compensation. Mr. Rwazo argued that the order for re-instatement was grossly erroneous and in violation of Rule 32 (2) (b) and (c) of the Labour Institutions (Mediation and Arbitration Guidelines, GN. No. 67 of 2007, on the ground that the misconduct was so serious, that it rendered the employment relationship intolerable, and that the mutual trust between the parties had been lost. This is in view of the numerous complaints that the respondent had against the applicant, and the disciplinary measures that came with the complaints. When that happens, the counsel argued, termination becomes the only feasible option. The counsel based his argument on the decisions of the Court in ***Majige M. Makoko v. Pangea Minerals Limited***, HC-Labour Revision No. 46 of 2016; and ***Geita Gold Mining Ltd v. Nyacheri Joseph Mwangwa***, HC-Labour Revision No. 38 of 2019 (both unreported). The applicant's counsel held the view that the ***Standard Chartered Bank case*** (supra) had been erroneously decided

since circumstances of the case demand that termination would have been preferred to re-instatement.

Submitting on the severance pay, the applicant's counsel stated that there was nothing wrong with the arbitrator's finding and conclusion that severance pay that is due to the respondent is for three years of his employment and not six years as contended. He argued that, in terms of section 42 (1) of the ELRA, payment is only in respect of continuous years of service, and this excludes the period during which re-instatement was awaited. The counsel held the view that where termination is based on misconduct, the claim of severance pay becomes untenable. This, he contended, is in view of section 42 (3) (a) of the ELRA; Rule 26 (2) (b) of the Employment and Labour Relations (Code of Good Practice Rules) GN. No. 42 of 2007; and the holding in ***Security Group (T) Ltd v. Mashaka Setebe***, Revision No. 54 of 2017 (unreported).

The applicant's counsel urged the Court to hold that the application is lacking in merit and that the respondent is not entitled to any of the reliefs sought.

In his rejoinder submission, the respondent began by contending that the applicant's reply submission has not dwelt on the issue of payment of compensation below the statutory minimum of 12 months. He took the view

that such failure amounted to an admission. While reciting the provisions of section 40 (1) and (3) of the ELRA, the respondent's counsel contended that the leeway given to the employer not to reinstate carried an obligation of ensuring that compensation paid for unfair termination is not less than 12 months' salary.

On whether the employment relationship was intolerable, the respondent's argument is that he was ready and willing to render services to the applicant and that, as gathered from exhibit D8, the only strain in the relationship was the respondent's decision to pursue her rights under the contract. He urged the Court to order reinstatement without any loss of remuneration.

From these long drawn disputations by the parties, the broad issue is whether the arbitrator's award was erroneous in declaring that the respondent's termination was unfair, and ordering compensation and severance pay.

With regards to the applicant's complaints the critical question is: Was the termination of the respondent's employment fair, in procedure and in substance? As I move to resolve this grand issue, need arises for laying a foundation on what it takes to hold that the termination is fair. The engrained principle in the conduct of labour proceedings is that termination of the

employee's services is considered to be fair if the reasons leading to the termination and the procedure for such termination are proved to be fair. Thus, substantive fairness and procedural fairs are two sides of a coin that must be proved before a termination is given a 'clean bill of health'. In law (See: section 37 (2) of the ELRA, read together with Rules 12 and 13 of the Code), the onus of proving that the termination conformed to these tenets is cast upon the employer, in this case the applicant. This means that the employer who chooses to lay off the employee should not be blemished of any unfairness, not only in the manner he effected the termination, but also in terms of the reasons that motivated him to terminate the employee. Proof of validity of reasons entails proving the existence of such reasons, and involves ascertaining if the reasons cited as the basis for termination are ***sound, defensible, well founded, not capricious, fanciful, spiteful or prejudicial*** (see Grogan, J on ***Workplace Law***, 10th Edition, at pages 217-218; and ***Geita Gold Mining Limited v. Jongo Mwikola,*** HC-Revision Application No. 61 of 2017; and ***Antony Masanga v. Mohamed Kayemba Hussein,*** HC Revision Application No. 15 of 2017 (Mwanza-both unreported). Inevitably, conclusion on fairness or otherwise of the termination involves leafing through the evidence adduced by the employer during the arbitral proceedings.

Having laid the foundation on fairness of termination, the next bigger task is to address the issues raised by the applicant, and I intend to do so guided by the issues as raised and addressed by the parties.

The applicant's contention with respect to the first issue is that the arbitrator's evaluation and analysis of evidence was wanting, since exhibit D1 and the testimony of DW1, DW2 and DW3 are clear on the respondent's culpability. Through this testimony, the arbitrator ought to have concluded that section 37 (2) (c) of the ELRA; and rules 9 (3) and 12 (1) of the Code were complied with, and that the termination was fair. This view is not shared by the respondent's counsel who holds the view that the applicant's burden of proving that termination was fair failed spectacularly. Part of the arbitrator's criticism lies in his finding and conclusion that the requirements of rule 13 (1-10) of the Code were not fulfilled, and that the procedural aspects of the fair termination were not observed. I am inclined to agree with the arbitrator's findings, and my starting point is the applicant's decision to conduct a hearing in the absence of the respondent.

DW1 has testified, as did the respondent, that on the day of the hearing, he was served with a letter that requested for adjournment of the matter, one of the grounds being that his representative was unable to be present. This letter was tendered as exhibit D1, and it was duly received and

endorsed by the DW3, the chair of the committee. The said letter notwithstanding, the wisdom of the committee dictated that the hearing should go ahead in the absence of the respondent. While the law allows a committee to proceed ex-parte whenever a suspected employee willfully refuses to appear before the committee, the question is whether the respondent's non-appearance was an act of willful refusal. All witnesses who testified for the applicant were unanimous that the reason quoted for the respondent's non-appearance is the pendency of his complaints in court and tribunal, and the absence of his representative. None of these reasons suggest, albeit remotely, that these were non-existent reasons which infer refusal to attend the proceedings. None of the witnesses testified that the respondent's representative, at least, was around but unwilling or prevented by the respondent from entering an appearance. All of the witnesses acknowledge, as well, that the respondent had ongoing proceedings which pitted the applicant as an opposite party. Whether pendency of those cases constituted the basis for requesting for an adjournment, is a subject for another day. It is enough that reasons cited for non-appearance were within the knowledge of the said witnesses.

One other thing is the manner in which the respondent's request was handled. DW1 and DW3 admitted that the respondent's request received

their attention but they chose to ignore it, choosing, instead, to compel the respondent to attend the meeting at which his issue would be deliberated. I am of the view that this approached was flawed and irregular. The expectation was that the respondent's request would be responded to in writing, giving reasons as to why the proposed adjournment was unacceptable, after which a date would be appointed for the hearing. The committee could even choose to refuse to grant the adjournment by simply informing the respondent, in writing. As it is now, nothing proves that this request was accepted or refused, and the closest it got is when DW1 testified that he advised the respondent to attend the proceedings and raise his concerns. But this is not evidenced and its veracity remains to be a matter of serious contention.

Turning back to the conduct of the disciplinary proceedings, my scrupulous review of exhibit D4 conveys some worries on conformity with the procedural aspects of fair termination. Looking at exhibit D4 it is clear that those who were present at the hearing are DW1 and DW3, who served as secretary and chairperson of the committee, respectively. None else, including DW2 was present, notwithstanding the fact that he stated, in his testimony, that he was present and attended to the proceedings. Thus, while no law sets the quorum for a disciplinary hearing, as Mr. Rwazo argued, the

fact that this disciplinary hearing was said to have been attended by more people means that the expectation is all those who were said to be in attendance would be reflected in the hearing form. The other disquieting problem is that there is no summary of the evidence that was adduced in the committee on the basis of which the decision to terminate the respondent would be done. This stems from the fact that those who appear in item 11 of exhibit D4, as witnesses, do not appear to have testified, and it is not clear who among them tendered the documents that are listed in item 11 (i). It leaves us with uncertainty if hearing was conducted, and highly doubtful if the decision that terminated the respondent was based on any evidence. It should be noted that, while an absconding party suffers the consequence of non-appearance, the worst he can suffer is to forfeit his right to be heard. Once hearing is ordered, the prosecutor (the employer) faces the usual task of proving the allegation. This is done through adduction of evidence. Was this done? My answer to this question is that there is no evidence to prove that.

It is worth of a note that, conduct of the proceedings in the applicant's company is guided by exhibit D7, Disciplinary Policy and Procedures. Clause 7.8.4 provides obligates the committee to put a record of the people involved and the roles that they perform in the hearing. Clause 7.8.10 compels the

complainant to present facts constituting the complaints against the offender after which the committee calls a witnesses to testify on the facts and be offered for questioning by the adverse party (Clause 7.8.12). While it is assumed that these imperative requirements were followed, the expectation of having these seen in exhibit D4 or any other exhibit proved to be elusive. It is my conviction that the absence of evidence to prove the existence of these facts means that the disciplinary process leading to the respondent's termination was bungled, a clear infraction that amounts to a procedural impropriety. I find nothing wrong with the arbitrator's finding in that respect.

The other area of concern by the applicant is the arbitrator's conclusion that the respondent was not accorded the right to be heard. The applicant's argument is that the ex-parte hearing was a result of the respondent's willful refusal to attend to the proceedings. This aspect has been covered hereinbefore and I need not reproduce what I have alluded to. It is only enough to state that the manner in which the respondent's request for adjournment was handled left the impression that the ex-parte hearing was unwarranted and unfair. The reasons for adjournment were sound and plausible and they fell within the committee's powers. There is no evidence that the response to the respondent's letter, if any, notified the respondent of the adverse consequences, including proceeding with hearing in his

absence. This means, in my considered view, that hearing of the matter proceeded without affording the respondent of the opportunity of being present and heard on the allegations levelled against him. This amounted to denying him the right to be heard. Such denial constituted a breach of one of the cardinal principle of natural justice known in Latin, as *audi alteram partem*, meaning ***hear the other side***. It requires that every party be afforded an opportunity to be heard before a determination is made on their rights. It is a principle that casts a responsibility on the presiding officers to afford the parties the right to be informed of any adverse point that constitutes the basis for the decision in a matter. The significance of this requirement was underscored in ***Hadmor Productions v. Hamilton*** [1982] 1 ALL ER 1042 at p. 1055, wherein Lord Diplock stated as follows:

> *"Under our adversary system of procedure, for a Judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what is his answers to it".*

From this excerpt, it is clear that non-conformity with this imperative requirement draws a dire consequence, as stated in a number of decisions. These include: ***Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina***

George Mwakyoma [2003] TLR 251, quoted in ***Ausdrill Tanzania Limited v. Mussa Joseph Kumili & Another***, CAT-Civil Appeal No. 78 of 2014 (MZA-unreported); and ***Margwe Erro & 2 Others v. Moshi Bahalulu***, CAT-Civil Appeal No. 111 of 2014 (ARS-unreported).

The most captivating of all these decisions in the reasoning in ***Scan – Tan Tours Ltd v. The Registered Trustees of the Catholic Diocese of Mbulu***, CAT-Civil Appeal No. 78 of 2012 (ARS-unreported), in which the Court of Appeal of Tanzania made the following observation:

> *"We are of the considered view that in line with the audi alteram partem rule of natural justice,* ***the court is required to accord the parties a full hearing before deciding the matter in dispute or issue on merit*** *- See* ***Shomary Abdallah v. Hussein and Another*** *(1991) TLR 135;* ***National Housing Corporation versus Tanzania Shoes and Others*** *(1995) TLR 251 and* ***Ndesamburo v. Attorney General*** *(1977) TLR 137.* ***The right to be heard is emphasized before an adverse decision is taken against a party****."* [Emphasis added].

See also: ***Mire Artan Ismail & Another v. Sofia Njati***, CAT-Civil Appeal No. 75 of 2008 (unreported).

It is my humble contention that the aggregate of these vicious procedural lapses constitute the reason for concluding, as the arbitrator did,

that the respondent's termination of employment was marred by procedural unfairness deserving nothing less than being declared procedurally unfair. I, therefore, find nothing on which to fault the arbitrator's finding that the respondent's termination was procedurally unfair. The net effect of these irregularities is sufficient to settle question of fairness of the termination, and I find no reason to dwell on the aspects of fairness of reason,, as doing so is nothing short of needless waste of our precious time, and unnecessary flexing of the muscles.

The next battleground relates to reliefs granted by the arbitrator and these are also the crux of the respondent's application. They relate to the issue or payment of compensation and severance pay. As I embark on this journey, I wish to remark that consequences of unfair termination are catered for by the provisions of section 40 of Cap. 366. For ease of reference, it is apposite that the said provision be cited in *extenso*, as follows:

> *"(1) If an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer-*
>
> *(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employer was absent from work due to unfair termination; or*

(b) to re-engage the employee on any terms that the arbitrator or Court may decide; or

(c) to pay compensation to the employer of not less than twelve months' remuneration.

(2) An order for compensation made under this section shall be in addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement.

(3) Where an order of reinstatement or re-engagement is made by an arbitrator or court and the employer decides not to reinstate or re-engage the employee, the employer shall pay compensation of twelve months' wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment."

While the employer has an obligation to reinstate or re-engage when ordered to do so, such obligation cannot involve paying compensation alongside reinstating the employee. It is either reinstatement or re-engagement on the one side, or payment of compensation that goes along with payment of wages due and other benefits.

The applicant's complaint is that the remedy of reinstatement and award of compensation were ordered concurrently. This is a plausible complaint that exposes the arbitrator's deviation from the requirements of

the law. Compensation would only apply where reinstatement or re-engagement had not been preferred as an option, meaning that, it is at the instance of the employer to opt for compensation if the choice of reinstatement or re-engagement is too much to bear. In the instant case, the applicant did not choose this route and, even if it did, its only choice would be to prefer one to the other and not both. It follows, therefore, that the arbitrator's conduct in that respect was erroneous, thereby making the awards contradictory to one another and potentially impossible to implement.

The applicant has also taken an exception to the decision to order reinstatement without considering that the employment relationship between the parties would be intolerable. The law is settled in this country, to the effect that termination of employment should be ordered only where it is proven that the employment relationship between the parties has become intolerable. One of the instances of intolerability of the relationship is where, as cited in ***Majige M. Makoko v. Pangea Minerals Limited*** and ***Nyacheri Joseph Mwangwa*** (supra), a fundamental breach of mutual trust and confidence is cited and proved. In such a case, termination and payment of compensation becomes an inevitable eventuality. The view held by the applicant is that the relationship with its employee, the respondent,

is at that irreconcilable position which renders termination an option that lacks feasibility. While the evidence to that effect is not readily visible, allegations levelled by both parties, the barbs traded in the course of handling the disciplinary proceedings, and all subsequent proceedings, have revealed a waning trust in one another. Possible clashes were the parties to be brought back to their respective positions prior to this acrimonious ending cannot be ruled out. The process of finding a solution to their dispute has left their relationship severely bruised and the wounds may take a while to heal. These are issues that skipped the arbitrator's mind when he ordered reinstatement, and I subscribe to the applicant's reasoning that reinstatement was not the wisest of the decisions in the circumstances. Consequently, I reverse it and substitute it with payment of compensation in lieu of reinstatement.

The other area of mutual concern, and the respondent's gravamen of complaint, is on the payment of compensation for six months; and payment of severance pay for three years instead of six. With respect to the former, the applicant's challenge is premised on the fact that termination of employment was fair, a finding that would rule out the issue of compensation. This is in contrast with the respondent whose contention hinges on the law on award of compensation.

As I delve into this issue, it should be stressed that payment of compensation kicks in where reinstatement or re-engagement is, as is the case here, found to be practically problematic. This is the position that has been expounded in various decisions of the Court. In the case of ***TUCTA v. Nestory Kilala Ngula*** [2014] LCCD 39, it was held:

> *"The compensation for unfair termination under Section 40 of the Employment and Labour Relations Act No. 6/2004 is well known as the remedies are outlines under Section 40 (1) (a) (b) (c) (2) and (3) the law talks of exceptions to re-instatement, re-engagement that where it is not reasonable (sic) practicable for the employee to re-instate or re-engage then the employer must compensate the employee. compensation comes only when the primary remedy for unfair termination namely reinstatement of the employee is not met due to reasonability and practicability of the act to reinstate the employee. usually the compensation and other benefits from the date of unfair termination to the date of final payment.... The spirit is therefore that the compensation awarded to the employee should be in the same vein with the damages for the breach of contract and the employee who has been unfairly terminated be placed in the same position had the contract of employment not been breached. The purpose and spirit of making just and equitable compensation goes further to the effect that the awards must serve to rectify an attack on ones dignity.*

There are factors to be considered in such cases. a good example is our case at hand where the position of the respondent as a General Secretary of TUCTA national wide is a dignified position a very senior post national wise and therefore a need for solatium award [comfort] in terms of ***action injuria.***"

As stated by Mr. Lutehanga, the arbitrator's discretion to award compensation is not without limitations. One of such limitations is with respect to the minimum amount of compensation that the arbitrator can award. In this case, the arbitrator moved to the 'south' of the equation by ordering compensation which is below the threshold set by the law. This was an erroneous decision that offends the imperative requirement under section 41 (1) (c) and (3). The application of the words "***not less than twelve months' remuneration***" ought to have reminded the arbitrator that his discretion is only with respect to compensation in excess of the twelve months' remuneration which is a base of the payable compensation. It follows, therefore, that the award of six months' remuneration was nothing short of an infraction of the law and I abhor it. Accordingly, I revise the award in that respect, and order that the said compensation be enhanced to twelve months' remuneration.

Moving on to severance pay, my hastened view is that the respondent's argument in this respect is hollow. It is quite clear that the respondent's employment stint lasted for three years, running between 2nd November, 2015, when he was employed, to 19th November, 2018, when his services were dispensed with. This was the period of the respondent's continuous service on the basis of which severance pay has to be computed. To demand that severance, pay should be paid for a period during which the respondent was tussling with the applicant on his termination is, to say the least, a misnomer that cannot find any purchase. It would stretch the whole essence of effecting a severance pay and dilute the significance of having continuous service as a key precondition for its payment. I hold that the arbitrator's finding with regards to payment of this benefit was unblemished and I uphold it.

In the upshot of all this, I find the Arbitrator's conclusion that the respondent's termination was unfair is, on the basis of the available evidence, plausible and based on sound legal and factual foundation. I therefore dismiss the applicant's application in that respect. I also partly grant the respondent's application to the extent stated above.

For avoidance of doubt, and for ease of implementation, the following orders are issued:

(i) That the respondent's termination is adjudged unfair and the arbitrator's finding in that respect is upheld;

(ii) That in lieu of reinstatement, the applicant is ordered to pay the respondent compensation in the sum equivalent to twelve months' salaries;

(iii) That the respondent should be paid severance pay (if not paid), calculated based on the respondent's years of continuous service, from the date of his employment *i.e.* 2nd November, 2015, to the date of termination of his employment *i.e.* 19th November, 2018.

(iv) All other statutory benefits relating to termination of employment (if not paid) as stipulated in section 44 of the ELRA.

Order accordingly.

DATED **at MWANZA** this 12th day of July, 2021.

M.K. ISMAIL

JUDGE

Date: 12/07/2021

Coram: Hon. M. K. Ismail, J

Applicant: Present online.

Respondent: Present online

B/C: J. Mhina

Court:

Ruling delivered in chamber, virtual presence of Mr. Eric Lutehanga, Counsel for the Applicant and Mr. Libent Rwazo, Counsel of the respondent, this 12th day of July, 2021.

M. K. Ismail

JUDGE

At Mwanza

12th July, 2021