

TANZANIA / JUDGMENT

brigitha chaila vs sbc tanzania limited

2023 tzhcld 1464 19 october 2023

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19 October 2023

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM REVISION
APPLICATION NO. 209 OF 2023 (Arising from the ruling issued on 03/08/2023 by Hon. Lucia
Chrisantus Chacha, Arbitrator, in Labour complaint No. CMA/DSM/ILA/336/2022/205/2022 at
Ilala) BRIGITHA CHAILLA APPLICANT VERSUS SBC
TANZANIA LIMITED RESPONDENT

JUDGMENT

Date of last Order: 05/10/2023 Date of Judgment: 19/10/2023 B. E. K. Mganga, J. On 24th June 2022, Brighita Chaila, the abovementioned applicant filed Labour complaint No. CMA/DSM/ILA/336/2022/205/2022 before the Commission for Mediation and Arbitration (CMA) against her employer namely, SBC Tanzania Limited, the abovementioned respondent. It is said that respondent made investigation in fleet department (mechanics and garage and found that some items were missing. It is undisputed by the parties that due to missing of some items, respondent summoned 1 applicant to attend disciplinary hearing for inter-alia the count of gross negligence that contributed to the loss of TZS 27,767,891. It is also undisputed that the disciplinary hearing committee issued a final warning letter to the applicant and ordered her to pay TZS 3,470,986.41 to cover part of the loss respondent incurred. Applicant was unhappy with that decision as a result she knocked the doors of CMA challenging validity of the warning letter and repayment order. She further indicated in the Referral Form (CMA F1) that respondent be ordered to transfer her from the current working station. When the application was called on before Hon. Lucia Chrisantus Chacha, Arbitrator, respondent raised a preliminary objection against Hemedi Omari, the personal representative of the applicant to represent applicant in the said complaint, allegedly due to conflict of interest. It was argued on behalf of the respondent that applicant is still her employee and that it is not proper to be represented by the abovementioned personal representative who, is the ex-employee of the respondent and is handling other complaints filed at CMA against the respondent. It was further submitted before the arbitrator that applicant being a senior officer of the respondent may divulge confidential information to her personal representative hence conflict of interest. Having heard submissions of the parties, on 3rd August 2023, the 2 arbitrator delivered her ruling sustaining the preliminary objection and directed applicant to find another personal representative. Applicant was aggrieved with the said ruling

hence this application. In the affidavit in support of the application, applicant raised three grounds namely: - i).The arbitrator erred in law for failure to consider that applicant is entitled to be represented by the representative of her own choice. ii).That the arbitrator failed to consider that when there is conflict between the law and Court decision, the law must supersede and iii).The arbitrator erred in law and fact by failure to consider that the preliminary objection was supposed to be based on law only and not evidence. In resisting the application, respondent filed the counter affidavit of Patric David. Together with the said counter affidavit, respondent filed the notice of preliminary objection that “the application is not maintainable for contravention of laws”. When the application was called on for hearing, Mr. Hemedi Omari, appeared and argued for and on behalf of the applicant while Patrick David, learned advocate appeared and argued on behalf of the respondent. In arguing the preliminary objection, Mr. David, learned counsel for the applicant submitted that the application is interlocutory hence barred by the provisions of Rule 50 of the Labour Court Rules, GN. No. 3 106 of 2007 because the dispute between the parties is pending at CMA. He submitted further that, this application also contravenes the provisions of Rule 44(1) of GN. No. 106 of 2007 because in the impugned ruling, the arbitrator issued an order that Hemedi Omari should not represent the applicant. He argued further that, Hemedi Omari was supposed to file an application to be joined in this application as interested party. He went on that, applicant was supposed to appear and argue her application and that, Hemedi Omari as an interested party, was supposed to appear and argue on his part as to why the arbitrator issued an order against him. When probed by the court as who were the parties at CMA, counsel for the respondent conceded that the dispute that was before the arbitrator was between the applicant and respondent and that, there was no dispute between Hemedi Omari and the respondent. Arguing against the preliminary objection, Mr. Omari, the personal representative of the applicant submitted that, Rule 44(1) of GN. No. 106 of 2007(supra) has nothing to do with the preliminary objection raised by the respondent because the said Rule relates to joinder of parties in the representative suit. He submitted further that, in the application at hand, there is only one applicant and there is no any other person to be joined as applicant. 4 On the preliminary objection that the application is interlocutory, the personal representative of the applicant submitted that, the ruling is not interlocutory because it terminated representation of the applicant though the dispute is pending at CMA. He argued further that the impugned ruling denied applicant right to be represented by the representative of her own choice and that arbitrator has no power to issue such ruling. Having heard submissions of the parties on the preliminary objection and considering the impugned ruling, I decided to reserve the ruling and hear the parties on the main application. Therefore, this judgment will cover the points of the preliminary objection and grounds for revision. Arguing the 1st ground in support of the application, Mr. Omari, the personal representative of the applicant submitted that, section 88(9) (c) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] provides that, a party may be represented by a person of his/her own choice. He submitted further that; the arbitrator erred to terminate representation of the applicant because the arbitrator has no such powers. He added that, in the impugned ruling, the arbitrator denied applicant right to choose the person to represent her and right to be heard. Mr. Omari cited the case of Ndaro Bwire Songora v. Mwinuko 5 Secondary School, Civil Appeal No. 371 of 2019, CAT (unreported) to support his submissions.

Arguing the 2nd and 3rd grounds on behalf of the applicant, Mr. Omari submitted that, the arbitrator erred to base her ruling on the case of DAWASCO vs. Robert Mugabe that was not applicable in the circumstances of this application. It was further submissions of Mr. Omari that, reasons relied on by the respondent in the preliminary objection namely that, the personal representative of the applicant was a former employee of the respondent and had an interest and that, the said personal representative may disclose confidential information, were matter of facts or evidence and not law. He concluded his submissions by praying the court to allow the application so that applicant can continue to enjoy the service of the personal representative of her own choice. Resisting the application, Mr. David, learned counsel for the respondent opted to argue those grounds generally. It was submissions by Mr. David that, Section 88(7)(a) and (b) of Cap. 366 R.E. 2019(supra) and section 7(1)(a) and (b) of the Labour Institutions Act [Cap. 300 R.E. 2019] provides right to be represented by an Advocate, member of a Trade Union Association and that the said section does not cover personal representative. He submitted further that; these 6 provisions do not allow personal representatives to represent the parties at CMA. It was further submissions by counsel for the respondent that, the arbitrator did not infringe applicant's right to be represented. When probed by the court, he readily conceded that, the arbitrator prohibited Hemedi Omari to represent the applicant. He further conceded that there is no provision giving the arbitrator power to choose representatives who will appear before CMA on behalf of the parties because that is the domain of the parties themselves. He was quick to submit that, the arbitrator considered relationship of the applicant and respondent, relationship between the applicant and the personal representative and relationship between the personal representative and the respondent. He went on that the arbitrator considered that respondent had several disputes with her employees who are represented by the personal representative hence frustrating business of the respondent. He submitted further that the main source of all these is Mr. Hemedi Omari the personal representative. Counsel for the respondent relied on various notice of representation signed by different employees of the respondent appoint Mr. Hemedi Omari to be their personal representatives. Learned counsel further submitted that 7 applicant has a right to choose a different personal representative apart from Hemedi Omari. On whether the preliminary objection that was raised by the respondent was on point of law, he readily conceded that it was not and further that, the arbitrator considered the matter of fact and not law in issuing the impugned ruling. He argued further that, the arbitrator can dispose the preliminary objection based on the circumstances of the dispute before him or her. Learned counsel for the respondent concluded his submissions praying the court to dismiss this application for want of merit. In rejoinder, Mr. Omari, the personal representative of the applicant submitted that section 88(7)(a) and (b) of Cap. 366 (supra) has been amended and does not exist. He submitted further that, Section 7(1)(a) and (b) of Cap. 360 (supra) has no relation with this application. He strongly submitted that, the arbitrator considered relationship of the parties and not law hence erred in issuing the said ruling. He maintained that; applicant has a right to be represented by a person of her own choice. I will start with the 2nd part of the preliminary objection based on the provisions of Rule 44(1) of GN. No. 106 of 2007(supra). The said Rule as was correctly submitted by Mr. Omari, the personal 8 representative of the applicant, relates to joinder of parties and representative suit. It is not applicable to the circumstances of

this application because the dispute at CMA is between applicant and the respondent only. I therefore dismiss that ground. The 1st part of the preliminary objection is that the application is interlocutory. It is true that the impugned ruling did not finalize the dispute between applicant and the respondent at CMA. In terms of Rule 50 of GN. No. 106 of 2007(supra), the ruling is interlocutory not subject to revision. See the case of Jitesh Jayantilal Ladwa & Another vs Dhirajilal Walji Ladwa & Others (Civil Appeal 435 of 2020) [2022] TZCA 526. This preliminary objection was sufficient to dispose this application, but owing to peculiar circumstances of this application, as I will demonstrate hereinbelow, it cannot. This court cannot close its eyes when fundamental right of an individual has been infringed or is likely to be infringed. More so, it cannot close its eyes when there is an issue relating to jurisdiction. I therefore dismiss all the preliminary objections raised by the respondent. It was correctly argued on behalf of the applicant and conceded by counsel for the respondent that the issue that was raised by the respondent at CMA was not pure point of law rather, it was a matter of fact or evidence. Therefore, the arbitrator erred to sustain the purported 9 preliminary objection. See the case of Mukisa Biscuits Manufacturing Company Ltd v. West end Distributors Ltd [1969] E.A 696, Salim O. Kabora vs TANESCO Ltd & Others (Civil Appeal 55 of 2014) [2020] TZCA 1812 and Charles Chama & Others vs General Manager TRA & Others (Civil Appeal 224 of 2018) [2019] TZCA 108 to mention but a few. In the impugned ruling, the arbitrator barred Mr. Hemedi Omari, the personal representative of the applicant based on matters of evidence or fact and not law. At that time, no evidence was adduced by the respondent rather, mere submissions from the bar, which has no evidential value. Section 88(9) of Cap. 366 R.E. 2019(supra) is clear that a party to the dispute at arbitration hearing has a right to be represented by a person of his own choice. The said section provides: - “88(9) In any arbitration hearing, a party to the dispute may be represented by-

- (a) member or official of that party’s trade union or employers’ association;
- (b) an advocate; or
- (c) a personal representative of the party’s own choice.” (Emphasis is mine). The court of Appeal had an advantage to discuss a similar issue of representation by the personal representative in the case of Ndaro Bwire Songora vs Mwinuko Secondary School (Civil Appeal 371 of 10

2019) [2022] TZCA 825. In my view, right of representation cannot be taken away by the arbitrator based on unsubstantiated reasons. It is clear from section 88(9) of Cap. 366 R.E. 2019(supra) quoted above that, the personal representative must be chosen by the party to the dispute. The arbitrator has no power to choose the representative of the parties to the dispute or has no power to bar the representative of the party unless, there is proof of violation of the law. In the application at hand, proof of the allegations against the personal representative of the applicant was wanting. The mere fact that Hemedi Omari, the personal representative of the applicant is ex-employee of the respondent and is handling many disputes filed against the respondent by her employees, is not a justification to deny applicant to enjoy her right under the provisions of section 88(9)(c) of Cap. 366 R.E. 2019 (supra). In fact, the impugned ruling violated fundamental right of the applicant namely,

right to be heard guaranteed in our Constitution. In barring Hemedi Omari from representing the applicant based on the aforementioned reasons, technically, the arbitrator was forcing applicant to find another representative, who, was not her choice and who, might have not represented her effectively. In other words, in raising the purported preliminary objection that led the arbitrator to issue the impugned ruling, respondent was choosing a weak person to represent the 11 applicant and ensure that the dispute can be decided in her favour. Unfortunately, the arbitrator was trapped in trap which was intended to deny applicant right to be represented and right to heard properly. It is for the foregoing, I found it prudent to dismiss the preliminary objection raised by the respondent that, this application is interlocutory because, the impugned ruling violated Constitutional right of the applicant. More so, Rule 50 of GN. No. 106 of 2007 (supra) which provides that no revision against interlocutory order cannot override the Constitution. Sustaining the preliminary objection, would have blessed the order that denied applicant right to be represented by the personal representative of her choice and right to be heard properly. Submissions by counsel for the respondent that Section 88(7)(a) and (b) of Cap. 366 R.E. 2019(supra) and section 7(1)(a) and (b) of Cap. 300 R.E. 2019(supra) does not cover the personal representative is a misconception because the proper provision is section 88(9)(c) of Cap. 366 R.E. 2019(supra) quoted hereinabove. As it was correctly submitted by the personal representative of the applicant, section 88(7)(a) and (b) of Cap. 366 R.E. 2019(supra) does not exist. Again, section 7(1)(a) and

- (b) of Cap. 300 R.E. 2019(supra) cited by counsel for the respondent is not applicable. It is also my considered opinion that, the arbitrator 12 misapplied Mugabe's case (supra) which is totally distinguishable with the application at hand. For the foregoing, I allow the application and order that the parties should go back to CMA so that the dispute can be heard on merit by a different arbitrator. I further order that Hemedi Omari, the personal representative of the applicant shall continue to represent the applicant until when applicant on her own will, decides otherwise. Dated at Dar es Salaam on this 19th October, 2023. B. E. K. Mganga JUDGE Judgment delivered on this 19th October 2023 in chambers in the presence of Hemedi Omari, Personal Representative of the Applicant and Patric David, Principal Officer of the Respondent. B. E. K. Mganga JUDGE 13

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Prepared on 13 October 2026 · Esheria