IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT TABORA
REVISION NO. 16 OF 2016

TANZANIA LEAF TOBACCO COMPANY LIMITED....APPLICANT

VERSUS

SAID MGEMWA.....RESPONDENT

JUDGEMENT

Date of Last Order: 15/03/2018

Date of Judgement: 20/03/2018

L.L.Mashaka, J.

The applicant has filed this revision application against the award issued by the Commission for Mediation and Arbitration, (herein referred to as the CMA), by way notice of application and chamber summons under Section 91(1)(a) & (b),(2)(a),(b) & (c) and Section 94(1)(b)(i)of the Employment and Labour Relations Act No 6 of 2004 as amended by Written Laws(Miscellaneous Amendments) Act No.3 of 2013, Rule 24(1),(2)(a)(b)(c)(d)(e) and (f), (3)(a)(b)(c)&(d) and Rule 28(1)(a)(b)(c) (d) and (e) of the Labour Court Rules GN 106 of 2007. The application is supported by the affidavits of James Kisoma and Samweli Mashaguli.

During the hearing, the applicant was represented by Ms. Ghati Nyakitina, Advocate while the respondent appeared in person.

Learned Counsel for the applicant submitted that the applicant filed this application for revision of the CMA award delivered in CMA/TBR/DISP/59/2015 and subsequent ruling in Misc. Appl. No. 10 of

2016 dated 14th September 2016 and gave a brief history that the respondent was employed by the applicant for a specific term contract for 3 years as Field Technician. That under the said contract they agreed that the respondent would be under probation for 6 months. However on the 26th November 2015 the respondent was terminated from employment after it was discovered that he was implicated in serious integrity issues with his previous employer which led to him to be unsuitable for the position and employment confirmation with the applicant. The respondent being aggrieved with the decision of the applicant referred the matter to the CMA.

Learned Counsel submitted further that, the mediation process failed and the parties referred the dispute to arbitration stage where the applicant was aggrieved with the award delivered and filed this application for revision in which the applicant has been aggrieved with the CMA award on the grounds stipulated at paragraph 18 of affidavit deponed by James Kisoma.

In ground No. 1 as at paragraph 18(i) of our affidavit, Learned Counsel argued that while the dispute was schedule for hearing on the 21/05/2016 the applicant's representative one Mr. Samwel Mashaguli fell seriously sick to the extent that he could not move from one place to another as his legs were swollen on both knees. After a medical test it was revealed he was suffering from gout and that some crystals *ranging* in size were found in his kidneys. Subsequently he had to undergo intensive medical treatment at the Temeke District Hospital and other hospitals as

directed by medical practitioners. With regard to his condition, Learned Counsel argued that he could not travel to Tabora to proceed with the case on the schedule date. For that reason, he opted to send Mr. James Kisoma who is applicant's Human Resources Manager to seek adjournment before the CMA and inform Hon. Arbitrator the reason for his non appearance. That on 15th July 2016, when the case came for hearing, Mr. James Kisoma appeared before the CMA and informed the Hon. Arbitrator the inability of applicant's representative to appear before the Arbitrator for arbitration hence the matter was adjourned to 29th July 2016 for hearing pending furnishing evidence that the Representative for the applicant was sick. And on the 29th July 2016 Mr. James Kisoma, appeared before the CMA to inform the Arbitrator about the representative's sickness and the proof of sickness but the Arbitrator was absent.

She further submitted that Mr. James Kisoma left the premises of the CMA at 3.30pm when the offices were closed but could not see Hon. Arbitrator to submit his concern. Learned Counsel insisted that non appearance of the applicant's representative was not a deliberate action and the same was an act of God which was out of his control.

On the 2nd ground for revision at paragraph 18 (ii) of affidavit Learned Counsel that, during the hearing of the application to set aside an ex parte order and she prayed to abandon this sentence. That after the schedule date 29/07/2016, the Arbitrator issued an *ex-parte* award on the 1st August 2016. During the hearing of the *ex-parte* award on 26/08/2016, the Advocate for the applicant appeared before the CMA with proof of

original copies of medical certificates showing that the applicant's representative was very sick and his movements were curtailed and could not move from one place to the other. That the applicant tendered an affidavit of Mr. James Kisoma who appeared before the CMA when the matter was schedule for hearing with all the documents to form part of the evidence. That the issue raised by the respondent that the applicant had an opportunity to send another advocate cannot be maintained since there were only 3 advocates at the chamber and both were engaged in other matters respectively, therefore the Arbitrator failed to consider all the evidence produced by the applicant to prove his case and he claimed that the documents adduced by the applicant were not genuine. Learned Counsel argued that they were referring to the Ruling of the ex parte award, where there was no where the Arbitrator stated the reasons to why he found the evidence produced by the applicant was not genuine, which Learned Counsel submitted that it was a mere guess or emotional feelings and a technique of the applicant to delay justice.

She further argued that the medical certificates tendered by the applicant were from a known Government hospital, so if Hon. Arbitrator had doubts on its genuineness, he would have wrote a letter to the said Hospital for confirmation.

On the 3rd ground for revision at paragraph 18 (iii) of affidavit Learned Counsel for the applicant argued that Hon. Arbitrator did not state any reason as to why he thinks that the medical certificates were forged. That since the certificates were not produced during the 1st and 2nd

adjournments, it is not enough to prove that the medical certificates were not genuine. That the medical certificates are normally handed over to the patient after completion of medical treatment and not otherwise. Therefore the applicant's representative was not in the position to prove for the same during the 1st and 2nd hearing.

On the 4th ground for revision at paragraph 18(iv) of affidavit that the Hon. Arbitrator failed to consider all the reasons for the non appearance of the applicant's representative despite the evidence produced, she argued the fact that the applicant sent his employee one James Kisoma was enough to prove that he had good intention to ensure that each party secure fair justice, be given a right to be heard at the CMA. That Hon. Arbitrator failed to take into consideration of a serious matter which has denied the applicant her right for fair hearing.

On the 5th ground for revision at paragraph 18(v) of affidavit, she submitted that Hon. Arbitrator failed to seek for reasons as to why the respondent was terminated from employment, that is to say since the applicant was denied the right before the CMA, Hon. Arbitrator did not have the opportunity to hear on the reasons for termination of employment. When going through the CMA award delivered on 01st August 2016 there is no place which state the date of applicant's case (employer). That it only shows that the matter was schedule for hearing on the 29/07/2016 of which applicant's representative was present up to 3.30pm and he waited in vain for Hon. Arbitrator until the CMA offices were closed. The ex-parte award delivered by Hon. Arbitrator does not show as to when

the respondent appeared before the CMA and prosecute his case. Instead of on 2nd August 2016, the applicant was served with an ex-parte award. That is to say the next 2 days after the matter was schedule for last adjournment, the applicant was served with an ex-parte award. That the applicant has every reason to believe that there was no hearing because on the said date 29/07/2016, the applicant's officer was present and Hon. Arbitrator was absent. That the award delivered was procured in an unknown place and not before the CMA.

Learned Counsel argued that on the 6th ground for revision at paragraph 18 (iv) of affidavit, that when the matter was referred for mediation at the CMA, by the respondent, the applicant raised preliminary objection that the respondent is disqualified to refer the matter under unfair termination which is Part E of the Employment and Labour Relations Act No. 6 of 2004. Hon. Arbitrator dismissed the preliminary objection for the reason that the reliefs sought by the respondent is not among the remedies which is prescribed under Sub Part E of Act No. 6 of 2004. That Sub- Part E states clearly a person under probation cannot refer a dispute under unfair termination. That looking into the facts, the respondent only worked for 47 days and due to serious integrity issues the applicant opted to terminate his employment thus he could not be awarded with compensation for unfair termination. She insisted that the fact that the reliefs sought are not under Sub-Part E of the Act, it was not enough to justify he can file case under unfair termination.

In substantiating that Learned Counsel referred this Court to several decision which agreed with the fact that an employee who is under probation cannot benefit from the fruits of unfair termination, referred the case of **Stanbic Bank Vs. Irene Walala,** Revision No. 36 of 2012, High Court Labour Division at Dar es Salaam, [2013] Labour Court Case Digest 35, where the Court held that when a person is on probation means he is under practical interview, also in the case of **Musoma Fish Processors Vs. Godlove P. Kyambala,** Revision No. 7 of 2013, [2013] Labour Court Case Digest 86, the Court was of the opinion that the employer is not obliged to comply with the provisions of Section 35 of Act No. 6 of 2004 when dealing with employee with less than 6 months employment. From that reason Learned Counsel argued that for Hon. Arbitrator to award compensation of 34 months means it proclamated to unfair termination while the respondent is disqualified to claim for the same.

That the applicant pray to the Court to set aside the ex-parte award so that both parties may be heard on merit.

In rejoinder the respondent argued that he was employed on the 01st October 2015 for a specific contract of 3 years. On the 25th November 2015 he was required to report to the office for a meeting where he reported on the 26th November 2015 and was told to hand over all the working tools which he had to the office and on that very same day he was given letter for termination of employment. He had only worked for the applicant for 47 days and was still on probation.

He submitted that he believed that the process of termination of his employment as a probationary employee was against the procedure laid down under Rule 10(7)–(9) of Employment and Labour Relations (Code of Good Practice)GN No. 42 of 2007. That he referred his dispute to the CMA on the 30/11/2015 on termination of employment without following fair procedures and after mediation failed a certificate was issued to go for arbitration. He filed the form for arbitration and went for arbitration. That the applicant raised preliminary objection as submitted by Learned Counsel for the applicant and it was dismissed since the dispute was on termination of employment of a probationary officer without following fair labour practices and procedures.

The matter was fixed for hearing and the applicant was represented by Mr. Mashaguli, Advocate who kept on requesting for adjournments. That on the 02/06/2016 he was informed that he was required at the CMA. The dispute was fixed for hearing on the 03/06/2016 but Hon. Arbitrator decided to hear the dispute on the 02/06/2016 because he had passed here on his way to Dar Es Salaam where he is stationed. On that day the Advocate for the applicant Mr. Mashaguli requested for adjournment and the matter be fixed for hearing on the 21/06/2016 and the 22/06/2016 and would bring witnesses. That on the 21/06/2016 the applicant and his representative failed to enter appearance and the matter was adjourned to the second day 22/06/2016. That on the 22/06/2016, the officer of the applicant Mr. James Kisoma was present and informed Hon. Arbitrator that their advocate was sick.

He requested for adjournment and the matter be fixed for hearing on the 15/07/2016. He explained that he complained on the prayer for adjournment and need to bring proof of documents that the Advocate was sick. Hon. Arbitrator did agree with his concern that there should be proof of evidence and adjourned the dispute to the 15/07/2016. On the said date, officer of the applicant entered appearance and requested an adjournment because their advocate was still sick and going on with treatment but Hon. Arbitrator refused to adjourn the dispute to the 29/07/2016 as prayed by the officer of the applicant only if he would bring the medical certificates on the 19/07/2016. On the 19/07/2016, neither the officer of the applicant nor the Advocate entered appearance; hence Hon. Arbitrator decided that the dispute would be heard ex-parte on the 29/07/2016. On the 29/07/2016, the respondent entered appearance before Hon. Arbitrator, but the officer of the applicant nor their Advocate did not enter appearance.

On that issue this Court requested the respondent as to whether summons was issued to inform the applicant on the ex-parte hearing on the 29/07/2016, since he was not present on the 19/07/2016, the respondent replied that he did not have any recollection if the applicant was served summons to enter appearance on the 29/07/2016. That on the 29/07/2016, he was at the CMA and he did adduce evidence before the Arbitrator and fixed to deliver his decision on the 01/08/2016. That the ex-parte award was delivered on the 01/08/2016 and he delivered the ex-parte award to the applicant on the 2nd August 2016.

He further argued that on the 12th August 2016, the applicant did file application to set aside ex-parte award and in that application medical certificates were attached for Advocate Mashaguli. On the medical certificates, it showed that the Advocate went to hospital on 13/06/2016, 16/06/2016, 19/06/2016, 02/07/2016, 07/07/2016, 13/07/2016, 14/07/016 and the 26/07/2016. Respondent argued that he believed that the medical certificates were forged because the Advocate visited the hospital on different dates, hence they could have sent the previous medical certificates, and they were never brought before Hon. Arbitrator on time as ordered by Hon. Arbitrator to provide proof on the 19/07/2016, that the proof was brought after the ex-parte award.

He argued that though it was not true that the medical certificate remain with the patient until he completes medical treatment, it was also not true that the Advocate's chamber had only 3 Advocates who had been assigned other cases.

That the CMA dismissed their application to set aside ex-parte award on grounds found correctly by Hon. Arbitrator and prayed the Court to dismiss the application for revision.

In rebuttal, Learned Counsel submitted that on the 19/07/2016, the applicant was required to submit proof of sickness on or before the said date, but Hon. Arbitrator did not state when he fixed the date of ex-parte hearing and at the same time, the respondent has submit that the ex-parte hearing was fixed for hearing on the 29/07/2016, and if one refers at page 2 of CMA award, where it states that when the officer of the applicant

proposed the matter be fixed for hearing on the 29/07/2016 Hon. Arbitrator refused the prayer. Therefore the applicant has every reason to believe that the dispute was never heard **ex-parte** before Hon. Arbitrator but only at a place known to the respondent and Hon. Arbitrator.

On the submission by respondent that the Advocate was sick for some time and therefore in a position to submit the medical certificates, Learned Counsel argued that the same were baseless because it is known that original certificates were required to be submitted as proof of sickness of the Advocate.

She submitted further that the respondent had not submitted any evidence he adduced before the CMA and Hon. Arbitrator has not stated what evidence was adduced by the respondent before him, only the CMA Form No.1 is attached in the **ex-parte award**, it does not show when the CMA fixed the dispute for delivery of its decision, after hearing the dispute **ex-parte**. Also the respondent has not told the Court on the procedure to be followed by the officer of the applicant on the 15/07/2016. From the submission by the respondent, Learned Counsel argued that it was obvious the CMA **ex-parte award**, there was no justice in obtaining this award according to the grounds explained in submission in chief.

Lastly, she prayed to reiterate her prayers in her submission in chief and the matter be remitted back to the CMA for justice be done.

Having heard submissions by both parties and making a thorough perusal of the CMA records, this Court has noted a very serious irregularity on the part of Hon. Arbitrator who had conduct of the matter at hand when

issuing the order for ex-parte hearing and the award thereto. Due to that the Court will not deal with the grounds for revision and parties submission but deal with the key issue raised by Learned Counsel for the applicant.

The Court has note the typed CMA proceedings and signed therein on each page by Hon. Arbitrator Anosisye, A.K. in Labour dispute CMA/TAB/DISP/59/2015 between the parties, the records of proceedings from 11/05/2016 show that both parties were present; on the 26/05/2016 parties were present but Hon. Arbitrator was absent, matter adjourned till 03/06/2016, but the dispute was called for hearing on 02/06/2016 parties were both present and Hon. Arbitrator was also present; then with concerns raised it was postponed to the 21 and 22/06/2016. On the 21/06/2016 respondent was absent and the matter was adjourned to 22/06/2016 where the respondent was represented by James Kisoma, Senior Human Resources Officer who informed Hon. Arbitrator that their advocate was sick and prayed for adjournment till 15/07/2016. On that date again he entered appearance and informed Hon. Arbitrator that the Advocate was still sick and prayed that the matter be fixed for hearing on 29/07/2016. Hon Arbitrator ordered the matter to be on 19/07/2016 and to bring evidence that their advocate was still sick otherwise the matter was to proceed with ex parte hearing.

On the 19/07/2016 the respondent was absent and Hon. Arbitrator decided to proceed ex parte and Hon. Arbitrator ordered "*fika 29/07/2016 uamuzi kutolewa*". Actually before the order issued by Hon. Arbitrator to proceed with exparte ruling, the applicant stated, " *mimi sina cha zaidi.*

Maelezo na ushahidi nimeleta kwenye opening statement. Tume iamue yenyewe." There is no further records on the ex parte hearing conducted by Hon. Arbitrator but an ex-parte award issued on 01/08/2016, the one being disputed by the applicant.

Rule 22(1) of Labour Institutions (Mediation and Arbitration Guidelines) Rules Government Notice No. 67/2007 provides the arbitration process on arbitration to be, a party to the dispute to give evidence, call witnesses, question witnesses and present arguments, whereas sub rule (2) provides for stages of arbitration, to involve introduction, opening statement and narrowing of issues; evidence, arguments and award. In the present dispute which was ordered to proceed with ex parte hearing and award, Hon. Arbitrator only adhered to receiving of opening statement (Rule 22(2)(b)) and issuance of award (Rule 22(2)(e)).

On the stage of Opening statement which Hon. Arbitrator based on to write the award without getting evidence from the applicant, the law requires that, the Opening Statement does not constitute evidence in respect of the issues in dispute, unless admitted between parties. As per Rule 28 (2) of Government Notice No. 67/2007, the party present did not prove his case, he only presented an opening statement but there was no evidence adduced, and no arguments in support of his case. Also under Rule 24 (4) of the same Government Notice No. 67/2007 calls for narrowing of issues in dispute, the same was not done. Rule 24 (6) of same GN No. 67 of 2007 requires production of parties' documents intended to be used as evidence in the dispute. It is not known the

documents used as evidence whether they were produced and at what stage.

Since the dispute proceed ex-parte and the award issued was an ex-parte award, Hon. Arbitrator failed to adhere to the requirements of law to wit Rule 24(4) and Rule 28(2) of Government Notice No 67/2007 which provides that:-

> *"**Rule 24(4)** at the conclusion of the opening statements, the Arbitrator shall attempt to narrow down the issues in dispute as much as possible and explain to the parties that the purpose of doing so is to eliminate the need for evidence in respect of factual disputes."*
>
> **Rule 28 (2)** *"..where an Arbitrator proceeds in the absence of a party, the party present has to prove its case and to present an opening statement, evidence, and any argument in support of the case."*

There is no record of the arbitration proceedings to summarize the evidence and arguments submitted by the party present and record of all key issues relating to the dispute, this violates Rule 32(1) and (3) of Labour Institutions (Mediation and Arbitration) Rules GN No. 64 of 2007. The Hon. Arbitrator failed to adhere to the procedures at hand governing conduct of ex parte hearing.

It is the finding of this Court that the CMA award issued on the 01/08/2016 originates from an empty CMA proceedings and all what is in

there is a nullity thereto as there was no hearing conducted of the party present. Seemingly Hon. Arbitrator formulated his own record on the dispute and issued an award thereto. That was a serious procedural irregularity on the part of Hon. Arbitrator.

This Court when dealing with proper recording of CMA proceedings in the case of **Project Manager Barrick Gold Mine(Bulyanhulu) Vs Adriano O. Odhiambo,** Revision No. 290 of 2008,HCLD at Mwanza,[unreported] Hon. Rweyemamu, J (as she then was) at p.4 where the Court was confronted with the issue at hand, held that, *"the Arbitrator failed to keep records of proceedings as required under Rule 32 of the Labour Institutions (Mediation and Arbitration)Rules GN 64/2007,*quoting the case of **Bidco Oil Soap Vs Abdu Said and 3 Others,** Revision No 11/2008, **Mandia, J** at page 4 that:

".. emphasis (is) on regular and orderly progress in law and procedure from commencement of an action to execution of judgement..the function of arbitration are quasi-judicial, so arbitrators should insist on basic characteristics of orderliness and regularity in execution of their duties. Luckily the Commission has made elaborate rules (published as GN 64/2007 and GN 67/2007)..These rules of procedures are subsidiary legislation and arbitrators are bound to follow rules set therein. The Court held that failure to keep a proper record vitiated the whole proceedings including the resultant award, which it proceeded to quash."

Also in the case of **Edna Pendael Tenga Vs Parokia ya Bugando, Revision No 19/2007,** HCLD at Mwanza [unreported], Hon.

Rweyemamu,J(as she then was), at page 2 noted that; "*...the records does not show how the case commenced ,what issues were up for arbitration; what evidence was lead and the like. It would appear the parties were only requested to file statement–themselves not indicated to be part of the record. In short, there was no record of proceedings properly so called...*"

In the cited cases of this Court, the Court decided among other issues proper recording of CMA proceedings, where the whole proceedings with their resultant awards were quashed and set aside and the disputes ordered to state afresh according to the law.

I accordingly revise and quash the whole of the CMA purported award with its proceedings in labour dispute CMA/TBR/DISP/59/2015.

Using powers vested in this Court under Section 91(4) of the Employment and Labour Relations Act No 6/2004 remit the file to the CMA with an order that the dispute be processed afresh before a different Arbitrator of competent jurisdiction. The respondent should file the same within 30 days from today if still desirous to pursue the matter.

The revision application is meritorious and granted.

Right of appeal explained.

L.L.Mashaka

JUDGE

20/03/2018