

TANZANIA / JUDGMENT

20190718 TZHC Mbeya

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA
(LABOUR DIVISION) AT MBEYA REVISION NO. 42 OF 2017 (Originating from the Complaint Ref.
CMA/MBY/1 41/2015 of the Commission for Mediation and Arbitration for Mbeya at Mbeya)
JAPHET PETRO APPLICANT VERSUS SWILLA
SECONDARY SCHOOL RESPONDENT

JUDGEMENT

Date of Last Order: 17/05/2019 Date of Judgment: 18/07/2019 MONGELLA, J. The Applicant referred a complaint to the Commission for Mediation and Arbitration for Mbeya over unfair termination of his employment contract. Mediation was scheduled to take place on 5th January 2016, but the Respondent did not appear despite being served with summons. Then it was adjourned to 14th January 2015 and the Respondent did not appear. The Commission then ordered the matter to be heard ex-parte on 20th January 2016. The Mediator then issued an ex-parte award relying on Section 87(3) (b) of the Employment and Labour Relations Act, No. 6 of Page 1 of 20 co

- 2004 and ordered the Respondent to pay the Applicant a total sum of T.shs. 23,6 1 7,307/-. The judgment was delivered on 1st March 2016. On 14th March 2016 the Respondent applied to set aside the ex-parte award, an application which was struck out on 25th May 2016 for being incompetent as it was not supported by an affidavit as required under the law. The Respondent filed another application to set aside the ex-parte award on 8th June 2016. The Applicant raised a preliminary objection to the effect that the application was time barred and the respondent had not applied for extension of time. However, the application was granted and the ex-parfe award was set aside. The matter was thereafter heard before the arbitrator who ruled that the termination was fair. Aggrieved by this decision, the Applicant under Rules 24(1), 24(2) (a) (b) (c) (d) (e) (f), 24(3) (a) (b) (c) (d), and 28(1) (a) (b) (c) (d) (e) of the Labour Court Rules G.N. No. 106 of 2007; Section 91(1)(a), 91(2)(b)(c), and 94(1)(b)(i) of the Employment and Labour Relations Act, No. 6 of 2004 filed this application in this Court praying for the records of the CMA to be called, examined and revised. Specifically he prayed for: This Hon. Court be pleased to call for the records in the labour dispute with reference no. CMA/MBY/141/2015; Upon calling for the records, this Hon. Court examines and revise the records, proceedings and award dated 2210612017 and satisfy itself as to the

correctness, regularity and propriety of the said CMA award; and Page 2 of 20 I, 29(1 (a) of G.N.64 oL200Z. That since the CMA lacked jurisdiction, the ex- parte award was illegally set aside and therefore all what transpired thereafter was null and void. He cited the case of Sameer Agriculture & Livestock (1) Ltd. v. Anand Kishor Josh, (2015) LCCD 177, whereby at page 196, Nyerere, J. (as she, then was) stated: "My understanding of the above provisions is that a party who is seeking the awards delivered under section 88(8) of the ELRA to be corrected or being set aside may apply to the CMA within the period of fourteen (14) days from the date the party who sought the award to be corrected or set aside became aware of the arbitration award." He concluded on this point by arguing that the arbitrator entertained the application to set aside an award which came late for more than a hundred days and was not vested with powers which are out of the prescribed time limit. That, this is a material irregularity which needs to be revised and corrected by this Court. Second, Mr. Ngulo argued that the CMA did not consider the evidence adduced by the Applicant on his absenteeism from work whereby the Applicant stated that the Respondent had assigned him spedal duties to prepare students for national examinations something which made him to attend early in the morning before the normal time which other workers were attending and signing the attendance book. He further argued that the reason for termination of employment was absenteeism, but the disciplinary committee did not convict the applicant on that allegation and there were no recommendations tendered in the CMA from the disciplinary committee to warrant punishment of termination. Page 4 of 20 Third, Mr. Ngulo argued that the procedures for terminating the Applicant's employment were not followed. That the Applicant was never given a letter by the Respondent informing him of the disciplinary meeting as required under the law. He referred to Rule 13(2) of G.N. 42 of 2007 which directs the employer to notify the employee of the allegations using the form and language the employee can understand before the hearing commences. He also referred to Rule 13(3) which requires the employer to accord reasonable time, not less than 48 hours, to the employee to prepare himself for the hearing. He also referred to Rule 13(8) of G.N. 42/2007 which requires the employer to supply the employee with a written notification of the decision and brief reasons of the disciplinary committee. He further submitted that fair termination should be both substantively and procedurally correct, but all these procedures amounting to fair termination were not adhered to by the Respondent. He concluded by arguing that the arbitrator erred in law and fact by not considering all these procedural aspects which were ignored by the Respondent. Lastly, Mr. Ngulo argued that the arbitrator erred in law and fact by evasively and erroneously denying all the claims by the Applicant of his terminal benefits and compensation arising out of the unfair termination. That the Applicant as filled in CMA form no. 1, was entitled to payment of notice of termination to the tune of 750,000/- as one month salary, severance payment to the tune of 1 75,000/-, payment for leave not taken to the tune of 700,0001-, payment of unpaid salaries to the tune of 750,000/-, payment of gratuity to the tune of 4,050,000/-. He also submitted that the Applicant was entitled to be paid compensation Page 5of20

- whereby it should be a salary of 21 months which are the remaining months within the contractual period of three years signed between the parties. He cited the case of Benda Kasanda Ndasi v. Maku full Motors Ltd, Revision No. 25 of 2011, whereby Rweyemamu J. (as she then was) awarded compensation by ordering payment of salary for the remaining contractual period. He also submitted that the Applicant was entitled to payment of general damages to the tune of T.shs. ten million because he proved to the OMA that he suffered psychiatric injuries and mental anguish due to the unfair termination. Mr. Sahwi responded to Mr. Ngulo's submissions by arguing that it is not true that the Respondent absconded the mediation on the dates mentioned by the Applicant. He said that the Respondent attended the session on 5th January 2016, but there was shortage of stationery, particularly rim papers something which led the matter to be adjourned sine die and that is why even the records of proceedings of the CMA start on 20th. He further submitted that the Respondent received summons through EMS on 25th January 2016, which indicated that the mediation was scheduled to be conducted on 20th January 2016. After making a follow up, the Respondent was notified that the matter was ordered to proceed ex parte on that date. Mr. Sahwi conceded that the second application did not comply with Rule 30(1) of GN 64/2007, but argued that the ruling setting aside the ex parte award was justified in law because the Respondent was not timely served with summons to appear on the mediation. He further argued that the ex parte award was illegally reached by the Hon. Mediator and thus Page 6 of ZO cannot be executed. To substantiate his argument he gave the following

reasons:

First, that the title is written "Expert Award" something which is not recognized in law. Second, that, the mediator issued an award while he is not empowered to do so under the law. That the mediator stated that the award is an outcome of a failed mediation while there was no mediation conducted. That the mediator purported to make the award relying on Section 87(3)

- (b) of the Employment and Labour Relations Act (ELRA), which requires the mediator to decide the complaint if the other party to the complaint fails to attend the mediation hearing. Mr. Sahwi argued that the mediator was supposed to rule that the mediation has failed and order for the matter to be determined under arbitration. If the mediator did resolve the matter to proceed ex parte he should have ordered the Applicant to testify and tender all the necessary exhibits to facilitate the delivery of the decision and thereafter deliver a ruling and not an award. He further argued that the mediator converted himself into an arbitrator without being specifically appointed to function as such. To back up this argument he cited the case of MIS Namera Group of Industries (1) Ltd v. Juma Zimbabwe & 58 Others, Revision no 5 of 2008 in which the same was ruled by this Court (Mandia, J.). Third, that, the mediator erroneously granted reliefs which were not claimed by the Applicant. That, the Applicant in CMA Form no. 1 claimed for lesser amount than that awarded by the mediator. He argued further Page 7 of 20 that the mediator also granted some of the reliefs claimed without proof. These being severance pay, which the Applicant was not entitled as he had not completed one year with the employer, gratuity while the contractual period was not

completed, general damages which were not proved, leave not taken, one month salary in lieu of notice whereas the Applicant was the one who terminated his employment by absconding, and one month salary which was already paid. He cited the case of Power Roads (1) Ltd v. Haji Ornari Ngomero, Revision no 36 of 2007 and that of Cocaco!a Kwanza v. baud! Mapunda, Revision no. 18 of 2013 whereby this Court ruled that the CMA cannot award more than what is claimed by the claimant. Mr. Sahwi further argued that the Applicant was not entitled to any reliefs. On payment of notice, Mr. Sahwi was of the view that the Applicant absconded from work for such a long period without any justification or permission. Therefore he was the one who ought to have paid the notice to the Respondent as he terminated his own employment. On severance pay, Mr. Sahwi argued that the Applicant was not entitled to such relief for two main reasons. First, the Applicant worked for only seven months while the law requires the employee to have worked for more than twelve months for him to be entitled to severance pay. Second, the Applicant was terminated on grounds of misconduct, hence not entitled to severance pay as per Section 42(2) (3) of the ELRA. On leave payment, Mr. Sahwi argued that the Applicant worked for only seven months thus not entitled to leave as provided under Section 31 (4) of the ELRA. On payment for November 2015 salary, Mr. Sahwi argued that it Page 8 of 20

- is clear on records that the said salary was paid though the Applicant did not work for it. On compensation for the remaining months in the contractual period, Mr. Sahwi argued that the claim is baseless as the Respondent did not intend to terminate the employment of the Applicant unjustifiably. The Applicant absconded from work thereby necessitating the termination and thus cannot be entitled to such compensation. On payment of general damages to the tune of ten million, Mr. Sahwi argued that there were no valid reasons or evidence advanced by the Applicant to warrant him being paid such a relief. On payment of gratuity, Mr. Sahwi argued that the Applicant is as well not entitled to such relief because it is clear under clause 3 of the employment contract which was admitted as Exhibit SSS1 that gratuity of 15% of all the salaries shall be payable at the end of the contract, except upon death of the employee where it shall be paid in full to the next of kin. He argued that gratuity is payment in honouring the contribution of the employee for the whole of the contractual period. That the contract between the parties was for thirty six (36) months and the Applicant had not completed this contractual period. Mr. Sahwi supported the decision of the arbitrator which was issued in favour of the Respondent on the ground that the Respondent succeeded in proving that the Applicant committed misconduct by absconding from work without justifiable reasons. He argued that under the Schedule to the Employment and Labour Relations Act (Code of Good Practice) Rules, Page 9 of 20 G.N. 42 of 2007, absence from work without permission or acceptable reasons for more than five working days justifies termination. Therefore the Applicant was fairly terminated as he absconded from work for more than 1 five days without permission or justifiable reasons. On the issue of non-compliance with termination procedures, Mr. Sahwi argued that the Applicant was nowhere to be seen and the only way they could manage to reach him was through mobile phone. That it was after several attempts that they managed to reach the

Applicant through mobile phone and informed him of the disciplinary hearing and the Applicant attended the said meeting. He cited Section 99(3) of the ELRA read together with Rule 13(11) of the Code of Good Practice, G.N. 42 of 2007 which enables the employer, on exceptional circumstances to depart from the requirement of the law, especially with regard to procedures. He argued that under the circumstances, the Respondent was faced with exceptional circumstances and thus justified to depart from the procedural requirements on termination. I have carefully considered the submissions by both counsels and the grounds advanced in the affidavit and counter affidavit respectively in which both counsels prayed they be adopted by this Court as part of their submissions. I find that the whole scenario brings us to four main points for determination by this Court. These are: I. Whether it was proper for the CA4A to entertain an application made out of time by the Respondent to set aside the ex parte award. Page 10 of 20 Whether it was correct for the Mediator to issue an award upon deciding the matter. Whether there was unfair termination. Whether the reliefs granted were justified and correct. On the first point for determination, the records show that the ex parte award by mediator was issued on 01/03/2016. The Respondent applied for the same to be set aside on 14/03/2016 which was within the time limit of fourteen days. However, the application was struck out on 25/05/2016 for being incompetent. The Respondent made a second application to set aside the ex parte award on 08/06/2016. In arguing this application, the Applicant raised a preliminary objection to the effect that the same was time barred as it was filed outside the time limit of fourteen days provided under Rule 31(1) of GN 64 of 2007. The mediator decided to set the ex parte award on the ground that the CMA misplaced the documents of the Respondent. In my view, I find the decision of the mediator setting aside the ex parte award was incorrect. The second application was filed after the elapse of more than sixty days from the date the ex-parfe award was issued. Therefore the Respondent was required to first apply for extension of time to file the application. The reasons advanced suo motu by the CMA would have been applied to grant the extension of time. The law is very certain on limitation of time whereby the remedy available for a party who is time barred is to apply for extension of time. Having observed as such I quash the CMA decision issued on 25/05/2016 setting aside the ex parte award. Having quashed this decision, the award issued on 22/06/2016 is automatically nullified because it lacks the base to stand on as there is already an ex parte decision issued by the mediator. Page 11 of 20 On the second point for determination, the mediator acted under Section 87(3) (b) of the ELRA which states: "In respect of a complaint referred under this Act, the mediator may-

- (b) Decide the complaint if the other party to the complaint fails to attend a mediation hearing" Mr. Sahwi argued that the decision that the mediator was to make was to rule that the mediation has failed or if he was to determine the rights of the parties, he was wrong in terming the decision "ex parte award." Instead he should have termed it "Ruling." In my view, the phrase "decide the complaint" means to determine the rights and liabilities of the parties in a dispute. I therefore do not agree with Mr. Sahwi's argument that the mediator was supposed to record that the mediation has failed under this provision. On the other

hand, the law does not direct on the proper term to be used on the decision made by the mediator under Section 87(3) (b) of the ELRA. Mr. Sahwi argued that the decision should have been titled "Ruling" instead of "Ex parte Award," however, just as Mr. Ngulo argued, he did not state under which provision the heading "Ruling" is provided. At this point we can ask ourselves what does a ruling mean and under what circumstances can it be issued? To my understanding, a ruling is a decision which is not a judgment, if it is issued in applications or where there are matters which need to be decided pending the determination of the main case. A complaint filed in the OMA in my view is like a main case in a normal court where a judgement could be issued in the end. However, the CMA as provided under the law does not issue judgments but awards. Page 12 of 20 EJ therefore find it correct for the mediator to term the decision he made ex parte as an "Ex parte Award." Mr. Sahwi cited the case of MS Namera (supra) arguing that the Court ruled that the mediator is not empowered to issue an award. With all due respect I think he misconceived this decision. The dispute under this case was a dispute of interest under which the law categorically directs the mediator to record failure of the mediation where the other party defaults in entering appearance. But if the dispute was a complaint, the mediator could make an award. Specifically, at page 4 and 5 of this case, the Court (Mandia. J. as he then was) stated that: "...the mediator in the proceedings before me exceeded his mandate by giving an award. He could only give an award if he resolved the dispute amicably under Section 86(4) of the Act, or if what was before him was a complaint, not a dispute, as provided in Section 87(3) (b) of the Employment and Labour Relations Act." (emphasis added) The dispute that was before the mediator in the case at hand was a complaint and not a dispute of interest. An award could therefore be issued as ruled in the above named case. Mr. Sahwi also attacked the title of the award which was written "Expert Award" instead of "Ex parte Award." On this argument I agree with Mr. Ngulo that this was a clerical mistake of which can be cured by an application for review as directed under the law. On the third point for determination, that is, on whether there was unfair termination, the Respondent conducted a disciplinary meeting against Page 13 of 20 the Applicant without according him a chance to prepare for his defence as required under the Law. Rule 13(3) of G.N. 42 of 2007 requires that not less than 48 hours should be accorded to the employee prior to conducting a disciplinary hearing so that he/she could prepare for his defence. Mr. Sahwi argued that the Applicant was nowhere to be seen and after several attempts the Respondent managed to reach him and inform him of the disciplinary hearing through mobile phone and that the Applicant attended the said meeting. He argued that under Section 99(3) of the ELRA read together with Rule 13(11) of the Code of Good Practice, G.N. 42 of 2007 the employer can on exceptional circumstances depart from the requirement of the law, especially with regard to procedures. He further argued that the Respondent was faced with exceptional circumstances and thus was justified to depart from the procedural requirements on termination. I do not at all agree with Mr. Sahwi's argument as I do not see any exceptional circumstances that warranted the respondent not to adhere to termination procedures. Mr. Sahwi has submitted that the Applicant was reached through phone and informed of the disciplinary hearing of which he attended. If the Respondent could reach the Applicant through phone call to inform him of

the meeting, he could as well reached the Applicant through the same phone call and arrange for the collection of the summons and charge against him. The Respondent could have as well serve the Applicant with the summons and charge on the date scheduled for disciplinary hearing on which he attended and postpone the disciplinary hearing to another date upon the elapse of 48 hours as required under the law. Fair termination has to be both substantive and Page 14 of 20 procedural. The Respondent had a fair reason for termination as the Applicant absconded from work. However, no matter how fair the reason for termination is, the procedures for termination as provided under the law have to be followed. Failure to follow the procedures amounts to unfair termination. It is therefore my finding that for failure to accord the Applicant opportunity to prepare for his defence as required under Rule 13(3) of G.N. 42 of 2007, the Respondent unfairly terminated the Applicant from his employment. On the fourth point for determination the records show that the Applicant claimed a total of T.shs. 32,175,000/- divided as follows:- Compensation for remaining contractual period: T.shs. 15,750,000/-; Compensation for damages: T.shs. 10,000,000/-; T.shs. Severance allowance: T.shs. 175,000/-; Gratuity: T.shs. 4,050,000/-; Salary in lieu of notice: T.shs. 750,000/-; Salary for November 2015 not paid: T.shs. 750,000/-; and Leave pay: T.shs. 700,000/-. The CMA granted the Applicant a total of T.shs. 23,617,307/- divided as follows:- Severance pay: T.shs. 201,923/-; Payment in lieu of notice: T.shs. 807,692/-; Compensation for remaining contractual period: T.shs. 15,000,000/-; General damages: T.shs. 2,000,000/-; November 2015 Salary: T.shs. 750,000/-; Gratuity: T.shs. 4,050,000/-; and Leave: T.shs. 807,692/-. Mr. Sahwi claimed that the Applicant is not entitled to the reliefs granted by CMA because the reliefs were granted contrary to the law and were not proven. He also argued that the reliefs were wrongly granted as the CMA granted reliefs not claimed by the Applicant in CMA form No. 1. First of all I agree with the argument that the CMA should not have granted Page 15 of 20 IN the reliefs in excess of what was claimed by the claimant/Applicant. In addition, the reliefs granted must conform to what the law provides. The Applicant claimed for compensation amounting to T.shs. 15,750,000/- for the remaining contractual period. Section 40 (1) (c) of the ELRA provides that where there is a finding that the termination was unfair, then the employer can be ordered to pay compensation to the employee of not less than 12 months' remuneration. Basing on this provision the CMA granted T.shs. 15,000,000/- which is about 20 months remuneration. In my view, the law has set up a minimum amount, but the Court or the CMA cannot grant more than the minimum amount set under the law without stating the reasons or considerations taken into account for such a raise. The records do not show what considerations the Mediator took into account in granting such an amount in the ex parte award. Since I do not find any tangible reasons to grant compensation above the minimum amount set under the law, I grant the Applicant 12 months' remuneration amounting to T.shs. 9,000,000/-. The Applicant claimed for general damages amounting to T.shs. 10,000,000/- and the CMA awarded T.shs. 2,000,000/-. To my understanding, for general damages to be awarded the claimant has to prove to be entitled to such damages. The Applicant claimed that he and his family suffered psychologically to extent of him failing an interview at Makabe Secondary School following the termination of his employment. I find

these allegations to be mere allegations as there is no any proof on record showing that the Applicant and his family suffered psychologically. There is no medical report to that effect to warrant the grant of general damages on such claims. There is also no proof that the Page 16 of 20 4 failure in the interview by the Applicant was in fact connected to termination of his employment by the Respondent. I therefore find this claim devoid of merits and overrule its grant by the CMA. The Applicant claimed for severance pay amounting to T.shs. 1 75,000/- of which was granted by the CMA. The law is very clear under Section 42 (2)

- (a) of the ELRA that the employee shall be entitled to severance pay upon termination of his employment if he has completed 12 months continuous service with the employer. It is clear on records that the Applicant was engaged on 21s' March 2015 and terminated on 12th November 2015, which amounts to 7 months and 21 days. Basing on this provision of the law the Applicant becomes not entitled to severance pay. The Applicant claimed for gratuity amounting to T.shs. 4,050,000/-, which was granted by the OMA. To my understanding, gratuity is payable at the end of the contractual period or otherwise in circumstances of death or disability of an employee in accordance with the terms of the employment contract. The contract of employment between the Applicant and the Respondent herein under clause 3 clearly states that gratuity shall be paid at the end of the contractual period or upon death of the employee whereby it shall be paid in full to the heirs. The contract between the Applicant and the Respondent did not come to an end of the contractual period of three years or upon death, but was rather terminated by the Respondent for allegations of misconduct. I therefore find the award of the gratuity by the CMA to be incorrect and consequently overrule it. Page 17 of 20 On salary in lieu of notice, I find the Applicant entitled to this payment as his employment was terminated without him being given notice by the Respondent in accordance with the employment contract. I therefore uphold the award by the CMA of T.shs. 750,000/- as one month salary in lieu of notice. The Applicant also claimed for salary of November which was not paid amounting to T.shs. 750,000/-. This was also granted by the CMA. Mr. Sahwi challenged this claim by arguing that the salary was duly paid. I have gone through the records and have not found evidence of payment of such salary. I therefore uphold the award of the CMA on payment of T.shs. 750,000/- for November 2015 salary. The Applicant claimed for leave payment amounting to T.shs. 700,000/-, however, the CMA awarded him T.shs. 807,692/-. As much as the Applicant was entitled to leave payment, it was incorrect for the CMA to increase the amount and without any explanation. Mr. Sahwi argued that the Applicant was not entitled to any leave because he had not completed one year in his employment. In my view and as I have pointed out already, the Applicant was entitled to leave payment. Section 31(1) of the ELRA requires the employer to grant the employee annual leave of at least 28 consecutive days in respect of each leave cycle. In respect of annual leave, Section 30 (1) (b) (i) (aa) (bb) defines leave cycle to be a period of 12 months consecutive employment with an employer following an employee's commencement of employment; or the completion of the last twelve months leave cycle. These provisions however, have to be read together with Section 29(1) of the ELRA which provides that an employee shall be entitled to paid leave if he has worked for

not less than six months. My understanding of this provision is that in any kind of leave Page 18 of 20 e provided under the ELRA, including the annual leave, an employee shall be entitled for paid leave after the expiry of six months from the date of commencement of his employment. The Applicant herein had completed six months from the commencement of his employment and thus entitled to a paid leave not taken. I therefore overrule the amount of T.shs. 807,692/- awarded by the CMA. Since the Respondent never challenged the accuracy of the amount of T.shs, 700,000/- as initially claimed by the Applicant, I therefore grant the some amount as leave payment. From the above observations I uphold the ex parte award of the CMA issued on 1st March 2016 with modifications as to the reliefs granted. The Respondent is therefore ordered to pay the Applicant a total sum of T.shs. 11,200,000/- as indicated above. Dated at Mbeya this 18th of July 2019. 41roA. L. M. MONGELLA JUDGE 18/07/2019 Page 19 of 20 Court: Judgment delivered in Mbeya in Chambers on this 18th day of July 2019 in the presence of Mr. Braison Ngullo, learned Advocate representing the Applicant, also holding brief for Mr. Benedict Sahwi, learned Advocate representing the Respondent. 6~0~ 11 L. M. MONGELLA JUDGE 18/07/2019 Right of Appeal duly explained ~~14 1 L. M. MONGELLA JUDGE 18/07/2019 Page 20 of 20

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