

TANZANIA / JUDGMENT

SOLOMON ODO HAULE V

COURT
TANZLIIDECIDED
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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM CONSOLIDATED REVISION APPLICATION NO. 3686 & 4252 OF 2024 (Arising from an Award issued on 19/1/2024 by Hon. Mwakisopile, I.E., Arbitrator, in Labour Dispute No. CMA/DSM/ILA/184/2022/11/2022 at Ilala) SOLOMON ODO HAULE APPLICANT/RESPONDENT VERSUS CHINA DESHANG BANK LIMITED RESPONDENT/APPLICANT

JUDGMENT

Date of Last Order: 06/05/2024 Date of Judgement: 17/05/2024 B.E.K. Mganga, J. Facts of this application in brief are that, on 1st July 2021, Solomon Odo Haule, herein referred to as the employee, signed a two-year fixed term contract of employment with China Deshang Bank Limited, hereinafter referred to as the employer. In the said two-year fixed term contract, the employee was employed as Head of Business Development at monthly salary of TZS 15,000,000/. The employee was also entitled to monthly payment of TZS 200,000/= to facilitate official communication. On 02nd November 2021, the parties signed contract that changed the period from two years fixed term contract entered earlier to three-year fixed term contract expected to expire on 30th June 2024. It was further 1 indicated in the said three-year fixed term contract that, the employee's probation in the two-year fixed term contract shall remain as it is, and that probation will be completed on 31st December 2021. It is undisputed by the parties that, on 19th January 2022, the employee was served with a letter dated 6th January 2022 informing him that probation period has been extended for three months and will expire on 31st March

2022. It is further undisputed by the parties that, on 8th February 2022, the employer served the employee with a letter dated 27th January 2022 informing him that, from July to December 2021, his performance was not satisfactory and that, there have been no significant changes. On 25th March 2022, the employer terminated employment of the employee due to unsatisfactory performance and that, termination was with effect from the said date. Aggrieved with termination of his employment, on 8th April 2022, the employee filed Labour dispute No. CMA/DSM/ILA/184/2022/11/2022 before the Commission for Mediation and Arbitration henceforth CMA at Ilala. In the Referral Form (CMA F1), the employee indicated that the dispute was relating to unfair Labour practices. The employee further indicated that, he was praying to be reinstated without loss of remuneration and compensation for breach of contract. In addition to the foregoing, the employee also filled

part B of CMA F1. In the said part 2 B of CMA F1, on fairness of reason for termination, he indicated that, reason for termination was not proved. On fairness of procedure, he indicated that, procedures prior termination was not adhered to. On 19th January 2024, Hon. Mwakisopile, I.E, Arbitrator, having heard evidence of the parties, issued an award that the employer had valid reason to terminate the employee due to poor performance. The arbitrator further held that, the employer did not adhere to fair procedures of termination of employment. With those findings, the arbitrator awarded the employee to be paid TZS 30,000,000/= being two months' salary. The employee was aggrieved with the said award, as a result, he filed revision application No. 3686 of 2024 seeking the court to revise the said award. In the affidavit in support of the Notice of Application, the employee raised five grounds namely:-

1. That, the honourable arbitrator erred in law and fact in not considering evidence adduced and presented by the applicant.
2. That, the honourable arbitrator erred in law and fact by failing to determine all the issue raised for determination.
3. That, the honourable arbitrator erred in law and fact by not analyzing the complaint on both substantive and procedural aspect.
4. That, the honourable arbitrator's decision is not supported by evidence on record.
5. That, the honorable arbitrator erred in law and fact to award compensation of two (2) months only. 3 The employer resisted the application filed by the employee by filing both the Notice of Opposition and the Counter affidavit sworn by Charles Mathis Kisoka, her legal counsel. On the other hand, the employer was also aggrieved by the said award, as a result, she filed Revision Application No. 4252 of 2024. The employer filed the affidavit sworn by Charles Mathis Kisoka, her legal counsel. In the said affidavit, the employer raised two issues namely:-
 1. Whether the arbitrator was justified in overlooking the fact that senior employees, like the respondent, may be exempted from certain probationary procedures.
 2. Whether the arbitrator correctly determined that the applicant unfairly terminated the respondent's employment based on a minor procedure mistake, warranting two (2) months' salary compensation. The employee also filed both the Notice of opposition and his counter affidavit opposing the application by the employer. Since the two applications emanates from the same CMA proceedings and award, on 6th May 2024, after addressing the parties, I issued a consolidation order, hence this Consolidated Revision Application No. 3686 and 4252 of 2024. When the application was called on for hearing, Mr. Walter Shayo, learned advocate appeared and argued for and on behalf of the 4 employee while Mr. Charles Mathias Kisoka, learned advocate appeared and argued for and on behalf of the employer. Arguing in support of the application filed by the employee, Mr. Shayo submitted in respect of the 1st and 4th ground that, the employee was terminated 8 days prior to expiration of

probation period, allegedly, due to poor performance. In short, he submitted that, the employee was terminated while he was a probationer. Counsel for the employee submitted that, in CMA F1, the employee indicated that the dispute is on unfair labour practices. He went on that, it was proper for the employee to fill part B of CMA F1 because he was claiming that there were unfair labour practices, a claim that touches both substantive fairness and procedural fairness of termination. When probed by the court, learned counsel for the employee conceded that procedures for unfair labour practices are not the same to that applicable to termination of employment. Mr. Shayo was quick to submit that, even filling part B of CMA F1 is not fatal because, the employee had already filled the other part that enabled CMA to know the nature of the dispute to be determined. He further submitted that, the application was properly heard at CMA. Learned counsel for the employee further submitted that, the arbitrator did not consider appraisal forms (exh. D6 and D7) that is 5 evidence of the employee and other evidence that was adduced by the employee to show targets and his achievements. He went on that, the arbitrator did not consider the employees' achievements to determine whether rating that was done by the employer was right or not. He also submitted that, the category of 49% that the employee was rated did not require improvement. He went on that, the employee missed 1% to be in category 3 that is good performance. When probed by the court, counsel for the employee conceded that, no evidence was adduced on how to calculate percentage of achievements. Learned counsel for the employee further submitted that, the arbitrator erred because there was no evidence from the employer showing that there was a meeting to harmonize the score of rating between the employee and the employer. He added that, to the surprise, in the award, the arbitrator indicated that the employee was called in the meeting but there was no evidence to that effect. Counsel for the employee further submitted that, in CMA F1, the employee indicated that he was praying to be reinstated and be paid compensation for breach of contract. When probed by the court, learned counsel for the employee submitted that, the relief of reinstatement is provided under section 40(1)(a) of the Employment and Labour Relations Act[Cap. 366 R.E. 2019]. Counsel for the employee strongly 6 submitted that, the employee was entitled to this relief though he was a probationer because, if CMA or the court finds that there were unfair labour practices, then can order reinstatement. Arguing the 2nd and 3rd grounds of revision advanced by the employee, Mr. Shayo submitted that, parties raised three issues namely,

- (i) whether there was valid reason not to confirm the complainant, (ii) whether procedures were adhered to and (iii) to what reliefs are the parties entitled to. Counsel for the employee submitted that, the arbitrator did not determine the 1st issue relating to validity of reason as to why the employee was not confirmed. Counsel for the employee prayed the court to determine the said issue arguing that the court has powers under Rule 55 of the Labour Court Rules, GN. No. 106 of 2007. Learned counsel for the employee submitted further that, the arbitrator did not also determine substantive and procedural aspects of the dispute. He clarified that, the arbitrator did not consider Rule 17(1)(c) and (d) of the Employment and Labour Relations(Code of Good Practice) Rules, GN. No. 42 of 2007 as to whether, the said

performance standard is reasonable and the reasons as to why, the employee failed to perform. He went on that, the arbitrator did not also consider Rule 18(1) of GN. No 42 of 2007(supra) that requires the employer to give training to the employee and conduct investigation in relation to reasons 7 for poor performance of the employee. Mr. Shayo submitted that, these rules are applicable also to probationers. He further submitted that, in exhibit S2, the employee was applying for training, but the employer declined that request. Arguing the 5th ground, counsel for the employee submitted that, the arbitrator held that there was just slight mistake on procedure, which is why, the employee was awarded two months' salary compensation. Learned counsel further submitted that, in CMA F1, the employee prayed compensation but did not specify the amount of compensation. He added that, in the opening statement, the employee elaborated the amount of compensation. He argued that, opening statement is pleading. He added that, in the opening statement the employee claimed 27 months that is the remaining period of the contract. For the foregoing, counsel for the employee prayed that the application be allowed, the CMA award be quashed and set aside. Responding to submissions made in respect of the 1st and 4th ground, Mr. Charles Mathias Kisoka, learned counsel for the employer, submitted that, the arbitrator considered all evidence of the parties. He submitted further that, the employee did not meet other categories of targets. He added that, the one who set targets is the employer and not the employee. Learned counsel for the employer further submitted that, the employee was terminated 8 days prior completion of probation period. Counsel for the employer further submitted that, Rule 18(5) of GN. No. 42 of 2007(supra) gives power to the employer to give opportunity to senior employee to improve. He added that, the employee was head of business development and that, he did not prove the targets he met. He went on that, exhibits D3, D4 and D5 shows that the employee did not meet targets. Mr. Kisoka went on to submit that, in the CMA F1, the employee indicated that the dispute relates to unfair labour practices but also filled part B of CMA F1 hence CMA F1 was improperly filled and filed. He further submitted that, the dispute was supposed to be struck out because, section 86(1) and (2) of Cap. 366 R.E. 2019 (supra) and Rule 11 of the Labour Institutions (Mediation and Arbitration) Rules, GN. 64 of 2007 provides how disputes or complaints can be instituted. Counsel for the employee submitted that, the employee was not supposed to fill part B of CMA F1 that relates to fairness of termination only. He went on that, section 35 of Cap. 366 R.E. 2019 (supra) Clearly provides that, unfair termination does not apply to probationary employees. 9 Arguing the 2nd and 3rd ground of revision filed by the employee, counsel for the employer submitted that, the arbitrator determined all the issues stating validity of the reason for termination, procedure, and reason as to why the employee was not confirmed. He further submitted that, the employee was placed under performance improvement plan so as to allow him to improve. He added that, training was not an issue because the employee was under performance improvement plan. Arguing against the 5th ground of revision raised by the employee, Mr. Kisoka, submitted that, in CMA F1, the employee was seeking reinstatement without loss of remuneration and compensation for breach of contract. He argued that, the said relief is not awardable to a probationer because, section 35 of Cap. 366 R.E. 2019 (supra) Clearly provides that, fairness of termination does

not apply to the probationer. He further submitted that, the arbitrator erred to state that there was termination by referring to section 37 of Cap. 366 R.E. 2019 (supra) while that section falls under sub-part E of the said Act and that sub- part E does not cover the probationer. He went on that, the employee cannot be awarded 12 months' salary compensation because the dispute was not on unfair termination. Learned counsel for the employee further submitted that, opening statement is neither evidence nor pleadings. He 10 added that, CMA F1 is the only pleading because it is the one that specifies the nature of dispute and that, opening statement only narrates facts relating to the dispute. Mr. Kisoka concluded his submissions praying that the application by the employee be dismissed. In his rejoinder submission, Mr. Shayo advocate for the employee submitted that, Rule 18(5) of GN. No. 42 of 2007(supra) uses the word "may" implying that it is not mandatory. He added that, the employer extended probation period of the employee for 3 months an indication that she did away with the requirement of Rule 18(5) of G.N. 42 of 2007(supra) hence she cannot rely on the same rule. He further submitted that, the employer was, if she wanted, supposed to terminate employee without extending probation period. Mr. shayo also submitted that, submissions that since the employee was under performance improvement plan was not supposed to be trained, cannot be valid because, rules 10(6)(b) and rule 18(2) of GM. 42 of 2007(supra) are clear that the employer shall provide training, guidance etc. to the employee during probation. Arguing the issues raised by the employer in Revision application No. 4252 of 2024, Mr. Kisoka, learned counsel for the employer submitted that, at the time of termination, the employee had already served initial 6 months of probation, but probation was extended as per 11 exhibit D5. He further submitted that, since employee was senior employee as head of business development, he was not supposed to be given time to improve. Mr. Kisoka submitted further that, the award of two months' salary compensation is based on section 37 that is in sub- part E of Cap. 366 R.E. 2019(supra) which does not cover probationary employee. He added that, lack of intention to confirm the employee has no justification in law for the employee to be awarded two months' salary compensation. He therefore concluded that the application by the employer be allowed, CMA award be quashed and set aside. Resisting the application by the employer, Mr. Shayo, learned counsel for the employee submitted that, the employer decided not to apply the provisions of Rule 18(5) of GN. No. 42 of 2007(supra) which is why, she extended probation period of three months. He lamented submitted that, termination was done 8 days prior its expiry. When probed by the court, he conceded that there is no provision specifying that a probationer cannot be terminated prior expiry of a certain period. He further conceded that, there is no provision providing that the employer cannot terminate employee if the probation period remaining is short. Mr. Shayo also submitted that, targets were set based on three months and that, in the remaining period of 8 days, the employee could have met the targets as the employee testified in his evidence. 12 In rejoinder submission, Mr. Kisoka submitted that, it is not disputed that the employee was afforded right to improve which is why, probation was extended. He further submitted that, extension of probation period to the employee did not waive the provisions of Rule 18 of GN. No. 2007(supra). Learned counsel for the employer concluded his submissions submitting that, employer had valid reason and that, procedures

were adhered to. I have examined evidence of the parties in the CMA record and considered submissions made on their behalf in this consolidated revision and find that, the most crucial legal issue first to be addressed by this court is whether, the dispute was properly filed by the employee at CMA. It is undisputed that, the employee was terminated eight (8) days before expiry of probation period. In short, termination of employment occurred at the time he was a probationer. It was correctly, in my view, conceded by counsel for the employee that, there is no provision in our laws prohibiting the employer from terminating a probationer employee if the remaining probation period is very short. In other words, there is no provision in our laws prescribing the period within which a probationer can either be terminated or not. Since there is no such a period, then, the employer can terminate a probationer employee at any 13 time before expiry of probation period, of course after adhering to procedures of terminating a probationer, because at that time, the employee is under practical interview. See the case of David Nzaligo vs National Microfinance Bank Plc (Civil Appeal 61 of 2016) [2019] TZCA 540 (9 September 2019). It is undisputed by the parties that, in the referral form (CMA F1), the employee indicated that the dispute relates to unfair labour practices. It is further undisputed by the parties that, the employee also filled part B of the said CMA F1. I should point out from the outset that, part B of CMA F1 must be filled only when the dispute relates to fairness of termination of employment. It is my view that, by indicating that the dispute relates to unfair labour practices and then proceed to fill Part B of CMA F1, made the said CMA F1 to be defective. I am of that view because, the words “ADDITIONAL FOR TERMINATION OF EMPLOYMENT DISPUTES ONLY” appearing in Part B of CMA F1 were not inserted therein for cosmetic purpose. In my view, part B of CMA F1, is specifically intended to help the complainant to state with clarity, the date termination occurred, how termination was communicated, reasons for termination advanced by the employer, whether employer had a valid reason for termination or not and whether, the employer followed procedures of termination of employment or not. In short, part 14 B of CMA F1 is intended to help the parties and the arbitrator to be focused on fairness of reason and or fairness of procedures of termination. As I have hinted hereinabove, filling part B of CMA F1 while the nature of dispute was unfair labour practices made the said CMA F1 to be defective. In fact, this court has held in the case of Bosco Stephen vs Ng'amba Secondary School (Revision 38 of 2017)

[2020] TZHC 390 (20 March 2020) and Clarence Chris Mgimba vs Fountain of Joy Nursery and Primary School (Revision No. 1484 of

2024) [2024] TZHCLD 21 (7 March 2024) that, filling part B of CMA F1 when the dispute does not relate to fairness of termination makes the said CMA F1 to be defective and the whole dispute incompetent. Therefore, in the application at hand, CMA F1 was defective hence the whole dispute was incompetent. It was supposed to be struck out by the arbitrator even before hearing evidence of the parties. Since the CMA F1 was defective and the dispute was incompetent, then, the whole proceedings and the resultant award was a nullity. It is undisputed by the parties that, the employee indicated in the said CMA F1 that, he was claiming to be reinstated and be compensated for breach of contract. It is clear from the

CMA F1 that the employee did not specify the amount he was claiming to be compensated for breach of contract. It was argued by counsel for the employee that the 15 employee was claiming to be paid 27 months' salary as the remaining period of the contract and that, the said amount was stated in the opening statement, which according to him, is pleadings. It is my view that, the prayer for compensation for breach of contract was misplaced because, the employee indicated that the dispute was unfair labour practices and not breach of contract. In my view, these are two different causes of action. This also made the said CMA F1 to be defective. It was correctly submitted on behalf of the employee that, the relief of reinstatement is provided under section 40(1)(a) of Cap. 366 R.E. 2019(supra). It was further submitted on behalf of the employee that, though the employee was a probationer, the court or CMA can award him the relief of reinstatement upon finding that there were unfair labour practices and prayed the court to hold in favour of the employee. With due respect to counsel for the employee, a probationer is not entitled to the reliefs provided for under section 40 of Cap. 366 R.E. 2019(supra) as it was correctly submitted by counsel for the employer. The relief for reinstatement is only awardable to a confirmed employee and not those under probation as it was held by the Court of Appeal in Nzaligo's case (supra). For the foregoing, I find that the dispute was improperly filed at CMA because, CMA F1 was defective making the whole dispute to be 16 incompetent. As pointed hereinabove, proceedings and the award emanating from a defective and incompetent dispute are a nullity. I therefore nullify CMA proceedings, quash, and set aside the CMA award. I order that, if the employee is still interested to pursue his rights, he may, subject to the provisions of Rule 10(1) and (2) and Rules 11 and 29 of the Labour Institutions(Mediation and Arbitration)Rules, GN. No. 67 of 2007, file a proper dispute at CMA. I should point out that, all that I have discussed hereinabove has disposed the two applications filed by the parties. I find it unnecessary to discuss other grounds raised by either the employee or the employer in this consolidated revision. Dated in Dar es Salaam on this 17th May 2024. B. E. K. Mganga JUDGE Judgment delivered on this 17th May 2024 in chambers in the presence of Walter Shayo, Advocate for the employee and Victor Mgawe, Advocate for the employer. B. E. K. Mganga JUDGE 17

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