IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

REVISION APPLICATION NO. 9 OF 2020

(Originating from Labour Dispute No. CMA/ARS/ARB/256/2017)

MOHAMED AKIDA .....APPLICANT

Versus

GRUMET RESERVES LTD ..... RESPONDENT

JUDGMENT

10th June & 5th August, 2021

MZUNA, J.

Mohamed Akida (the applicant herein), is challenging the award issued by the Commission for Mediation and Arbitration for Arusha (CMA). It awarded to him Tshs 2,782,400 being two months' salaries for August and September, 2017 which was withheld by Grumet Reserves Ltd, the respondent herein, during the investigation hearing. He says, ought to have been awarded terminal benefits after what he says, there was an unfair termination.

Brief facts show, the applicant was employed by the respondent as Purchasing Officer from 28/04/2014. He was suspended from employment effectively from 24/7/2017 allegedly that there was mismanagement of the procurement ethics. His suspension was pending disciplinary hearing which was set on 7/8/2018, at Lawatu Board room, in Mugumu Serengeti at the respondent's headquarters. He did not attend even after there was another hearing set on 17/8/2017. The applicant was summoned to their office for a

meeting with the Management to discuss the way forward, after the applicant had failed to attend the disciplinary hearing. The applicant defied even that call despite the fact that he was to be facilitated with the flight tickets, both to and from, and accommodation.

The applicant replied that he would not attend the discussion, due to various reasons, including the fact that the agenda of the meeting was not served to him in advance so that he could prepare himself. On 9/9/2017, the respondent wrote another letter to the applicant, thereby withholding the applicant's salary pending appearance in the meeting to discuss the decision of the Management after his failure to attend disciplinary hearing of 7/8/2017.

On 5/10/2017, the applicant lodged the dispute in the CMA claiming for two months renumeration for the months of August and September, 2017 that was withheld by the respondent, to the tune of Tshs 3,852,350.60 together with bonus. The CMA as above said, awarded the applicant Tshs 2,782,400/=as salary arrears for two months during the suspension, hence this application.

Reading from the filed application and submissions, the application has been preferred on two grounds. First, he faults the award for holding that the applicant breached the contract therefore he was not entitled to salaries. Second, the CMA erred by holding that the matter was breach of contract while it was unfair termination by the respondent.

When the application came up for hearing which proceeded by way of written submissions, the applicant was represented by Ms. Winnie Evarest Muruve, learned advocate while the respondent was represented by Mr. Evold Mushi, learned advocate.

The main issues for determination are; First, whether the CMA raised a new issue and thereby denying the parties the right to argue on the same? Second, whether the CMA award was proper?

Ms. Muruve adopted her affidavit in support of the application and sought to rely on the same. Submitting in support of the application, Ms Muruve contended that in the award, the CMA raised the issue whether the applicant was in breach of the contract while that issue was not discussed by the parties or even included in the drafted issues. It was her view that it was raised by the CMA *suo motu* without giving parties opportunity to address the arbitrator on the issue. To support her contention that parties must be afforded right to address court on a new raised issue s*uo moto*, Ms. Muruve cited the decision of the Court of Appeal in **Jayantkumar Chandubhai and 3 Others Vs. The Attorney General and 2 Others**, Civil Appeal No. 160 of 2016 (unreported). Due to such defect, Ms Muruve implored the court to revise and set aside the CMA award.

Contesting the application, Mr. Mushi, the learned counsel, argued that the allegation that the CMA determined the dispute based on breach of contract

which was not among the framed issues, is misconceived. He was of the view that the CMA arbitrator observed that the applicant's act of refusing to go back to work after suspension, was breach of his employment contract which means he cannot claim anything from the date he refused the call to go back to work.

He maintained that the case cited by Ms Muruve does not apply in the circumstances of this case because the arbitrator's view that the applicant breached the contract did not affect the decision which granted him what he had prayed for.

In a rejoinder submission, the applicant's counsel reiterated her submission in chief. She insisted that there is nothing in the entire CMA record which shows that the issue of breach of contract featured in the proceedings. According to Ms. Muruve, if the respondent found that the applicant's acts of refusing to go back to work amounted to abscondment, they ought to have resorted to disciplinary actions against him and not treating it as breach of contract.

In answering the above raised issues, I find it opportune to revisit the record. There were two issues which featured in the CMA, being whether the complainant (now the present applicant) is entitled to be paid the salaries while on suspension. The second issue was on reliefs.

The statement of issues of the said applicant encompassed the issue as to whether the complainant was unlawfully terminated. In order to appreciate

whether the award by the CMA raised a new issue in holding that the applicant was in breach of contract, one has to look at page 3 and 4 of the award. It is apt to note that the CMA arbitrator while deliberating on the amount of remuneration the applicant was entitled to, made a finding that he was entitled to two months' salaries, calculated to the tune of Tshs 2,782,400/=.

According to CMA arbitrator, the applicant defied the order of the employer which amounted to breach of contract of employment and therefore he was not entitled to the salaries from 9th September, 2017 to the day he was testifying as he stated. She made a finding that the applicant was not terminated unfairly by the respondent, on the contrary he absconded from work, which implies that he decided to end employment relationship with the respondent.

In arriving at the conclusion that the applicant was in breach of the contract, the CMA arbitrator was in fact justifying the amount awarded to the applicant. It does not, at any rate amount to a new issue as alleged by the learned counsel for the applicant. That suffices to conclude that the CMA did not raise new issue that would entitle the calling of the parties to address on it. That said, the first issue is resolved negatively.

The second issue is on the reliefs to which the applicant is entitled thereto. The statement of issues of the said applicant before the CMA, he asked for the reliefs like salary arrears, compensation for unfair termination, as well

as notice, severance pay and clean certificate of service. This however is opposed to what the applicant asked for in the Form No. 1, where he prayed for:-

"Respondent employer be ordered to pay me remuneration for august 2017 and September as required of him by the law for a suspended employee."

Responding on the awarded reliefs, Mr. Mushi is of the view that the applicant was awarded what he claimed in the CMA, which according to him makes this application frivolous and vexatious. Based on this, Mr. Mushi urged the court to dismiss the application with costs under rule 51(2) of the Labour Court Rules, G.N No. 106 of 2007.

In the CMA F.1, the applicant prayed to be paid Tshs 3,852,350 plus bonus. According to the tendered exhibits, especially the termination letter, it shows that the applicant was paid Tshs 1,156,000/= as monthly salary and Tshs 235,200/= as monthly living allowance. In his evidence, the applicant did not state how he arrived at the Tshs 3,852,350 and bonus that he pleaded in the CMA F.1. The monthly salary and the living allowance for two months once combined, they make a total of Tshs 2,782,400/= as was correctly awarded by the CMA being the payment during suspension as well stated under rule 27 (1) of the Code of Good Practice, GN No. 42 of 2007.

One thing which is clear and parties should know is that the award must be on the basis of what is claimed in the CMA form No.1. It was held

by Aboud J, in the case of **SDV Transami (T) Ltd v. Faustine L. Mugwe,** Labour Revision No. 227 of 2016 High Court Dar es Salaam (unreported) the position which I fully associate myself with, that:-

> *"Failure to consider what had been prayed in the CMA Form No.1 is an error which makes the award revisable."*

Exception to this is as well stated in the case of **One Products & Brothers Ltd v. Abdallah Almas & 25 Others,** Revision No. 201 of 2015, Nyerere, J (as she then was) that:-

> *"Basically there are employment benefits which this court or Arbitrator may grant without being pleaded by a party referring an employment dispute to the CMA these benefits includes benefits provided for under section 44 of the Employment and Labour Relations Act."*

The above benefits I dare say even if not pleaded can be granted with exception of fair termination based on misconduct like in our case where the applicant had refused to go back to work. It was an abscondment or misconduct which cannot entitle him severance pay under section 42 (3) of the ELRA (Act No. 6/2004). The respondent had intended to follow the disciplinary hearing which the applicant never attended. Even when he was called, so as to have the matter settled, he defied the employer's call that was made to him for a meeting. He cannot complain at this hour.

For the above stated reasons, the CMA could not award more than what the applicant prayed in the CMA Form 1, on the strength of the case of **SDV Transami (T) Ltd v. Faustine L. Mugwe** (supra) specially so, because he was terminated based on misconduct. The second issue is resolved in favour of the respondent. It is bound to fail.

The application which purports to say the CMA decided on new matters which parties were not called upon to address fails. Even the claim that he should be paid terminal benefits while he committed misconduct lacks merit. In the final results, the application stands dismissed with no order as to costs.

Order accordingly.

M. G. MZUNA,

JUDGE.

5th August, 2021.