IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KENTE, J.A. And MURUKE, J.A.)

CIVIL APPEAL NO. 24 OF 2021

MICHAEL MAHENDE ..... APPELLANT

VERSUS

SHELL EXPLORATION AND PRODUCTION (T) LIMITED ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Wambura, J.)

dated the 20th day of December, 2019
in
Revision No. 469 of 2019

.....

JUDGMENT OF THE COURT

23rd August, 2023 & 8th July, 2024

MWARIJA, J.A.:

The appellant, Michael Mahende was an employee of the respondent, Shell Exploration and Production (T) Limited (formerly BG Tanzania Ltd.). He was employed on 18/3/2013 on 12 months' probation period in the post of Contracts and Procument Analyst. He was later confirmed in that position on 18/3/2014. However, on 23/7/2014, he was terminated from employment on the ground of gross dishonesty; that he failed to act with integrity and transparency at the time when he filled the application for employment form.

According to the respondent, although he appealed against the decision of the respondent's disciplinary committee, his appeal was dismissed vide a letter dated 18/7/2014.

The allegations giving rise to the appellant's termination were that, during the recruitment process, the appellant failed to disclose that he was suspended from his previous employment with African Barrick Gold (ABG) after disciplinary proceedings which were instituted against him by his previous employer. The respondent contended that, instead of disclosing that information, which would have assisted it to make an informed decision to employ or decline to employ him, the appellant stated that he quitted his former employment with ABG because he was encountering family problems. Following the dismissal by the respondent, of his appeal against his termination, he filed a complaint in the Commission for Mediation and Arbitration (the CMA), Dispute No. CMA/DSM/ILA/R.687/14/77.

During the hearing of the dispute in the CMA, the respondent called two witnesses, Isabela Faya (DW1) who was at the material time the Human Resource Manager of the respondent and Sinclare Conor (DW2) who was the Head of the respondent's Legal Department. As for

the appellant, he gave evidence on his behalf and did not call any witness.

In her evidence, DW1 stated that, the appellant was sourced by a recruitment agent known as Radar. After a background check, the respondent was satisfied, after receipt of reference check from the appellant's former employer (the ABG), among other things, that he resigned from ABG due to family problems. DW1 went on to state that, later on in November 2013, the respondent's reference check company got information that the appellant had given false information about the reason for his resignation from his previous employer. The information was that, the appellant resigned while under suspension as a result of misconduct for which disciplinary charges were filed against him.

It was her further evidence that, the respondent proceeded to seek confirmation from ABG and through its official, one Jacob Lukwaro confirmed that the reason the appellant left the ABG was resignation. After that confirmation, the appellant was confirmed to his employment with the respondent in March 2014. Shortly thereafter however, DW1 went on to state, a red flag was raised again by one of the ABG security consultants who had visited the respondent's Security Manager in April 2014. The witness testified that, the ABG's undisclosed security official

recognized the appellant as the former ABG employee who was under investigation for misconduct. The information caused the respondent to seek further reference check report from ABG. According to DW1, in the second reference check, the same official of ABG, Jacob Lukwaro confirmed through email dated 8/5/2013 that, the appellant left his employment while he was under suspension following disciplinary proceedings filed against him by ABG. She testified further that, after the respondent had received the second reference check report, the appellant was charged with the disciplinary offence of giving false information as regards the reason for leaving his previous employment.

When cross-examined, DW1 admitted **first**, that the 2nd reference check report did not contain the official stamp of the ABG and **secondly**, that the nature of the disciplinary charges which were filed against the appellant by his previous employer were neither disclosed nor was the person who made the second reference check report, Jacob Lukwaro, called to testify on the matter.

With regard to DW2, the substance of his evidence was to the effect that; after the appellant had been employed and after the second reference check report was received at the instance of the unnamed ABG security official, he (the appellant) was charged with disciplinary

offences, to wit, failure to declare material information at the time of completing his employment form and the failure to comply with the company's business policy requiring its employees to be honest. He testified further that, the chairman of the Disciplinary Committee was Andy Day who, after the conclusion of hearing, found the appellant guilty of misconduct; that he gave false information by filling in his employment form that he left his previous employment with ABG for family reasons while it came to be established that, he resigned amidst disciplinary proceedings filed against him by ABG.

Having considered the evidence, the CMA found that the same did not prove that, **first**, that the appellant's termination was with a valid reason and **secondly**, that the procedure for terminating him was fair. It thus held that his termination was both substantially and procedurally unfair. As a result, it awarded the appellant a compensation of 12 months' remuneration in terms of s. 40 (1) (c) of the Employment and Labour Relations Act, 2004 (the Act) in the sum of TZS 99,750,000.00, severance pay of TZS 1,790,385.00 and TZS 99,925,000.00 being the expected amount payable under the Barrick Gold's Long-Term Investment Plan which was extended to him by the respondent. The respondent did not dispute that there was that arrangement between it

and some of its employees. It was also ordered to issue to the appellant a clean certificate of service.

Aggrieved by the decision of the CMA, the respondent filed an application for revision in the High Court of Tanzania, Labour Division at Dar es Salaam. In its decision, the High Court (Wambura, J.) reversed the decision of the CMA on the invalidity of the reason for termination and held that, the appellant's termination was due to valid reason, that, he misrepresented to the respondent, the cause for quitting his previous employment. Relying on the provisions of rule 12 (3) of Code of Good Practice and a number of foreign decisions, including the case of the **Department of Home Affairs, the Ministry of Home Affairs v. Simphime Emanuela Ndlovu & Others,** (DA/11/2012) [2014] ZALAC II, the High Court observed that, the appellant's dishonesty warranted his termination even though such dishonesty was discovered after he had been employed by the respondent. The learned Judge observed that:

> *"The reason for termination is that the appellant adduced false information on the reason of terminating his services with ABG when seeking to be employed by the respondent. He said it was*

for family reasons while in fact he had a pending disciplinary matter".

On the procedure, the High Court found that the disciplinary proceedings contravened guideline No. 4 of the Code of Good Practice. It stated as follows:

> *"...although the respondent was given sufficient time to prepare for the defence and call witnesses there were some irregularities in conducting the disciplinary hearing which had procedural effects as one cannot be judge of his own course. This was contrary to item 4 of the Guidelines...thus vitiated the procedures undertaken".*

On the reliefs, the learned High Court Judge varied the compensation from payment of 12 months remuneration to six months' salary amounting to TZS 46,033,462.00. He was also awarded one month notice payment, that is; TZS 7,673,077.00, severance pay of TZS 3,657,850.00 and TZS 1,790,000.00. As for the BG Long-Term Investment Plan which was extended to the appellant, the learned High Court Judge was of the view that, the appellant was not entitled to it

because the benefit had not been due at the time when he was terminated.

The appellant was dissatisfied with the decision of the High Court hence this appeal which is predicated on the following six grounds of appeal:

"1. *That, the Honourable High Court erred in law and fact in holding that the revision proceedings were properly before the High Court and that the affidavit in support of the application was proper.*

2. *That, the Honourable High Court erred in law and in fact by holding that the respondent had valid reason for terminating the appellant's contract of employment without positive evidence and without putting the entire evidence in an objective scrutiny.*

3. *That, the Honourable High Court erred in law and in fact by failing to properly evaluate the evidence on record regarding the respondent's failure to follow the laid down procedure for terminating the appellant from employment thereby down playing the gravity of the respondent's violation of the procedure.*

4. *That, the Honourable High Court erred in law and in fact by awarding the appellant a compensation equivalent to six months' salary contrary to the minimum compensation there should provided by law.*

5. *That, the Honourable High Court erred in law and in fact by holding that the appellant was not entitled to the BG Long Term Incentive Plan without regard to clear evidence on record to the contrary.*

6. *That, the decision of the High Court is otherwise faulty in law and in fact".*

On the date of hearing the appeal, the appellant was represented by Ms. Blandina Harrieth Kihampa, learned counsel while the respondent had the services of Dr. Onesmo Michael Kyauke, also learned counsel. The learned counsel for the parties had duly filed their respective written submissions in terms of rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009.

Before he could make his oral submissions, Dr. Kyauke raised a legal point concerning the propriety or otherwise of grounds 2, 3 and 5 of the appeal. He contended that, those grounds have been raised in breach of s. 57 of the Labour Institutions Act, 2004 which provides that, an appeal to the Court from the decision of the High Court, Labour Division must be based on points of law only. He submitted that, the three mentioned grounds have been based on matters of fact.

In response, Ms. Kihampa argued that, although the 2nd, 3rd and 5th grounds refer to matters of facts, in effect, they raise points of law

which cannot be dealt with in isolated of evidence. According to the learned counsel, whereas in ground 2 the appellant contends that the findings of the High Court were based on the evidence which was misapprehended by the learned High Court Judge, in grounds 3 and 5, the High Court is faulted for having failed to re-evaluate the evidence, thus arriving at the decision which was founded on the wrong principles of the law.

Having scrutinized the contents of the three grounds complained of by the learned counsel for the respondent, we are with respect, unable to agree with him that they are not based on points of law. In the 2nd ground, the appellant is challenging the decision of the High Court which reversed the finding of the CMA that the appellant's termination was without a valid reason. Section 37 of the Employment and Labour Relations Act, 2004 prohibits unfair termination of employment of an employee. For such termination to be fair, the employer must prove *inter alia* that, there was valid reason for doing so. That is the position of the law and thus the 2nd ground revolves around that point of law.

As to the 3rd and 5th grounds, we wish to state that, it was the legal duty of the High Court to re-evaluate the evidence adduced in the

CMA. The appellant's complaint is that, the High Court did not only fail on that duty but acted on misapprehension of evidence thus wrongly arriving at the findings which are different from those of the CMA. Obviously, in such a situation, this Court has a legal mandate to re-evaluate the evidence. See for instance, the case of **Godfrey Elisalia and Three Others v. Republic**, Criminal Appeal No. 39 of 2022 (unreported). In that case, we observed that:

> *"Where the two lower courts did not concur on the findings ... we are mandated and obliged to re-evaluate and analyse the facts and the whole evidence advanced in the trial court resulting in the impugned decision".*

For these reasons, we find that the two grounds are also based on points of law. The preliminary objection is, for these reasons, overruled.

That said, we now turn to consider the grounds of appeal. Starting with the 1st ground, it was the submission of the learned counsel for the appellant that, the application for revision was supported by a defective affidavit thus rendering it incompetent. It was argued that, the deponent, Angela Caramaschi, deponed on the facts which were not from her own knowledge without stating the source of that

information. Reliance was placed on O. XIX r. 3 (1) of the Civil Procedure Code, Chapter 33 of the Revised Laws (the CPC) as well as the Court decisions in the cases of **Serenity on the Lake Ltd v. Dorcus Martin Nyanda**, Civil Revision No. 1 of 2019 and **Convergence Wireless Network and 3 Others v. WIA Group Limited and 2 Others**, Civil Application No. 263 'B' of 2015 (both unreported). According to the learned counsel, even though affidavits for use in the Labour Court are governed by rule 24 (3) of the Labour Court Rules, 2007, the same must, in content comply with the requirements stated under O. XIX r. 3 (1) of the CPC. On the applicability of the CPC in the Labour Court proceedings, it was submitted that the same applies by virtue of rule 55 (1) of the Labour Court Rules, which provides that:

> *"Where a situation arises in proceedings or contemplated proceedings which these rules do not provide, the Court may adopt any procedure that it deems appropriate in the circumstances".*

In response to the submissions made in support of the 1st ground of appeal, the learned counsel for the respondent argued briefly that, the affidavit filed in support of the application complied with the

requirements stated under rule 24 (3) of the Labour Court Rules and therefore, the same is competent. He contended that, the learned High Court Judge had correctly held that, the cited provisions of the CPC are not applicable to the affidavits filed in the Labour Court. He argued further that, even if the affidavit is to be found to be defective, the same would not render the application for revision incompetent because the defect did not prejudice the appellant.

From the submissions made on that ground, the issue is whether or not the affidavit filed in support of the application for revision should have complied with rule 3 (1) of O. XIX of the CPC. There is no dispute that, affidavits filed for use in the Labour Court are governed by rule 24 (3) of the Labour Court Rules, which states as follows:

> *"24-(1) Any application shall be made on notice to all persons who have an interest in the application.*
>
> *(2) ....*
>
> *(3) The application shall be supported by an affidavit, which shall clearly and concisely set out-*
>
> > *(a) the names, description and addresses of the parties;*

(b) a statement of the material facts in a chronological order on which the application is based;

(c) a statement of the legal issues that arise from the material facts; and

(d) the reliefs sought".

It is clear that, an affidavit in support of an application filed in the Labour Court is distinct from that which is made under O. XIX r. 3 (1) of the CPC requiring a deponent to state matters of facts only, which facts must be from his own knowledge. That provision states as follows:

"3-(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted".

Provided that, the grounds thereof are stated.

The stance that the conditions set out in O. XIX r. 3 (1) of the CPC do not apply to affidavit made in support of applications filed in the Labour Court is apparent from the fact that, under rule 24 (3) (c) of the Labour Court Rules, statements of legal issues are allowed while such statements are prohibited under the above stated provision of the CPC.

With regard to the provisions of rule 55 (1) of the Labour Court Rules referred to us by the learned counsel for the appellant, since there is specific rule providing for matters which an affidavit in support of an application to the Labour Court must contain, it is obvious that a resort to the CPC is not required. The provision of rule 55 (1) of the Labour Court Rules is therefore, not applicable as regards the contents of the affidavit in question. We thus, find no merit in the 1st ground of appeal and hereby dismiss it.

On the 2nd ground of appeal, the learned counsel for the appellant submitted that, the High Court erred in law in reversing the finding of the CMA to the effect that, the termination of the appellant's employment was without a valid reason. According to the appellant's counsel, the High Court erred in disagreeing with the CMA that the adduced evidence did not establish the allegation that, at the time when he resigned from his previous employment with ABG, the appellant was facing disciplinary proceedings. It was argued that, had the learned High Court Judge put the entire evidence to an objective scrutiny, she would have found that, the resignation of the appellant from ABG was due to family problems.

Expounding the submissions made in support of this ground, the learned counsel argued that, the evidence adduced by DW1 and DW2 that, at the time of his recruitment by the respondent, the appellant had pending disciplinary proceedings was merely hearsay. Stressing his argument, the learned counsel contended that, neither the person who gave information about the existence of the alleged disciplinary proceedings was called to testify nor were any documents showing the nature of the disciplinary charges filed against the appellant were tendered.

In response to the submissions made in support of the 2nd ground of appeal, the respondent's counsel argued that, the finding of the High Court cannot be faulted because it was based on the investigation report, a copy of which was tendered and admitted in evidence as exhibit M7. According to the learned counsel, out of that investigation, the respondent requested for confirmation form ABG and through an amended reference, it confirmed that the appellant was facing disciplinary charges at the time when he resigned. The learned counsel argued further that, since the appellant did not controvert that evidence by seeking another report to the contrary, that evidence was properly acted upon by the High Court to reverse the decision of the CMA.

Having duly considered the rival arguments on this ground of appeal, the issue is whether or not, the finding by the High Court that, the appellant's termination from employment was for valid reason, was based on credible evidence. The evidence that the appellant was facing disciplinary charges filed against him by ABG was adduced by DW1 who was at the material time, the respondent's Human Resource Manager. Her evidence was to the effect that the appellant had pending disciplinary proceedings, had its source in the report of investigation conducted by a third party following the alleged incorrect reference check information previously obtained from ABG that, the appellant resigned because of family problems. She stated that, the subsequent information was to the effect that the appellant resigned from ABG while facing disciplinary charges. Having considered that evidence, which was challenged by the appellant on account that, the same was based on two contradictory reference reports from the same person, the CMA held as follows:

> "*...the reason for termination, to wit, misrepresentation of material fact relating to his previous employment, was never proved as required by section 37 (2) of the Act. It was alleged by the respondent that a red flag was*

raised when security personnel came at the respondent's offices and recognized the complainant as a former ABG employee that he had investigated and therefore the complainant left ABG while facing disciplinary proceedings. The commission queries, why the eye witnesses who investigated the complainant was never called during the disciplinary hearing and was not called to testify before the commission?".

The CMA wondered why the person whose report was relied upon by the respondent, Jacob Lukwaro was not called as a witness. It observed that, the evidence from the said persons was necessary in terms of s. 62 of the Evidence Act, Chapter 6 of the Revised Laws and thus proceeded to hold as follows as regards the respondent's evidence on that point:

> *"The testimony is hearsay and it is inadmissible. Thus, the respondent has failed to discharge its duty provided under section 30 of the Act."*

It found further that, since the respondent did not support its allegation with any documentary evidence, such as a copy of the disciplinary charges filed by ABG against the appellant, notice of disciplinary hearing and investigation report leading to the filing of the alleged disciplinary

charges, that evidence was unreliable and could not be acted upon to find that, there was valid reason for terminating the appellant.

In her judgment however, the learned High Court Judge did not, with respect, give reasons for disagreeing with the finding of the CMA that the respondent did not establish existence of a valid reason for terminating the appellant. She did not also re-evaluate the evidence adduced by the respondent to the effect that, at the time when he was employed, the appellant had pending disciplinary proceedings filed against him by ABG. From her judgment, the learned Judge was under the impression that, there did not exist a dispute that the appellant had given false information on the reason for resigning from his previous employer. She proceeded to conclude that, the termination of the appellant by the respondent was with a valid reason by stating as follows at page 674 of the record of appeal:

> *"There is no dispute that the termination of employment of the respondent had nothing to do with his performance. The reason for termination is that the respondent adduced false information on the reason [for] terminating his services with ABG when seeking to be employed by the applicant.* ***He said it was for family reasons***

while in fact he had a pending disciplinary matter".

[Emphasis added].

She held further as follows at page 676:

> *"Now in the matter before us there is no dispute that the respondent issued information which he ought to have known would be investigated upon. So, by issuing a false reason for terminating his services and it was later on found out by the applicant that it was not true, irrespective of the means, was a misconduct on the part of the respondent".*

As stated above, the allegation that the appellant had pending disciplinary proceedings before the ABG's Disciplinary Committee was disputed and the CMA had found for the appellant; that, the evidence relied upon by the respondent did not prove that allegation. Since the High Court did not re-evaluate the evidence before it arrived at its finding, it is the duty of this Court to step into the shoes of that court and do what it ought to have done.

From the record, the evidence on that issue was adduced by DW1 and DW2, who were the employees of the respondent. DW1 in particular testified as follows at page 248 of the record of appeal:

> *"In November 2013 there was a red flag by the BG reference check company about the circumstances under [which] Michael left his former employer African Barrick Gold (ABG)...*
>
> *We made a decision to approach ABG directly to get more reference... I did contact Mr. Lukwaro; I sent an email... I attached the letter to attach reference and the form... I sent [an email] to Lukwaro and response back...*
>
> *Reason for leaving-resignation. After we reviewed the document our legal department and finding it satisfactory then we confirmed Michael after probation March 2014 (A year after employment)".*

The witness went on to state at page 249 of the record of appeal that:

> *"It was [in] April 2014 when security consultant came to visit our Security Manager and identified Michael as somebody he was investigating while at ABG. He recognized him as he was [being]*

investigated while at ABG hence raising another red flag...

We discussed [with] our legal department. We found it was necessary to recall and reconfirm reference from ABG...

On the 2nd reference, it was state he had resigned pending disciplinary hearing".

After having re-evaluated the evidence on the issue under consideration, we are certain that the learned High Court Judge misapprehended it. The allegation that at the time of his recruitment, the appellant was facing disciplinary proceedings filed against him by ABG was not substantiated. It was based on the evidence of DW1 and DW2 who relied on the information conveyed to the respondent through a reference check report whose maker was not called to testify. Further, the nature of the disciplinary charges which were allegedly filed against the appellant were not specified. The net effect is that, the allegation was not proved on the balance of probabilities. We therefore, allow the 2nd ground of appeal and find that, the High Court erred in holding that the termination of the appellant was with a valid reason.

The complaints in the 3rd and 4th grounds of appeal are about the compensation which was awarded to the appellant by the High Court. As shown above, the CMA had awarded him a compensation of 12 month's remuneration in terms of s. 40 (1) (c) of the Act. However, the High Court varied the award to 6 months' remuneration after its finding that the appellant's termination was for valid reason and after observing that, the procedure for terminating him was "*slightly violated*" in that, the chairman of the disciplinary committee acted also as a prosecutor thus a breach of the principle that, no one should be a judge in his own cause.

The learned counsel for the appellant argued that, what was observed by the learned High Court Judge to be a slight violation of procedure was not the only procedural irregularity. He submitted that, there were other violations; **first**, that the appellant sought better and further particulars of the allegations made against him so that he could prepare his defence but was denied his request. **Secondly**, that the chairman attempted to reconvene the hearing after the closure of the proceedings with the view of addressing the shortcomings in the respondent's case, the act which was against the principles of natural justice. **Thirdly**, that the appellant was not given the opportunity to

give his mitigation before he was terminated and **fourthly**; that despite the appellant's objection, the chairman conducted the proceedings applying the rules contained in the respondent's handbook instead of the labour law rules and therefore, the conduct of the proceedings should not have been seen to be fair.

On the learned Judge's decision to reduce the compensation of 12 months remuneration to that of 6 months, the appellant's counsel faulted that decision arguing that, by virtue of s. 37 of the Act, once termination of employment has been found to be unfair whether due to invalid reason or procedural irregularity, the remedy is for the terminated employee to be paid a minimum compensation, which under s. 40 (1) (c) of the Act is 12 months' remuneration. He urged us not to follow our previous decision in the case of **Felician Rutwaza v. World Vision Tanzania**, Civil Appeal No. 213 of 2019 (unreported) in which we upheld the interpretation given by the High Court that, when the unfairness of termination is based on procedural irregularity only, the remedy need not be a minimum compensation of 12 months remuneration.

Submitting in reply to the arguments made in support of the 3rd and 4th grounds of appeal, the respondent's counsel argued, **first**, that,

the appellant's complaint on the issue whether or not there was violation of the procedure has no basis because the issue was decided in his favour. **Secondly**, as for the 4th ground, the respondent's counsel argued that, as interpreted by the Court, the amount of compensation under s. 40 (1) (c) of the Act may depend on the extent of unfairness of termination of the employee.

We need not be detained much in disposing of the two grounds of appeal in question. Having found that the learned High Court Judge had erred in overruling the finding by the CMA that the termination of the appellant was without a valid reason, the ground upon which she varied the amount of compensation becomes inapplicable. On the prayer by the appellant's counsel regarding application of the principle in the case of **Felician Rutwaza** (supra), we hasten to state that, the case is distinguishable. In that case, the Court upheld the interpretation made by the High Court in the case of **Sodetra (SPRL) Ltd v. Njellu Mezza and Another**, Revision No. 207 of 2008 (unreported) in which that court held as follows:

> *"a reading of other section of the Act gives distinct impression that the law abhors substantive unfairness more than procedural*

unfairness...the remedy for the former attracts a heavier penalty than the latter...the arbitrator who has found unfair termination, has discretion to award an 'appropriate amount of compensation' found fair and just to both parties in the case and therefore section 40 (1) (c) does not mandate the arbitrator to order compensation of 12 months pay in all cases of unfair termination".

In the case at hand, the violations are both substantive and procedural and therefore, the leeway leading to the variation of the award of 12 months' remuneration ordered by the CMA is inexistent. In the circumstances, in our considered view, whereas the 3rd ground of appeal is redundant, we find merit in the 4th ground of appeal and by extension, the 6th ground of appeal on that aspect. Consequently, we set aside the decision of the High Court varying the award of compensation to that of 6 months' remuneration and substitute for it a compensation of 12 months' remuneration as provided for under s. 40 (1) (c) of the Act plus other terminal benefits as enumerated by the learned High Court Judge in her judgment at page 678 of the record of appeal.

The 5th ground of appeal need not also detain us much. It was submitted for the appellant that, he was entitled to the BG long Term Investment plan and that, therefore, had he not been unfairly terminated, he would have benefited from that plan. The appellant's counsel relied on the principle of legitimate expectation to bolster the argument that the appellant was entitled to that incentive despite his termination from employment.

In reply, the respondent's counsel argued that, since the benefits based on the BG long Term Investment Plan are not part of the appellant's terms of contract of employment, they cannot be termed as legitimate expectations. It was argued further that, being in the form of bonus, the same is subject to meeting the targets set out by the respondent. In any case, the respondent's counsel went on to argue, the appellant asked for TZS 29,926,000.00 but the CMA awarded him TZS 99,925,000.00 which he did not ask contrary to the principles of pleadings.

In our considered view, the learned High Court Judge was correct in her finding that, even without determining whether or not the appellant was covered by the Investment Plan, since payment of such benefit had not been due, the appellant was not justified to claim the

same. We also agree with the respondent that, the incentive was not one of the contractual benefits agreed upon by the appellant and the respondent and that, like a bonus, it was a performance based benefit. According to the Oxford Advanced Learner's Dictionary, 7th ed; incentive is defined as:

"Something that encourages you to do sth..."

In his evidence at page 279 of the record of appeal, PW1 stated that, he was one of the employees who were included in, among other arrangements, the incentive schemes for the purpose of retaining them to continue working with the respondent. He clarified in his final written submissions before the CMA that, he was entitled to TZS 99,925,000.00 payable under the BG Long-Term Investment plan extended to him by the respondent.

For the reasons which we have stated above, we do not, with respect, find justification for the claim. From the title of the Investment Plan, payment of the benefit extended to the appellant was subject to the work performance and the returns in the investment. In the particular circumstances of this case, we uphold the decision of the

learned High Court Judge that, the appellant should not be paid what he had not earned through contribution of his work with the respondent.

In the event, the appeal is partly allowed to the extent shown herein above. In the circumstances and from the fact that the appeal arose from a labour dispute, we make no order as to costs.

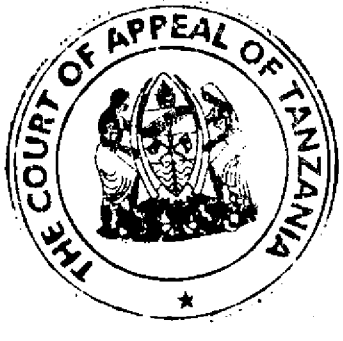
DATED at **DAR ES SALAAM** this 8th day of July, 2024.

A. G. MWARIJA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 8th day of July, 2024 in the presence of the Ms. Happiness Kawiche, learned counsel for the respondent and also holding brief for the Ms. Blandina Kihampa, learned counsel for the appellant, is hereby certified as a true copy of the original.



G. H. HERBERT
REGISTRAR
COURT OF APPEAL