IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: NDIKA, J.A., GALEBA, J.A., And MGONYA, J.A.)

CIVIL APPEAL NO. 77 OF 2021

SERENGETI BREWERIES LIMITED .... APPELLANT

VERSUS

ALBERTO NYOKA .... FIRST RESPONDENT
PAUL MABULA .... SECOND RESPONDENT
MOSES IBRAHIM .... THIRD RESPONDENT
ISMAIL MUSA KABYEMELA .... FOURTH RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Labour Division at Moshi)

(Mwenempazi, J.)

dated the 24th day of September, 2020

in

Labour Revision No. 7 of 2019

....

JUDGMENT OF THE COURT

28th May & 3rd June, 2024

NDIKA, J.A.:

On appeal is the judgment of the High Court of Tanzania, Labour Division at Moshi ("the High Court") dated 24th September, 2022 in Labour Revision No. 7 of 2019 affirming the award made by the Commission for Mediation and Arbitration at Moshi ("the CMA") issued on 24th February, 2019. In essence, the CMA upheld a joint unfair termination claim instituted by the above-mentioned respondents and, consequently, it ordered the appellant to reinstate them in their employment.

As of necessity, we begin with the abbreviated facts of the case. Between 2008 and 2011 the appellant, Serengeti Breweries Limited, employed the respondents in different capacities. Sometime in February 2016, the appellant's officials suspected that 1,500 cases of Tusker Lager beer valued at TZS. 68,550,000.00 (approximately USD. 32,642.00) had been stolen from its brewery at Moshi on 17th February, 2016. An internal investigation report dated 24th March, 2017 established that the theft occurred as suspected and that it was facilitated by fraudulent acts and collusion by a chain of employees in various sections – brewhouse, packaging, logistics and security. Given that the respondents were among the staff implicated by the report's findings, the appellant instituted disciplinary proceedings against them on two counts: one, dishonesty causing loss of 1,500 cases of Tusker Lager beer; and two, forgery and fraud leading to the aforesaid loss of 1,500 cases of Tusker Lager beer. The respondents were found guilty. So, the appellant terminated their employment contracts on 23rd May, 2016.

As previously mentioned, the respondents successfully contested the terminations, the CMA determining that they were both procedurally and substantively unfair. The appellant, not happy with the verdict, has now

appealed to this Court on six grounds after the High Court had upheld the CMA's award.

The appellant's learned counsel, Ms. Elizabeth Mlemeta, prosecuted the appeal whereas Mr. Andrew J. Kannonyele, learned counsel, stood for the respondents.

It occurred that, at the hearing of the appeal before us, Mr. Kannonyele, with remarkable forthrightness, conceded to the first ground of complaint postulating as follows:

> *"[t]hat the High Court erred in law by failing to hold that the arbitrator was biased and contravened the law by communicating and granting extension of time to the respondents to file their closing submissions on several occasions in the absence of and without notice to the appellant."*

It is on record that after both parties had presented evidence in support of their respective cases, on 19th July, 2018, Hon. T. S. Malekela ("the arbitrator") ordered the parties to file their respective closing submissions by 27th August, 2018 with the view that the award would be issued on 27th September, 2018. While the appellant duly lodged its closing argument, the respondents did not. To remedy their failure to lodge the submissions, the

respondents, through their personal representative, made their way before the arbitrator on 28th August, 2018 in the absence and certainly without the knowledge of the appellant seeking extension to lodge their closing submissions. The arbitrator entertained their request and granted them a one-month extension, which supposedly ended on 27th September, 2018, but no written argument was forthcoming. The arbitrator yet again entertained the respondents on the same prayer on 20th December, 2018 in the absence of the appellant and extended the period for lodging their closing argument to 2nd January, 2019. It turned out that the respondents lodged no written submissions eventually. On 24th February, 2019, the arbitrator issued his award, which the parties received on 6th March, 2019.

Before the High Court, the appellant assailed the award on eleven grounds of complaint one of which censured the arbitrator for the manner he handled the respondents' prayer for extension of time without its knowledge and involvement. It was particularly contended that the arbitrator was biased. The erudite High Court Judge rebuffed the claim. He held that:

> *"I am also aware of ground 7 that the Honourable Arbitrator was biased and erred in law and fact in granting an extension of time on various occasions to the respondents to file their closing submissions in the*

absence of the applicant [the appellant herein]. Upon examination of the record, the applicant was absent. Under the circumstances, if the ground is entertained, it will open a way for parties to absent themselves, so as to create reasons for appealing or filing any application to the superior court to challenge orders or actions taken while they were absent without giving notice. The situation would be different if there was notice of absence."

With respect, the learned Judge's reasoning is clearly based on a misapprehension of facts. It is certain that the appellant had no knowledge that the matter would come up before the arbitrator on both occasions when the respondents' representative appeared seeking enlargement of time to file written argument. Thus, the appellant did not deliberately absent itself from the proceedings. As a matter of procedure, the appellant ought to have been notified of the intended hearing for it to appear and to be heard on the respondents' prayers before the arbitrator issued the orders favourable to the respondents.

In **Bayport Financial Services (T) Limited v. Cresence Mwandele**, Civil Appeal No. 19 of 2017 [2020] TZCA 1876 [26th November, 2020; TanzLII], cited to us by Ms. Mlemeta, we censured an arbitrator for

meeting and hearing a party to that case on a prayer for extension of time to lodge written submissions in the absence of the other. We took the view that the said course flouted rule 29 of the Labour Institutions (Mediation and Arbitration) Rules, 2007, Government Notice No. 64 of 2007. The relevant part of said rule requires notice to be provided to the other party thus:

> *"**29.**-(1) Subject to Rule 10, this Rule shall apply to any of the following:*
>
> *(a) **Condonation**, joinder, substation, variation and setting aside an award;*
>
> *(b) Jurisdictional dispute;*
>
> *(c) Other applications in terms of these Rules.*
>
> *(2) An application shall be brought **by notice to all persons who have an interest in the application.**"* [Emphasis added]

In the aforesaid case we stressed that:

> *"... applications before the CMA should be made by informing all the parties concerned. This means that the Rules do not provide for ex parte hearing without prior notification to the opposite party as it was done by the arbitrator in this case when he heard the respondent alone and extended time for him to file written submissions. **It is our considered view that these requirements of law were aimed to***

> ***ensure transparency and fairness to the parties concerned.*** *Failure to comply with the provisions of law creates mistrust to those who are charged with the duty of determining employees' rights."* [Emphasis added]

We were cognizant, in the above case, that, although sub-rule (11) of rule 29 vested the CMA with the discretion to *"determine an application in any manner it deems proper"*, the said sub-rule (11) would only come into play once all persons having an interest in the matter have been notified in accordance with sub-rule (2). We continue to hold, as we did in that case, that the arbitrator ought to have convened both parties before granting the respondents a favourable order on two occasions.

Beyond the foregoing, the arbitrator's approach has one more unsettling aspect. His action appears to have constituted a violation of rule 5 of the Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrators) Rules, 2007, Government Notice No. 66 of 2007, as correctly asserted by Ms. Mlemeta and acknowledged by Mr. Kannonyele. The said rule stipulates the general attributes of mediators and arbitrators:

> *"5. All Mediators and Arbitrators shall in the course of discharging their duties-*

(a) ***act with honesty, impartiality, integrity,*** *due diligence and be independent of any outside pressure;*

(b) ***uphold themselves in a fair manner to all parties*** *and should not be subjected to personal interest or gain;*

(c) *not solicit to be appointed as a Mediator or an Arbitrator provided that, this shall not preclude Mediators and Arbitrators to indicate willingness of serving in that capacity;*

(d) *be reasonable by accepting appointments only where they believe that they are available and are competent to undertake the assignment;*

(e) *avoid entering into any financial, business or social relationship likely to affect their impartiality;*

(f) *not accept or be influenced by hospitality from either party or any other improper means including gifts or other inducements even in the presence of the other;*

(g) *ensure that a copy of any letter received from one party is sent to the other, either by the writer, Mediator or Arbitrator;*

(h) ***avoid having any communication except for the purpose of arranging the dates for meetings or hearing*** *in which case the outcome*

of those conversations should be notified to both parties; and

(i) ***avoid having any meeting with a party except in the presence of the other."***
[Emphasis added]

It seems to us that the arbitrator demonstrated bias and unfairness by meeting and hearing the representative of the respondents without the appellant's knowledge or consent. The contested award, as correctly argued by Ms. Mlemeta, serves as additional proof of the arbitrator's actual bias or prejudice against the appellant. Because the arbitrator neglected to address any of the points the appellant brought up in its extensive twenty-eight-page written submissions in the award, which is forty pages long, it indicates that he handled the submissions as though they were non-existent.

Therefore, we believe that, apart from violating rule 5 (a), (b), (h), and (i) above, the arbitrator's action infringed the appellant's right to be heard – see **Abbas Sherally & Another v. Abdul S.H.M. Fazalboy**, Civil Application No. 33 of 2002 (unreported) on the essence of a party's right to be heard. See also **Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] TLR 251; and **Director of Public Prosecutions v. Sabina I. Tesha & Others** [1992] TLR 237.

Both learned counsel agreed that the arbitrator's treatment of the case appears to have violated rule 5 (a), (b), (h), and (i) above and that the High Court should have set aside the contested award in accordance with section 91 (2) (a) of the Employment and Labour Relations Act, Cap. 366 for misconduct. We concur with them entirely. In fact, we believe it would be beneficial to keep in mind our holding in **Bayport Financial Services (T) Limited** (*supra*) thus:

> *"By entertaining the respondent alone and granting his request for extension of time in exclusion of the appellant,* ***the Arbitrator not only extended an unfair advantage to the respondent but also abrogated the appellant's right to be heard on the issue****. Furthermore, we are perturbed that in his award at page 186 the Arbitrator had the audacity to condemn the appellant's failure to lodge its submissions indicating that the said failure was prejudicial to its case. In our considered view, the Arbitrator's act was a fundamental mistake going to the root of the matter as it resulted in making the* ***arbitral forum uneven and biased. We would conclude that the conduct vitiated the award which we hereby set aside.****"* [Emphasis added]

In the end, we hold that the appeal has substance, and we allow it. As a result, we quash the High Court's judgment, set aside the CMA's award and remit the case file to the CMA so that a different arbitrator can entertain and determine the complaint with the urgency it demands, keeping in mind that this is an old dispute. This being a labour dispute, we make no order as to costs.

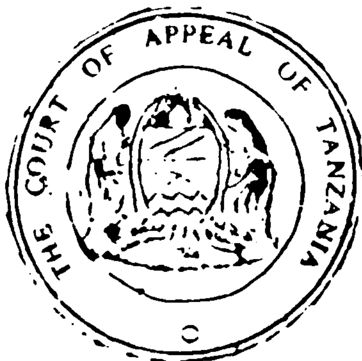
DATED at **MOSHI** this 31st day of May, 2024.

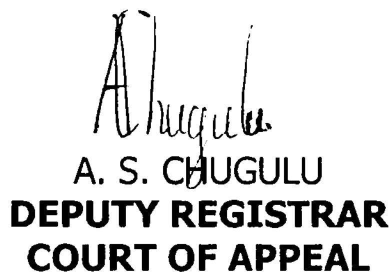
G. A. M. NDIKA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of June, 2024 in the presence of Mr. Emmanuel Shayo, learned counsel for the appellant and in the presence of Mr. Majura Magafu, learned counsel for the Respondents, is hereby certified as a true copy of the original.





A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL