

TANZANIA / JUDGMENT

CONSOLIDATED REVISION NO 15547 15752 OF 2024 ZAMBIA CARGO LOGISTICS LIMITED VRS SANTUS AIDAN CHIFWILA

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1 January 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA LABOUR DIVISION AT DAR ES
SALAAM CONSOLIDATED REVISION APPLICATIONS NO. 15547 & 15752 OF 2024 CASE
REFERENCES NO. 202407011000015547 AND 202407031000015752 BETWEEN ZAMBIA CARGO &
LOGISTICS LIMITEDAPPLICANT/RESPONDENT VERSUS SANTUS AIDAN CHIFWILA AND
GERALD GILBERT SHAYO RESPONDENTS/ APPLICANTS

JUDGEMENT

Date of last Order: 06/08/2024 Date of Judgement: 09/08/2024 MLYAMBINA, J. For the purposes of this decision, ZAMBIA CARGO & LOGISTICS LIMITED will be referred as the Applicant. On the other hand, SANTUS AIDAN CHIFWILA and GERALD GILBERT SHAYO, will be referred as Respondents. Gathered from the records, brief background of the disputes at hand is as follows; the Respondents were employed by the Applicant on different dates as Forklift Operators. It is alleged that on 6th April, 2020 and 12th March, 2020 the Respondents respectively, while working for the Applicant's client Ms. Reload Logistics, with ill intent destroyed copper blisters by using forklift machine for purposes of stealing and selling them. They were therefore suspended from employment to pave way for investigation. After investigation, the Respondents were summoned before the disciplinary hearing where they were all found guilty of the misconduct charged. Following the disciplinary hearing committee findings, the Applicant terminated the Respondents from employment with effect from 23rd June, 2020. Aggrieved by the termination, the Respondents referred the complaint to the Commission for Mediation and Arbitration (herein CMA). After considering the parties evidences, Hon. Mikidadi A - Arbitrator issued an Award on 21st May, 2024. The Arbitrator found that the Respondents termination was unfair both substantively and procedurally. Therefore, the Applicant was ordered to re-instate the Respondents and pay them 46 months salaries from the date of termination until the date of the Award. Both parties were aggrieved by the Award. They therefore filed the applications which were consolidated as indicated above. The Applicant filed Revision Application No. 15547 of 2024 on the following grounds:

- i. That, the Hon. Arbitrator erred in law and fact for ruling and awarding re-instatement of the Respondents and payment of 46 months salaries to each as compensation for unlawful termination and contrary to the law while there existed substantive reasons for their termination. ii. In the alternative, that the Trial Arbitrator arbitrarily/unjustly and unlawfully exercised her discretion in awarding the Respondents payment of 46 months salaries as compensation while it only faulted the procedural fairness of the Respondents' termination of their employments. iii. That, the CMA Award is unlawful, illogical and irrational for awarding compensation of 46 months salaries for unlawful termination despite overwhelming evidence which establishes the Respondents contributed to the delay in the conduct of their own case and that the CMA has burdened the Applicant for its own delay to deliver Award since 8th November, 2023 the day the Respondents' case was closed until 21st May, 2024. On the other hand, the first Respondents filed Revision Application No. 15752 of 2024 on the ground that calls for determination of one issue: Whether the evidence tendered in relation to his monthly salary was correctly interpreted and applied by the CMA in light of the existing laws and principles. The applications were disposed by way of written submissions. In prosecuting the application at hand, the Applicant was represented by counsel Regina Kiumba and Mr. Lwijiiso Ndelwa appeared for the Respondents. I appreciate the comprehensive submissions of the parties which will be taken on board in constructing this judgement. After consideration of both parties' arguments, I find the Court is called upon to determine the following legal issues: i. Whether the Applicant had valid reason to terminate the Respondents. ii. Whether the Applicant followed procedures in terminating the Respondents. iii. Whether the Arbitrator properly awarded the Respondents. To start with the first issue, Ms. Kiumba submitted that the records are loud. The Respondents were terminated for gross dishonesty, that with ill intent they destroyed copper blisters by using forklift machine for purposes of stealing and selling them. It was the Arbitrator's findings that the Applicant failed to present sufficient evidence to prove the misconducts charged. It was Ms. Kiumba's submission that the allegations were proved by documentary evidence, Exhibit D4 and D5 whereby hearing was conducted and the Respondents were found guilty. In reply, Counsel Ndelwa was of the firm view that the charges were not proved. He supported the Arbitrator's findings. I had an opportunity to go through the documentary evidence presented. Exhibit D3 collectively is the Charge sheet which listed the charges and particulars of the misconduct charged against the Respondent as stated above. Therefore, under normal circumstances, charge sheet by itself cannot stand as evidence to prove the misconduct against the employee. To the contrary, the employer is required to present sufficient evidence to prove the misconduct indicated in the charge sheet. As regards to the exhibit D4 collectively, it is the disciplinary hearing form. The form in question summarises everything transpired during the disciplinary hearing. To start with the disciplinary hearing held against the first Respondent, the allegation listed against him was theft of copper blister. On an item of summary of employee's response to allegation, the following words are recorded: He refused to proceed with hearing insisting chair person of the Committee to first sign the letter he brought. The above quoted words are self explanatory, the disciplinary committee decided to proceed with the disciplinary hearing in

absence of the first Respondent. Pursuant to the provision of Rule 13(6) of the Employment and Labour Relations (Code of Good Practice) Rules,; GN. No. 42 of 2007 (herein GN. No. 42 of 2007), the Applicant was in the right track to proceed with hearing in absence of the first Respondent. The cited provision provides as follows: Where an employee unreasonably refuses to attend the hearing, the employer may proceed with the hearing in absence of the employee. In the premises, hearing and evidence against the first Respondent had to be presented in his absence. Looking at the exhibit 6 in question, no evidence or statement from the employer was presented. In the end of the relevant exhibit, it is recorded that the Committee found the first Respondent guilty. In the circumstance, any reasonable man would ask himself/herself, was the first Respondent convicted on the basis of which evidence? As rightly found by the Arbitrator, such question is unanswered from the records. Thus, the allegation against the first Respondent was not proved at all. Similarly, the second Respondent, just like his colleague, he was also charged for theft of copper blister. The disciplinary hearing held against him proceeded in his presence, however, no evidence was tendered to prove the allegation against him. It was recorded as follows: Witness said there was allegations going on upon the offender, and the offender showed witness proof of the Copper blister pieces while carrying in the bag outside the gate. It is my view that the above recorded evidence is not sufficient and conclusive to convict the employee in question. It was hearsay evidence which needed corroboration. Since there is no any other evidence to corroborate the witness statement, it is my view that the Applicant failed to prove the misconduct charged. On the basis of the above analysis, I join hands with the Arbitrator's findings that the termination in the case at hand was unfair because the Applicant did not prove the misconduct levelled against the Respondents. The Arbitrator properly analysed the evidence on record. He also questioned the legality of the disciplinary hearing. As per exhibit D4, hearing for both Respondents conducted on 19th May 2020 commenced at 10:40 with the same panel. The Applicant failed to explain how was that possible. It shows that the disciplinary hearing was held as a matter of formality but not to avail the Respondents the right to be heard as one of the fundamental rights to be considered before termination. The second issue was on; whether the Applicant followed procedures in terminating the Respondents. The termination procedures on the ground of misconduct are provided under Rule 13 of GN. No. 42 of 2007, which I find no relevance to reproduce. The Arbitrator found that the following procedures were violated: One, the Respondent were not involved in the investigation process and they were not served with the investigation report. Two, they were not afforded right to be represented. Three, no witnesses were brought to prove the allegations against the Respondents. Four, they were not afforded the right to be heard. Five, they had no chance to mitigate after the disciplinary committee found them guilty of the misconduct charged. Before this Court, Ms. Kiumba for the Applicant strongly submitted that the termination procedures were adhered as provided under Rule 13 (supra). I have gone through the violated procedures as found by the Arbitrator. On the Applicant's failure to avail the Respondents with the investigation report, Ms. Kiumba submitted that the Respondents were issued with investigation report on 22nd April, 2020 prior to the date of disciplinary hearing. I have gone through the records, there is no evidence to prove Ms.

Kiumba's assertion. Even before the disciplinary hearing, the investigation report was not tendered by the Applicant, the fact which proves that no thorough investigation was conducted before charging the Respondents with the misconduct in question. In a range of decisions, the Court have emphasized that employee must be availed with the investigation report. This is the Court of Appeal position in the case of Enza Zadan Africa Limited v. Edwin Kasena, Civil Appeal No. 421 of 2021 (Unreported). Also, in this case, it is my view that basing on the misconduct charged, investigation report was necessary. Hence, its absence vitiates the disciplinary proceeding. The Applicant also responded to the findings of not availing the Respondents the right for legal representation and bringing their witnesses. In the notice to attend disciplinary hearing (exhibit D3 collectively), the Respondents were duly informed to bring representatives of their own choice. He therefore complied with the law. As regards to other violated procedures, the Applicant had nothing to submit to pursue the Court to fault the CMA's decision. Examining the records, I found the procedures were violated as rightly found by the Arbitrator. I have considered the Applicant's argument on adherence of termination procedures, as analysed above, in the matter at hand, some of the termination procedures were violated, thus the termination was also unfair procedurally. Turning to the last ground, since the termination was unfair both substantively and procedurally, it is my view that the order of reinstatement was rightly made by the Arbitrator because it was among of the Respondents' prayer. Ms. Kiumba for the Applicant argued that the CMA erred to award 46 months since the Respondents and CMA contributed for the delay of the Award in the conduct of the matter and delivery of the Award. She stated that the matter before the CMA ended since 8th November, 2023 and it took almost six (6) months for the Arbitrator to compose the Award contrary to Section 88(11) of the Employment and Labour Relation Act [Cap 366 Revised Edition 2019] (herein ELRA). It is true that from the date of termination to the date of the Award, 46 months had lapsed. However, the Applicant has not given any evidence showing that it was the Respondents who delayed the proceedings. In reply, Mr. Ndelwa admitted that the CMA issued an Award 6 months after the conclusion of the hearing. However, the principle of the law as stated in Malaik. K. Mwasungi v. Tanzania One Mining Ltd, 12011-2012] LCCD 28 is that: If there is a good cause the Award can be issued beyond the prescribed limit. He stated that in the Award, the Arbitrator explained the reasons for the delay. Thus, the Applicants cannot be prejudiced by the delay of the Arbitrator and the Court cannot nullify the Award. The remedy was stated in Tanzania Railways Corporation v. Raphael Siaga, Revision No. 194 of 2021 pages 10-11 where it was held that: If there is unexplained delay, it should be dealt with in administrative actions. Doing otherwise will be punishing the parties for the laziness of the Arbitrator which they are in not in control by themselves. In the impugned Award, the Arbitrator clearly stated the reasons for the delay to deliver the Award as it appears at page 22 paragraph 2 of the decision. He stated that the 30 days required by the law to deliver the Award ended when he was in his annual leave, movement of the office and inadequacy of working equipments. However, since it was not the Applicant's fault, they cannot be penalized for the same because under Section 88(11) (supra), the Award ought to have been delivered within 30 days from the date of conclusion of arbitration proceedings. The delay

occasioned by the Respondents is not proved from the records. As regards to the Revision Application No. 15752 of 2024, Mr. Ndelwa submitted that the CMA did not correctly interpret the evidence relating to the Respondents' monthly salaries as shown in Exhibit P11 and P13 causing the CMA to use wrong figures in computation. He stated that Exhibit P11 shows that the 1st Respondent's monthly gross salary was TZS 1,707,541.19/=. However, the CMA erroneously relied on notice of termination, Exhibit D5 which mentioned that the monthly salary was TZS 560,592.76/=. As regards to the 2nd Respondent, it was submitted that Exhibit P13 for June showed his monthly salary was TZS 2,212,258.36/=. However, the CMA erroneously held that his monthly salary was TZS 754,714.76/= relying on Exhibit D5. In response, Ms. Kiumba strongly submitted that the Arbitrator applied the correct salary scale for the Respondents. She stated that the basic salaries indicated in exhibits P11 and P13 includes basic salary for the month of June and one month salary in lieu of notice of termination. After thorough examination of the records, I join hands with Ms. Kiumba's submission that the Arbitrator used the correct salary scale. It is true that exhibit P11 and P13 indicates different basic salary scale from the one used by the Arbitrator. However, as rightly justified by Ms. Kiumba, the salary for the month of June 2020 included one month salary in lieu of notice of termination. Considering the fact that the Respondents were terminated on June 2020 and there is no any other evidence to prove the alleged increase of salary, I find the CMA's decision justifiable. In the result, I join hands with the CMA's findings that the Respondents' termination was unfair both substantively and procedurally. In the premises, I find Revision Application No. 15547 of 2024 to have partly succeeded. The Award of 46 months salaries is reduced to 41 months salaries. The first Respondent is entitled to the sum of TZS 29,711,416.3 and the second Respondent is entitled to TZS 39,999,881.8. Consequently, Revision Application No. 15752 of 2024, it is hereby dismissed for lack of merits. It is so ordered. JUDGE 09/08/2024 judgement pronounced and dated 9th August, 2024 in the presence of Counsel Eliezer Msuya for the Applicant and Lwigiso Ndelwa for the Respondents. Right of Appeal explained. vjs> Y J. MLYAMBINA JUDGE 09/08/2024

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Prepared on 13 October 2026 · Esheria