

TANZANIA / JUDGMENT

tanzania zambia railways authority vs eng gisbert sambala and 4 others 2023 tzhcd 1157 16 february 2023

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT PAR ES SALAAM APPLICATION FOR REVISION NO. 226 OF 2022 Arising from the Award of Commission for Mediation & Arbitration of DSM at Terneke Dated 2dh April 2019 in Labour Dispute No. CMA/DSM/TEM/664/17/38/18
TANZANIA ZAMBIA RAILWAYS AUTHORITY..... APPLICANT VERSUS ENG. GISBERT SAMBALA AND 4 OTHERS..... RESPONDENTS

JUDGEMENT

K. T. R. MTEULE, J. 06th February 2023 & 16th February 2023 This application for revision arises from the award delivered by Hon. Batenga, M. Arbitrator dated 29th April 2019 in Labour Dispute No. CMA/DSM/TEM/664/17/38/18, which was lodged in the Commission for Mediation and Arbitration of Dar es Salaam, Temeke (CMA). The Application is instituted by the employer (the Applicant). The employee is the Respondents. The Applicant herein is praying for orders in the following terms:-

1. That this Honorable Court be pleased to call for record and revise the award of the Commission for Mediation and Arbitration issued by Hon. Batenga, M. in Labour Dispute No. CMA/DSM/TEM/664/17/38/18 on 29th April 2019 in satisfying i the legality and correctness of awarding respondents basing on unapproved payment policy namely "Terms and Conditions of Services for Management staff 2002."
2. Any other order this Honorable Court may deem fit and just to grant. What next is some background facts leading to this application as grasped from the CMA record, affidavit and counter affidavit filed in this application. The Respondents were employed by the Applicant in various capacities. Between 2016 and 2018 they attained compulsory retirement and were to be paid retirement package. The amount of payment which was offered to them as retirement benefits did not meet their expectations. Aggrieved by the package, the Respondents filed a complaint in the CMA. CMA decided the matter in their favor. The Applicant was aggrieved and lodged this application for revision. Along with the chamber summons, the applicant filed an affidavit sworn by Marco MNS Mabala, who is the applicant's Principal Officer, in which after expounding the chronological events leading to

this application as already stated above, the deponent swore that the retirement package was fully paid to the respondents, and in his view the respondents are entitled to nothing. 2 The application was challenged through a counter affidavit jointly sworn by the respondents. They vehemently and strongly dispute the applicant's claims regarding sufficiency of the payment of retirement package. The applicant advanced three legal issues of revision as stated at paragraph 3 of their affidavit as follows:-

- i) Whether the Commission for Mediation and Arbitration was correct to entertain a dispute relating to Public Servant. ii) Whether the arbitrator was correct in awarding respondents' retirement package by using unapproved policy namely (Terms and Conditions of Service for Management Staff 2002). iii) Whether the arbitrator properly considered the law and evidence adduced by the applicant in her defence. The application was disposed of by a way of written Submissions. The Applicant was represented by Mr. Elias Mwendwa and Mercy Chimtau, State Attorney, whereas the Respondent was represented by Mr. Pascal Temba, Personal Representative. Arguing in support of the first ground Mr. Elias Mwendwa submitted that the arbitrator erred in awarding the respondents basing on terms and conditions not approved by the applicant's board. According to him, there are two categories of employees one formed by the management and the other one is composed of normal workers and both categories are governed by the same regulations. He added that the arbitrator ignored this fact and proceeded to issue an award based on unproved regulations. He is of the view that, the award is invalid. Supporting his stand, Mr. Mwendwa cited the case of TAZARA vs. Sudi Mtambulo and 56 others, Revision No. 570 of 2019, High Court of Tanzania, at Dar es salaam, (unreported). Regarding jurisdiction, Mr. Mwendwa submitted that the arbitrator misdirected himself in deciding a matter where the Respondents were public servants working in a public corporation. According to him, the respondents are governed by Section 32A of the Public Service Act which directs all public servants to exhaust all internal remedies before pursuing their claims through CMA. According to him the applicants ought to have referred their dispute to the Public Service Commission before taking them to the CMA. In his view, since the dispute was referred to the CMA in 2018, the respondents had to follow the procedure set out in the new law which started to operate in 2016. He cited the case of Tanzania Posts Corporation vs. Dominic A. Kalangi, Civil Appeal No. 12 of 2022, Court of Appeal of Tanzania where the Court of Appeal held that disputes involving public servants need to be referred to the Public Service Commission before pursued under the labour laws. 4 Ms. Mercy Chamtai, State Attorney added to what was submitted by Mr. Mwendwa. She addressed the question as to whether there is a difference between unionized staff and management staff. According to her, TAZARA (the applicant) is guided by staff Regulation of 1990 which was admitted as Exhibit TA.1 in CMA and items 13 and 14 of the said regulations provide for retirement benefits for all retired staffs. She continued to state that there was a collective bargain agreement entered between the applicant and the trade union which represented the employees with some various provisional adjustments including retirement benefits and all the employees were using them as a guide for retirement regardless of whether an employee fall under unionized or

management category. According to her, the Collective Bargain Agreement was the guide used by the applicant to pay all the employees. It was further submitted that the arbitrator erred in law by relying on Exhibit G-4 which contains terms and conditions for management staff of 2002 in awarding the respondent because the regulations were not approved. She referred to Exhibit G-7 which is the payment made to the retirement benefits to those the employees who were retired before the age of retirement and distinguished its applicability to the respondents who attained the age of retirement. 5 She prayed for the application to be allowed, and the decision of the CMA to be revised and set aside. In reply to the application, starting with the first ground as to whether the respondents were in management cadre or unionized Mr. Temba submitted that it is not disputed that they were management members. He stated that being Management staffs, the respondents were entitled to be paid their retirement benefits according to the terms and conditions applicable to the management staff, but unionized staff ought to be paid according to the collective bargain agreement. He referred to Exhibit G-7(payment of retirement benefits) which was admitted in the CMA. He further referred to Exhibit G-4, which contain terms and conditions for management staff of 2002 and submitted that the regulation was approved according to Exhibit G-8 which is the circular for the implementation of that Exhibit G-4. He added that in the same exhibit G-4, at the front page, there is an effective date 2002 which justify that the regulation was approved. According to him he is of the view that if a document was not approved, it can't bear the effective date. He further averred that the applicant's allegation regarding the use of Exhibit G-4 (regulations) lacks merits, on the reason that all benefits of voluntary retirement and compulsory 6 retirement have been well explained at page 65 of exhibit G-4 together with the benefits of long service gravity identified at page 7. In such circumstances he is of the view that, Revision No. 510 of 2019 which was cited by the Applicant's counsels is totally irrelevant because in that case CBA was not approved by the Board, while in this matter the challenged document was approved by the board and an implementation circular was enacted as seen in exhibit G-7. On jurisdiction, Mr. Temba submitted that the respondents' dispute rose before enactment of section 32A of the Public Service Act. This is according to exhibit G-3 which is the notice of retirement indicating that the retirement was between 2015 and 2016 before November when the law was enacted. On such basis he is of the view that they were not covered by Section 32A of the Public Service Act. Strengthening his argument, he cited different cases including the case Michael Mwinuka & Ridhiwan Ahmed and 45 Others vs. TAZARA & AG, Revision No. 342 of 2022, High Court of Tanzania, Labour Division, at Dar es salaam, (unreported). Thus, he prayed for the application to be dismissed and the respondents to be paid subsistence allowance because the Respondents have been halted for a long time without repatriation pays. 7 Having gone through the parties' submissions and their sworn statements together with the record of the CMA, I am inclined to address two issues. The first issue is whether the applicant has adduced sufficient grounds for this Court to review the CMA award and secondly, to what reliefs are parties are entitled? In addressing the first issue, all the grounds of revision raised by the applicant will be considered starting with the first one as to whether the Commission for Mediation and Arbitration was correct to entertain a dispute

relating to Public Servant. It is not disputed that the respondents were public servants for having worked with the applicant who is a public corporation. As well, parties are in one on the position that public servants are governed by Section 32A of the Public Service Act which requires exhaustion of remedies under the Public Service Act by referring a labour dispute to the Public Service Commission. The contention is on whether the cause of action having arose before the enactment of Section 32A of the Public Service Act, fall retrospectively within the mandatory requirement of referring the complaint in the Public Service Commission. I have considered the three High Court decisions supplied by Mr. Temba regarding retrospectivity of Section 32A of the Public Service Act. The cases include Asha Ahmed Issa and Another vs. TAZARA and 8 Another, Labour Revision No. 54 of 2022 and Michael Mwinuka & Ridhiwan Ahmed and 45 Others vs. TAZARA & AG, Revision No. 342 of 2022 at page 5. In these two cases, this Court being guided by the authority in the Court of Appeal case of Johansen Khenani supra confirmed that Section 32A does not apply retrospectively and therefore a cause of action arising before its enactment cannot be covered by that provision. This is so because there is no indication which suggest that the parliament intended the said provision to have retrospective application. Mr. Mwendwa tried to convince me to see a distinction of the situation in our case from what was the situation in Johansen Khenani supra. According to him, in Johansen Khenani, section 32A came into operation when the matter was already in the CMA. I have studied the Johansen Khenani's case; unfortunately, the Court of Appeals did not get the opportunity to deliberate on a situation concerning the cause of action. But at least what I could note, which was the basis of the decision reached in Asha Ahmed and Michael Mwinuka, even the Justices of Appeal in Johansen Kenan supra doubted about the retrospective effects of section 32A. They questioned thus:- "14^5 the enactment meant to apply retrospectively? We have serious doubt, for, Parliament did not 9 state so in dear terms. Was the requirement purely procedural? We equally have serious doubts" Since the Court of Appeal doubted whether the requirement is purely procedural, I will still rely on the High Court decisions cited supra to continue holding that Section 32A does not apply retrospectively. Having deliberated as above, it is apparent and not disputed that the dispute arose before November 2016 when the enactment of Section 32A of Public Service Act came to operation. In such circumstances I am of the view that Section 32A of the Public Service Act, G.N No. 48 of 2016 does not apply in this matter and therefore CMA had jurisdiction in the matter. Having resolved the issue of jurisdiction of the CMA, the next is whether the arbitrator relied on appropriate policy documents in awarding the respondents' retirement package. I have noted from the award and CMA record that, the evidence adduced and the entire scenario created a question as to which document the applicant should have used to compute the respondent's retirement benefits. The applicant believed that the respondents' retirement benefits ought to have been computed according to the collective bargaining agreement and not according to the Terms and Conditions of Service for Management Staff 2002 since the said terms io and conditions were not approved by the Board of Directors. In the award, the only issue framed was whether the complainants were entitled to what they were claiming. Having summarised the evidence adduced by the parties the arbitrator proceeded to compute the

retirement benefits by using the Terms and Conditions for Management Staff (Exhibit G 4) and ordered the respondents to be paid the difference computed from what they were already paid according to the collective bargaining agreement. The arbitrator did not give any explanation as to why he thought that the applicants ought to have been paid basing on that document. He did not consider the applicants assertion that the document was not approved. In my view, the arbitrator missed the actual points of contention in the matter. I think, an issue was to be framed to ascertain as to whether the applicants ought to have been paid according to the Terms and Conditions for the Management Staff or according to the collective bargaining agreement. This issue was to be answered by evaluating the evidence adduced in the CMA. I agree with the applicant that it was an error on the part of the arbitrator for having not considered which is the appropriate document to have been used to pay the retirement benefits. It is from the above reasons I find that the CMA was not properly guided by appropriately framed issues to tackle the actual contention in the 11 dispute. This concludes the first issue affirmatively that there are sufficient grounds established to warrant this court to revise the decision of the CMA and set it aside. Regarding remedies, I have view that the error in framing issues is a task which should be done by the first instant forum. It was a serious omission which must be rectified at the level of the CMA being a forum of first instance and not at the revisional level. Accordingly, I revise the proceedings and set aside the award thereon. I remit the record to the CMA for the arbitration to be conducted afresh by another arbitrator who shall properly frame appropriate issues to resolve all the disputed factual and legal issues in the matter to acerating the appropriate policy document which should be used to pay the retirement benefits of the respondents. Each party to take care of its own cost. It is so ordered. Dated at Dar es Salaam this 16 day of February 2023. ^Katarina revocati mteule JUDGE * 16/02/2023 12

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