IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 26428 OF 2023

(Arising from a Award issued on 20/10/2023 by Hon. Igogo, M, arbitrator, in Labour dispute No. CMA/ DSM/ILA/27/19 /49 at Ilala)

HAPPINESS ROMWALD CHUWA .....1ST APPLICANT

YOHANA JOSHUA MASWI.....2ND APPLICANT

DAVISON DAUSEN SHOO.....3RD APPLICANT

ANTHONY SYLVESTER NSHIKU.....4TH APPLICANT

VERSUS

SANLAM GENERAL INSURANCE
TANZANIA LIMITED .....RESPONDENT

RULING

Date of last Order: 21/02/2024
Date of Ruling: 26/02/2024

B. E. K. Mganga, J.

Applicants had an unspecified period contract of employment with the respondent. Happiness Romwald Chuwa, the 1st applicant was employed as Credit Controller. Yohana Joshua Maswi, the 2nd was employed as Claims Supervisor. Davison Dausen Shoo, the 3rd Applicant was employed as underwriting Supervisor. Anthony Sylvester Nshiku, the 4th Applicant was employed as Branch Manager, stationed at Mbeya. Duty

stations of the 1st, 2nd and the 3rd applicants were in Dar es Salaam while duty station of the 4th applicant was Mbeya. It happened that in 2018, respondent terminated employment contracts of the applicants allegedly due to operational requirements. Applicants were unhappy with termination of their employment as a result, they filed Labour dispute No. CMA/DSM/ILA/27/19/49 before the Commission for Mediation and Arbitration henceforth CMA at Ilala complaining that they were unfairly terminated. On 20th October 2023, Hon. Igogo, M, Arbitrator, having heard evidence of the parties issued an award that respondent had valid reason to terminate employment of the applicants and that she followed procedures of termination.

Applicants were aggrieved with the said award as a result, they filed this application seeking the court to revise the said award. In their joint affidavit in support of the Notice of Application, applicants raised six(6) grounds namely:-

1. *That, the Arbitrator erred in law and facts in holding that the respondent adhered to labour laws and contractual agreements and followed necessary procedures in retrenching the applicants.*
2. *That the Arbitrator erred in law and facts in holding that respondent had valid reason for retrenching the applicants despite the fact that bad debts were largely collected since significant financial burden amounting to billions of money remained uncollected.*

3. *That, the Arbitrator erred in law in holding that Applicants were not entitled to receive 10% collection from the ad debts since they had not sought that relief in the Referral Form (CMA F1) without regard that the relief was sought in the opening statement.*
4. *That, the Arbitrator erred in law and facts having found that the 1st applicant had sought the relief of 10% collected from the bad debt in the Referral Form(CMA F1) on that she did not provide evidence that she collected debts from BUSARA, ALLIANCE and CHADEMA companies.*
5. *That, the Arbitrator erred in law in holding that Applicants were not entitled to general damages irrespective of the mental suffering sustained.*
6. *That, the Arbitrator erred in law in holding that the aggrieved party has a right to seek revision in the Labour Court within 40 days.*

Respondent resisted this application and filed both the Notice of Opposition and the Counter sworn by Lucy, Ng'itu her Human Resources and Corporate Services Manager.

When this application was called on for hearing, applicants were represented by Mr. Benedict Bagiliye, Advocate while the respondent was represented by Mr. Emmanuel Godson Miage, Advocate.

Before allowing the parties to submit on the above grounds raised by the Applicants, I went through the CMA record and noted that, initially the matter was handed by Massey, Arbitrator, who drafted issues but later on it moved to Igogo, Arbitrator and thereafter to Ndonde, arbitrator, who recorded evidence of DW1 in chief. The matter then

moved back to Igogo, Arbitrator, who recorded evidence of DW1 starting from cross examination and recorded evidence of all other witnesses. I noted that, the record does not show reason as to why the file changed hands amongst these arbitrators. I noted further that, during hearing, the arbitrator admitted and marked exhibits R1, R2, A1, A2, A3, A4, A5, A6, A7 and A8 without prayer from the witnesses and the other party was not asked to comment before admission of those exhibits. With those observations, I asked both learned counsel to address the court whether, the procedure adopted in the CMA proceedings is proper and whether exhibits were properly admitted and the effect thereof.

Responding to the issues raised by the court, Mr. Bagiliye, advocate for the applicants, submitted that, failure to record reason of taking over by the successor arbitrator is a fatal irregularity because, it leads to lack of transparence. He added that, the effect thereof is that, proceedings are a nullity. He went on that, there are many cases decided by the Court of Appeal that the irregularity is fata and cited the case of ***Jumuiya ya Wafanyakazi Tanzania vs. Kiwanda cha Uchapishaji cha Taifa*** [1988] TLR 146 CAT to support his submissions. he added that, this court is bound by decisions of the Court of Appeal.

It was further submissions by counsel for the applicants that, failure to record that a witness prayed to tender exhibit and failure to afford the other party right to comment, is a fatal irregularity. He added that, those exhibits are supposed to be expunged. He was quick to add that, the omission was done by the arbitrator and that, to expunge those exhibits will be injustice to the parties. He therefore prayed CMA proceedings be nullified, the award be quashed and set aside and order trial *de novo* before a different arbitrator.

On the other hand, Mr. Miage, Advocate for the respondent, briefly submitted that, the omission or irregularities pointed are valid and are fatal. He added that, the omission goes to the jurisdiction of CMA hence cannot be cured. He concluded that, the only remedy is to nullify CMA proceedings , quash the award and order trial *de novo* before a different arbitrator.

I have considered submissions by both counsel and I entirely agree with their submissions. It was correctly submitted by Mr. Bagiliye, advocate for the applicants that failure by the successor arbitrator to record reason of taking over is a fatal irregularity because, it led to lack of transparence in the CMA proceedings. In fact, Rule 5(a), (b), (c) and (d) of the Labour Institutions (Ethics and Code of Conduct for Mediator

and Arbitrators) Rules, GN. No. 66 of 2007, requires arbitrators to act with honest, impartiality, integrity, to act without personal interest or gain, not to solicit appointment, be reasonable by accepting appointments where they are available and before acceptance, consider his or her competence in handling the dispute. In my view, the intention of the drafter of the said Rule was, *inter-alia,* to safeguard integrity and impartiality of both arbitrators and ensure that there is confidence of the parties to the commission, which is why, arbitrator is required to accept the dispute which he or she is competent to arbitrate. All these, in my view, can be swept away if arbitrators are allowed to scramble amongst themselves the disputes to be arbitrated. To avoid scramble, the drafters in their wisdom, found that, an arbitrator to arbitrate a dispute, must be appointed, and assigned the dispute for that purpose. Evidence to show that the arbitrator did not illegally take over the dispute, must be found in the file. In my view, there must be assignment in the file or reasons for taking over.

It is my view that, if the assigned arbitrator fails to finalize proceedings, the only way to show that there was no scramble, is for the successor arbitrator to record reasons for taking over. In so doing, it will enhance transparence in the conduct of arbitration and minimize allegations that the arbitrator took over the dispute for personal gain or

interest. I therefore agree with counsel for the applicants that failure to record reasons for taking over by both Igogo and Ndonde, Arbitrators led to lack of transparence in the CMA proceedings. What I have explained hereinabove is supported by what was held by the Court of Appeal in various cases. See for example the case of ***Mariam Samburo vs Masoud Mohamed Joshi & Others*** (Civil Appeal 109 of 2016) [2019] TZCA 541, ***Leticia Mwombeki vs Faraja Safarali & Others*** (Civil Appeal 133 of 2019) [2022] TZCA 349, ***M/s Georges Center Limited vs The Honourable Attorney General & Another*** (Civil Appeal 29 of 2016) [2016] TZCA 629 and ***Dimond Motors Ltd vs K-group T. Ltd*** (Civil Appeal 50 of 2019) [2019] TZCA 425 to mention a few. In ***Dimond's case*** (supra) the Court of Appeal held that: -

> *"... recording of reasons for taking over the trial of a suit by a judge* ***is a mandatory requirement, as it promotes accountability on the part of successor judge... overriding objective principle is not applicable against the mandatory provisions of the procedural law which goes to the very foundation of the case****. In the appeal at hand, we find and hold that, the takeover of the partly heard case by the successor judges mentioned above was highly irregular as there were no reasons for the succession advanced on record of appeal. We think that in the circumstances of the suit which was before the High Court, reasons for successor judges were important especially the first who took over. In the circumstances, we are settled that,* ***failure by the said successor judges to assign reasons for the reassignment made them to lack jurisdiction to take over the trial of the suit*** *and therefore, the entire*

proceedings as well as the judgment and decree are nullify." (Emphasis is mine)

In ***Mwombeki's case*** (supra), the Court of Appeal held *inter-alia* that: -

> *"…the issue for determination is whether the omission on succession of Judges did vitiate the trial and the resulting judgment…The essence of the cited order is to ensure that trial commenced by the trial judge or Magistrate is completed by the same presiding judicial officer and in case he/she is unable, it is incumbent on the successor judicial officer to assign reasons for continuation of the trial of a partly heard case.* ***The rationale behind is that, the one who sees and hears the witness is better placed to assess the credibility of such witness which is crucial in the determination of the case before the court*** *and furthermore,* ***the integrity of judicial proceedings hinges on transparency without which justice may be compromised****." (Emphasis is mine).*

In ***Mariam's* case** (supra) the Court of Appeal held *inter alia* that: -

> *"…This means failure to do so amounts to procedural irregularity which in our respective views and as rightly stated by Mr. Shayo and Mr. Mtanga, cannot be cured by the overriding objective principle as suggested by Dr. Lamwai. The reason behind being that, the overriding objective principle does not implore or require the Court to disregard jurisdictional matters which go to the root of the trial of the suit. For it is upon assignment when a judge or magistrate is clothed with authority to entertain a particular matter. We therefore respectfully differ with the view expressed by Dr. Lamwai that the overriding objective principle … can rescue the irregularity to the effect that the appeal should proceed to hearing. We wish to emphasise that …* ***the overriding objective principle cannot be applied blindly against the mandatory provisions of the procedural law which goes to the very foundation of the case****…"* (Emphasis is mine).

Reasons and logic of requiring reasons to be recorded when a judicial or quasi-judicial officer takes over a partly heard matter was given by the Court of Appeal in ***M/s Georges Center's case*** (supra) quoting its earlier decision in the case of ***Priscus Kimario vs Republic*** (Criminal Appeal 301 of 2013) [2015] TZCA 13 that:-

> *"...where it is necessary to re-assign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete the matter must be recorded.* ***If that is not done, it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal with to the detriment of justice****. This must not be allowed."* (Emphasis is mine).

It was correctly in my view, submitted by Mr. Miage, advocate for the respondent brief as he was, that the omission went to the jurisdiction of the arbitrators. In fact, what was submitted learned counsel for the respondent is the position of the Court of Appeal in the case of ***Abdi Masoud @ Iboma & Others vs Republic*** (Criminal Appeal 116 of 2015) [2015] TZCA 7 cited also in ***Georges Centre's case*** (supra), wherein it held *inter alia* that:-

> *"...in the absence, on record, of any reason for the taking over, by a different magistrate of the trial of a case that is partly heard,* ***the successor magistrate lacks jurisdiction to proceed with the trial and consequently all proceedings pertaining to the takeover of the partly heard matter becomes a nullity****."* (Emphasis is mine).

The above cited cases have nailed it all that failure by successor arbitrators in this application to record reasons for taking over the dispute between the parties, led them to have not jurisdiction.

It was correctly submitted by the counsel for the applicants that exhibits were not properly tendered because there was no prayer by the witnesses to tender those exhibits and the other party was not asked to comment whether there is no objection or not. It is my view that the omission deprived the other party a right to be heard. Since right to be heard is fundamental, the omission has occasioned injustice to the parties. Exhibits that were not properly tendered and admitted cannot be acted by this court as evidence of the parties. In fact, the Court of Appeal had an advantage to discuss the effect of that omission in the case of ***Mhubiri Rogega Mong'ateko vs Mak Medics Ltd*** (Civil Appeal 106 of 2019) [2022] TZCA 452 and held *inter-alia*:-

> *"It is trite law that, a document which is not admitted in evidence cannot be treated as forming part of the record even if it is found amongst the papers in the record… Therefore, it is clear that the two courts below relied on the evidence which was not tendered and admitted in evidence as per the requirement of the law. This omission led to miscarriage of justice because the appellant was adjudged on the basis of the evidence which was not properly admitted in evidence…"*

A similar position was held by the Court of Appeal in the case of ***M.S SDV Transami Limited vs M.S Ste Datco*** (Civil Appeal 16 of 2011) [2019] TZCA 565, **Japan International Cooperation Agency vs. Khaki Complex Limited** [2006] T.L.R 343.

For the foregoing, I hereby nullify CMA proceedings, quash and set asiede the award and order trial de novo before a different arbitrator.

Dated at Dar es Salaam on this 26th February 2024.

B. E. K. Mganga
JUDGE

Ruling delivered on 26th February 2024 in chambers in the presence of Happiness Chuwa, Davison Shoo and Anthony Nshiku, the 1st, 3rd and 4th Applicants but in the absence of the respondent.

B. E. K. Mganga
JUDGE