

TANZANIA / JUDGMENT

leonarda olaph vs eyecatchers t limited

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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. 195 OF 2023 (Arising from Award issued on 10/07/ 2023 by Hon. Mikidadi, A,
Arbitrator, in Labour Dispute No. CMA/DSM/TEM/34/2021/14/2021 at Temeke) LEONARD OLAPH
..... APPLICANT VERSUS EYECATCHERZ (T) LIMITED
..... RESPONDENT

JUDGEMENT

Date of Last Order: 17/10/2023 Date of Judgement: 19/10/2023 B.E.K. Mganga, J. Brief facts of this application are that, on 28th April 2021, applicant filed Labour dispute No. CMA/DSM/TEM/34/2021/14/2021 before the Commission for Mediation and Arbitration (CMA) at Temeke complaining that respondent terminated his employment unfairly. In the Referral Form (CMA F1) applicant indicated that respondent had no valid reason 1 to terminate his employment and did not follow fair procedures. Based on that, applicant prayed to be reinstated without loss of remuneration. At CMA, respondent contended that applicant was not her employee. On 10th July 2023, Hon. Mikidadi, A, Arbitrator, having heard evidence of the parties issued an award that failed to prove employment relationship between himself and the respondent and dismissed the dispute. Being dissatisfied with the said award, applicant filed this Revision Application. In support of the Notice of Application, applicant raised seven (7) grounds namely: -

- i. That, trial arbitrator erred in law for failure to give a proper interpretation of the provisions of Rule 28(1) (2) of GN. No. 67 of 2007 which deals with default to appear during arbitration.
- ii. That, the arbitrator erred in law and fact in failing to analyze evidence on record thus arriving at a wrong finding.
- iii. That, the arbitrator erred in law and fact by his failure to appreciate evidence on record which clearly shows that applicant was terminated after being served with letter calling to attend disciplinary meeting and was paid terminal benefits by the respondent.
- iv. That, arbitrator erred legally and logically by not considering arguments advanced by the applicant and basic reason attached to the termination letter, calling to attend 2 disciplinary meeting and payment that were not contested by either party.

- v. That, the arbitrator erred in law and facts in assessing evidence and reached to an erroneous finding that documents tendered by the applicant were not stamped. vi. That, the arbitrator erred in law and fact for raising suo motu the issue which was not raised by the parties during hearing thus arriving to a wrong finding. vii. That, the arbitrator erred in law and facts by his failure to rule that the respondent have not challenged evidence on record. Respondent opposed the application by filing both the Notice of Opposition and the counter affidavit of Misam Fazal, her principal officer. When the application was called on for hearing, Mr. Kelvin Mundo, Personal Representative appeared and argued for and on behalf of the applicant while Mr. Hassan Salum, Advocate, appeared and argued for and on behalf of the respondent. During hearing, Mr. Mundo, personal representative of the applicant abandoned the 1st and 2nd grounds. In arguing the 3rd and 4th grounds, Mr. Mundo submitted that, on 08th April 2021 respondent served applicant with a letter (exhibit P2) to attend the disciplinary hearing. He submitted further that, on 19th April 2021 respondent terminated applicant's employment as evidenced by termination letter 3 (exhibit P1). He added that, on 20th April 2021, respondent paid applicant terminal benefits and served applicant with a certificate of service (exhibit P4). He submitted further that, there was employment relation between the parties which is why, applicant was served with notice to attend disciplinary hearing and termination letter. He went on that the arbitrator erred to hold that there was no employment relationship between the parties due to absence of contract of employment. Personal representative of the applicant cited the case of Stella Lyimo v. CFAO Motors Tanzania Limited, Civil Appeal No. 378 of 2019, CAT (unreported) to bolster his submissions that there was employment relationship between the parties. Arguing the 5th, 6th and 7th grounds of revision, Mr. Mundo submitted that it was wrong for the arbitrator to hold that documents that were admitted without objection had no stamp and proceeded to discredit them. He went on that, if the arbitrator felt that the documents did not meet admissibility test, was supposed to raise that issue at the time of receiving them as exhibits and not at the time of composing the award and deny the parties right to comment or to be heard. He submitted further that, the arbitrator was supposed to call the parties and ask them to make submissions thereon. To support his submissions, the personal representative cited the case of Jayantkumar 4 Chandubhai Patel @ Jeetu Patel & 3 Others v. The Attorney General & 2 Others, Civil Application No. 160 of 2016, CAT (unreported). Personal representative of the applicant concluded his submissions by praying the court to quash the award and order applicant be reinstated without loss of remuneration. When asked by the court as whether exhibits were properly tendered and admitted as evidence, the personal representative of the applicant submitted that they were not. Mr. Mundo submitted further the CMA record does not show that applicant prayed to tender exhibits P1, P2, P3 and P4 but were just so marked. He added that, this court cannot consider those exhibits as they were improperly admitted. He therefore prayed the court to nullify CMA proceedings, quash the award and order trial de novo. Opposing the application, Mr. Salum, learned advocate for the respondent submitted on the 3rd and 4th grounds that, exhibits that were tendered by the applicant did not prove employment relationship between the parties. He submitted further that Section 61 of the Labour

Institutions Act [Cap. 300 R.E. 2019] does not apply in the circumstances of this application. He went on that, the dispute was heard *ex parte* as a result, respondent had no opportunity to object or discredit those exhibits. 5 Submitting on the 5th, 6th, and 7th grounds, learned counsel for the respondent submitted that, the arbitrator did not error in raising the issue *suo motu* at the time of composing the award. During hearing, counsel for the respondent conceded that the arbitrator was supposed, at the time of admitting those exhibits, to ask applicant to explain as to why they have no stamp. He added that, in the alternative, at the time of composing the award, the arbitrator was supposed to call applicant and ask him to explain as to why those exhibits had no stamp. He also conceded that, applicant was not properly heard. Responding to the issue raised by the court namely whether exhibits were properly admitted in evidence, counsel for the respondent submitted that they were not because the CMA record does not show that applicant prayed to tender those exhibits. Learned counsel for the applicant concurred with the prayer by the personal representative of the applicant that CMA proceedings be nullified and order trial *de novo*. In rejoinder, Mr. Mundo maintained that applicant was not afforded right to be heard properly. I have carefully examined CMA record and considered submissions made on behalf of the parties in this application and find that, the CMA record shows that on 18th August 2022 when Leonard Olaph (PW1), the applicant was testifying, the respondent was represented by Martin 6 Frank and Hawa Tursia, learned advocates. The record shows further that, the said advocates cross examined applicant and re-examination was concluded, and the witness was discharged. When the dispute was adjourned to another date of hearing, respondent did not enter appearance until when the arbitrator decided to issue the award based on evidence of the applicant alone. It was correctly submitted by both parties that exhibits were not properly admitted into evidence. The CMA record does not show that applicant (PW1) prayed to tender those exhibits and counsel for the respondent were not asked to comment whether they have objection or not. When applicant (PW1) was testifying, the arbitrator recorded *inter alia*: - “Namlalamikia eye catcher ameniachisha kazi bila kufuata utaratibu. Barua ya kuachishwa kazi inapokelwa kama kielelezo P1...Kabla ya kuachishwa kazi nilipewa barua ya wito wa kikao cha nidhamu. Wito wa kikao cha nidhamu unapokelewa na tume kama kielelezo P2...Wakati wa kuachishwa kazi nililipwa na mlalamikiwa kiinua mgongo. Stakabadhi ya malipo wakati wa kuachishwa kazi imepokelewa na Tume kama kielelezo P3... Pia nilipewa hati ya utumishi na mlalamikiwa. Hati ta utumishi inapokelewa kutumika kama ushahidi kama kielelezo P4.” Since those exhibits were not properly admitted in evidence they cannot be acted upon. That was a fatal irregularity that vitiated the whole CMA proceedings. There is a plethora of case laws to that position. See for example the case of Total Tanzania Ltd vs Samwel 7 Mgonja (Civil Appeal 70 of 2018) [2021] TZCA 265, Mhubiri Rogega Mong'ateko vs Mak Medics Ltd (Civil Appeal 106 of 2019) [2022] TZCA 452 and Zanzibar Telecommunication Ltd vs Ali Hamad Ali & Others (Civil Appeal 295 of 2019) [2020] TZCA 1919 all unreported, to mention just a few. It is clear in the award that the arbitrator disregarded exhibits that were tendered by the applicant due to absence of stamp, but that issue was never raised at the time of hearing and the parties were not afforded right to comment. It is my view that, the parties were denied right to be heard. The arbitrator was

supposed to summon the parties to address that aspect. See the case of Jayantkumar Chandubhai Patel @ Jeetu Patel & Others vs The Attorney General & Others (Civil Application No.160 of 2016) [2019] TZCA 571. It was improper for the arbitrator to raise the issue of absence of the stamp on the said exhibits at the time of composing the award without affording the parties an opportunity to make submissions thereof. See the case of Ndaro Bwire Songora vs Mwinuko Secondary School (Civil Appeal 371 of 2019)

[2022] TZCA 825. 8 What I have discussed hereinabove has disposed the whole application. I therefore find it unnecessary to consider other grounds raised by the applicant. For the foregoing, I hereby nullify CMA proceedings, quash, and set aside the award arising therefrom and return the CMA file to CMA so that the dispute can be heard de novo by a different arbitrator. 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 Kelvin Mundo, Personal Representative of the Applicant but in the absence of the Respondent. B. E. K. Mganga JUDGE 9

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Prepared on 14 October 2026 · Esheria