IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISIONS No. 79/2018

(Original Labour Dispute No. CMA/MZA/31/2018 CMA Mwanza)

BETWEEN

AUMS TANZANIA LIMITED .....APPLICANT

VERSUS

PETER AMBROSE KAYOMBO.....RESPONDENT

JUDGMENT

30th March & 06th July, 2020

TIGANGA, J

This judgment is in respect of an application for revision registered as Labour Revision No. 79 of 2018 filed by a notice of application, notice of engagement of an advocate which I think stands for the notice of representation, and chamber summons supported by an affidavit of Dr. Janes Samwel who introduced himself as one of the principal officers of the applicant in the capacity of a country manager.

The application was preferred under sections 91(1)(a) and (b) 91(2)(a)(b) and (c) of the Employment and Labour Relations Act No. 6 of 2004, and Rule 24(1), Rule 24(2)(a),(b),(c),(d),(e),(f), Rule 24(3)(a)(b)(c)(d) and Rule 28(a)(c)(d) and (e) of the Labour Court Rules 2007 GN No.106 of 2007.

The applicant herein calls upon this court to grant the following orders;

(i) To call for records of Commission for Mediation and Arbitration at Geita and revise the proceedings and arbitration award issued in CMA/GTA/31/2018 dated on 11th September, 2018 and set aside the said award, on the following grounds namely;

(a) Misconduct on the part of the arbitrator,

(b) Improper procurement of the award,

(c) Unlawfulness and impropriety of the award.

(ii) Any other relief as the court may deem just to grant.

Briefly, the background of this dispute is that, the respondent an individual person, was employed by the applicant a mining service company providing an underground mining service to Geita Gold Mine Limited in Geita, as the ITH driller at the applicant's site in Geita. The employment of the respondent commenced on 20th Feb, 2017 and had a condition for probation of six months subject to extension thereafter.

After he was employed, his ethics and conduct failed to meet the terms of employment. He also exhibited poor performance which included failure to follow instruction and consequently recorded a poor performance during performance appraisal which he refused to sign. It is also on record as submitted by the employer that, he did not improve even after his various training which fact lead to further extension of the probation for six months to 20th February 2018. The facts are that, even after the extended

probation, he did not improve consequence of which he was given extension letter and final warning.

The deponent further deposed that on 09th Feb, 2018 he was further advised to improve performance but he did not improve, instead, he kept on unsatisfactory and poor work performance including refusal and failure to follow instruction. Following that state of affairs, the applicant terminated the respondent's employment. Dissatisfied, the respondent filed a dispute with the Commission for Mediation and Arbitration in Geita challenging his termination. After failure of mediation, the dispute was referred to arbitration where the applicant filed his opening statement along with the documentary evidence to be relied upon during the hearing. However, the arbitrator informed the applicant that there was no need to annex such documentary evidence, the omission which consequently denied the applicant the chance to tender and rely on the said documentary evidence.

He deposed further that, the mediator acted as mediator and arbitrator and proceeded to determine the dispute in a combined mediation and arbitration manner without authority to that effect.

Following that uncalled procedure, the award raises the following legal issues;

(i) The legality, appropriateness and propriety of the arbitrator to act as mediator and arbitrator without appointment and authority to that effect,

(ii) The legality and propriety of the commission to conduct combined mediation and arbitration proceedings,

(iii) The legality and propriety of the arbitrator in discouraging the applicant from filing documentary evidence to be relied upon during hearing,

(iv) The legality and correctness of the commission in awarding the respondent compensation of Tshs. 9,800,000/=,

(v) The legality and correctness of the commission findings, that the respondent employment termination was unfair in both reason and procedure.

The applicant asked the court to quash and set aside the proceedings and award of the commission for Mediation and Arbitration for Geita in the case referred above, as passed on 11th Sept, 2018 and any other relief as the court will deem just and fair to grant.

The application was opposed by the respondent by filing the counter affidavit affirmed by Mr. Majogoro the Advocate for the respondent that the appellant has never performed any performance appraisal, trained the respondent, and that the annexed documents have never tendered before that court.

Mr. Majogoro said that the respondent has never been counseled and that the respondent was employed as a ten year experienced driller, therefore the termination of the respondent was procedurally and substantively unfair. Last but one, it has been deposed that, the applicants opening statement was not attached with any document, but the closing submission was. Also that the fact that the arbitrator informed the applicant that there was no need to annex the documents was not proved.

Last that, the arbitrator was right in determining the matter in combined mediation and arbitration as there is evidence that the notice was given to the parties. On the rest of the facts deposed in the affidavit in support of the application, the applicant was put to strict proof thereof.

The application was argued orally, in which the applicant through the representation of Lubango Shiduki learned counsel submitted that, although the procedure of mixed or combined method of mediation and arbitration is allowed under the law, but the arbitrator who adopt that methods must be appointed by the commission, it is not proper for the arbitrator to appoint himself on his own volition. He submitted that Rule 18 of the GN.64 of 2007 of the Labour Institutions Mediation and Arbitration Rules 2007, especially Rule 18(5) and (6) allows the combined mediation and arbitration, but provide that, it is the commission which mandates a person to do a combined procedure of mediation and arbitration. It is his submission that the award at page 1 and 2 show that it was the arbitrator who decided to adopt the combined procedure against the law, and that is the reason he submit that the award was improperly procured.

In support of his contention, he cited the authority in the case of **Aziz Ally, Aidha Adam vs Chai Bora Ltd,** Revision No. 04/2011 which is at Labour Court Digest of 2011/2012 of the Labour Court at page 194/195 in which it was held that, the arbitrator has no power to choose himself, he must be appointed by the commission and that even if he does so the parties must be informed. In that case the High Court held that the award was improperly procured.

The commission as defined by section 12 and 13 of the Labour Institution Act, to be an institution, the arbitrator is never a commission but an employee of the commission, and throughout the award the arbitrator did not say he was mandated by the commission. He prayed in the end that, the award be nullified, as an award which is improperly procured cannot be set aside.

In reply Mr. Alhaji Majogoro learned counsel for the respondent submitted that, the combined method of mediation and arbitration is also allowed according to rule 18 (1) (2) (3) and (4). He submitted that in his opinion, if you say the commission, you mean the Commission for Mediation and Arbitration as defined by section 4 of the Employment and Labour Relations Act, in his opinion; the commission is presided over by an arbitrator who can also be a mediator.

On the argument that he must be appointed out of the CMA. He submitted that the commission under section 18 (2) is mandated to give notice to the parties, he submitted that in the proceedings, the commission gave such a notice dated on 20/03/2018 and that of 17/04/2018 to the parties that the dispute would be dealt with by the combined procedure of mediation and arbitration.

Further to that, he submitted that the argument by the counsel for the applicant was dealt with in the award, as the arbitrator warned himself before adopting the procedure. Furthermore he submitted that, there is no allegation that the adoption of the procedure caused any miscarriage of justice.

Distinguishing the case which was cited by the counsel for the applicant, he submitted that in that case, the mediator turned himself into an arbitrator with no reason, and did not at all; know that such a flout would cause procedural havoc. That makes the cited case distinguishable, and makes the award confirmable.

In rejoinder, the counsel for the applicant insisted and reiterated on what he submitted in his submission in chief, he further submitted that, although the arbitrator warned himself, but in real sense he was not appointed, that being the position, it means the award was improperly procured, it be revised and nullified for that reason.

Now, having summarized at length the content of the documents moving this court, the affidavit filed in support of the application, the counter affidavit opposing the application as well as the submission by the parties. I will, in disposing this application be guided by the legal issues raised in the affidavit of the applicant one after another.

To start with, I will combine issues number one and two which are questioning the legality, appropriateness and propriety of the arbitrator to act as mediator, and arbitrator without appointment and authority to that effect, and the legality and propriety of the commission to conduct combined mediation and arbitration proceedings.

As pointed out earlier on by the applicant, he is complaining that for the arbitrator to adopt the combined methods as indicated above he was supposed to be appointed and mandated by the commission. He relied under Rule 18 of the Labour Institution Mediation and Arbitration Rules 2007 GN 64 of 2007. The respondent also relied under the same rule.

Now it is true that a procedure of a combined mediation and arbitration in resolving labour dispute is not strange, it is provided under Rule 18 of the GN.64 of 2007 of the Labour Institutions Mediation and Arbitration Rules 2007 provides that, subject to section 19(7) of the Labour Institution Act, No. 7 of 2004 and section 88(3) of the Employment and Labour Relations Act No.6 of 2004, the commission may set a combined mediation arbitration process on the same date which may be conducted by the same person.

Section 19(7) provide that nothing in this Act or the Employment and Labour Relations Act precludes-

(a) A person being appointed as both a Mediator and an Arbitrator under this section;

(b) Such person from being assigned to perform both capacities in respect of a dispute.

While section 88(3) of the Employment and Labour Relations Act (supra) provides that;

"Nothing in subsection (2) shall prevent the commission from;

(a) appointing an arbitrator before the dispute has been mediated;

(b) determining the time, date and place of the arbitration hearing, which date may coincide with the date of the mediation hearing;

(c) advising the parties to the dispute of the details stipulated in paragraphs (a) and (b)."

Looking at the wording of the provisions, it goes without saying that it is the commission which may appoint a person, to perform a combined procedure. The issue remains to be what is the commission? Section 4 of Act No.6 of 2004; define it to means the Commission for Mediation and Arbitration established under section 12 of the Labour Institutions Act, 2004;

While section 12 read together with section 14, both of the Labour Institutions Act (supra) term it as Commission, as the body governing and overseeing the function of the institutions established to mediate and arbitrate labour disputes, having one of its function being to appoint the Mediator and Arbitrator to perform the function of the Commission.

This means the Commission is defined to mean, the body established to oversee and supervise the activities pertaining the resolving of the labour dispute. In that capacity the Commission is headed by the Chairman and the commissioners who are appointed by the President under section 16 of the Labour Institutions Act (supra), while on the other hand, it is an institution for resolving labour disputes by mediation and arbitration. In this later capacity the same is presided over by either the Mediator or Arbitrator depending on the stage of the dispute.

Now, further looking at the phraseology of section 18 of of the GN.64 of 2007 of the Labour Institutions Mediation and Arbitration Rules 2007, the law meant the commission in the second category of mediation and arbitration function, which means it is not expected that for the combined mediation and arbitration procedure, to be appointed by the commissioner or chairman of the commission. Since it is in my considered view the

mediatory and arbitratory procedure, assignment of the matter suffices appointment in terms of section 18 of GN.64/2007 (supra). That said, I find that, there was no any illegality, inappropriateness and impropriety of the arbitrator to do the combined, mediation and arbitration, as he followed all the procedure as indicated in rule 18 and 19 by issuing notices on 20/ 03/ 2018. The two issue are decided in negative.

The other ground raised by the applicant was, the legality and propriety of the arbitrator in discouraging the applicant from filing documentary evidence to be relied upon during hearing. The ground was based on the complaints that the arbitrator discouraged the applicant from annexing the documentary exhibits in his opening statement. The respondent disputed that, as he said there is no proof to that effect.

Whether this is true or false it is expected to be reflected on records, the applicant has not told the court at what time, did he meet the arbitrator who discouraged him, was it before filing the opening statement or during filing, if it was during filing, the question becomes did he remove them, from the statement after being so discouraged? These are serious allegations which actually demanded to be proved. Since there is no proof to that effect, the ground also fails for want of merit and proof.

The last two grounds were on the legality and correctness of the commission in awarding the respondent compensation of Tshs. 9,800,000/=, while the last was on the legality and correctness of the commission's findings, that the respondent employment termination was unfair in both reason and procedure.

Although these two grounds were pleaded, they were not argued during the hearing of the application. There is no any argument advanced in support of these grounds, and without arguing them I fail to know the gist of the two complaints. None arguing them impliedly mean that, the applicant probably decided to drop them. That said, with due respect to the applicant, I also find no base to deal with them without the arguments from him. That said, these two grounds also fail for want of prosecution.

In the fine, I find the application to have not raised sufficient ground to warrant revision of the award of the Commission for Mediation and Arbitration. The application therefore fails for want of merits.

It is accordingly ordered.

DATED at **MWANZA** this 06th day of July, 2020

J.C Tiganga

Judge

06/07/2020

Judgment delivered in open chambers in the presence of Mr. Robert- Advocate for the applicant and Alhaji Majogolo for the respondent on line via tele conference.

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA
MWANZA

J.C Tiganga

Judge

06/07/2020