IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

LABOUR REVISION CASE NO. 42 OF 2019

MARWA NYAIKI ..... APPLICANT

VERSUS

GEITA GOLD MINING LIMITED ..... RESPONDENT

JUDGMENT

8th December, 2020 & 2nd March, 2021

ISMAIL, J.

This revisional application has been taken at the instance of the applicant herein, a loser in the arbitral proceedings which were determined by the Commission for Mediation and Arbitration (CMA) at Geita. The arbitral proceedings were in respect of Dispute No. CMA/GTA/2018/GEITA, whose award was pronounced on 20th March, 2019. The Arbitrator's finding in the impugned award was that the respondent's lay off was substantively and procedurally fair. This verdict has not gone well with the applicant, hence his decision to embark on a new journey to this Court. The application is supported by the applicant's own affidavit in which grounds on which the prayers are based have been deposed. The averment by the applicant is that he proved, during the trial proceedings, that termination of

his services was unfair, and that the respondent did not deny that the applicant was terminated while he was charged with criminal charges in respect of the same allegations. The applicant prays that the award be revised, and that the respondent be ordered to reinstate the applicant back to his employment position.

In the counter-affidavit sworn by Joseph Kalungwana, the respondent's principal officer, the contention that termination of the applicant's services was unfair has been stoutly disputed. The respondent has taken the view that no criminal proceedings were in existence at the time of institution of the disciplinary proceedings. It was the respondent's averment that the respondent's services were dispensed with before the commencement of the criminal proceedings against him. Generally, the respondent took the view that there is nothing unfair about the applicant's termination of employment.

Hearing of the application took the form of written submissions whose filing conformed to the schedule drawn on the parties' consensual basis.

Appearing for the applicant was Mr. Masoud Mwanaupanga, learned counsel who drew the submissions, while the respondent was represented by Mr. Libent Rwazo, learned advocate. Firing the first salvo, Mr.

Mwanaupanga contended that the arbitral award is tainted with errors material to the merits of the matter, thereby causing an injustice. The basis for his contention is that the conduct of the proceedings involved a person who served as a prosecutor and a complainant, a conduct that Mr. Mwanaupanga contended was contrary to procedural law. Quoting the holding in ***Jimmy David Ngonya v. National Insurance Corporation Ltd*** [1994] TLR 28, the learned counsel argued that, Mr. Joseph Kalungwana (DW3), who was a complainant and an investigator, ought not to have participated in the proceedings against the applicant as doing that amounted to an injustice.

Mr. Mwanaupanga threw another jab at the CMA's admission of exhibits D2, D3 and D4, contending that exhibits D3 and D4 were data messages which were stored in an electronic device whose admission was allowed, without a supporting affidavit, contrary to the provisions of section 18 (3), (a), (b) and (c) of the Electronic Transactions Act, 2015, which sets conditions for admissibility of electronic print outs. In this case, the counsel contended, this requirement was not observed. The learned counsel further decried the CMA's failure to let the respondent read out exhibits D3 and D4 subsequent to their admission. In his view, such failure was an abrogation of the law as restated in the ***Director of Public Prosecutions v.***

Ashamu Maulid Hassan and 2 Others, CAT-Criminal Appeal No. 37 of 2019 MZA-unreported). It was Mr. Mwanaupanga's view and prayer that the said exhibits be expunged from the record. The counsel argued that, since the applicant's conviction was based on the exhibits whose admission was found to be wanting, it is clear that no sufficient grounds existed to justify his termination from employment. He urged the Court to revise the proceedings and set aside the arbitral award.

The respondent's rejoinder was equally vociferous. Mr. Rwazo, the respondent's counsel, began his onslaught by contending that the applicant had chosen to address the Court on new grounds, leaving those that were raised in the application. He took the view that this amounted to an abandonment of the grounds of his contention.

With respect to the investigator's dual role, Mr. Rwazo argued that the ***Jimmy Ngonya case*** relied up on by the applicant was distinguishable in that, unlike in the instant matter, in the cited case the investigator was a manager who also signed the termination letter. Secondly, the counsel argued that the said decision was premised on the position that has since been replaced by the current legal dispensation. Mr. Rwazo referred this Court to the cases of ***Tredcor Tanzania Ltd v. William F. Green***, HC-Revision No. 28 of 2016; ***Geita Gold Mining***

Limited v. Nkaina Harun, HC-Consolidated Revision Nos. 105/2019 & 110/2019; and ***Geita Gold Mining v. Edwin Mhagama***, HC-Revision No. 3 of 2019 (all unreported). In the former, the country manager's involvement in the disciplinary proceedings and his eventual signing of the termination were vindicated. The view taken by the respondent is that the investigator who doubled as a complainant was not a decision maker who would influence any decisions or inject a sense of bias in the minds of the members of the disciplinary committee. He held the view that the rule on conflict of interest is intended to cover arbitrators, judges, magistrates and other decision makers.

Mr. Rwazo took the view that the arbitrator strayed into error in holding that the rule against bias was offended in this case, and he took the view that the award of compensation was erroneous as the appropriate remedy was to dismiss the complaint.

Regarding admissibility of exhibits D3 and D4, the counsel's contention is that this was a new ground which was introduced lately. He submitted, however, that the view held by the applicant is misconceived, as the said exhibits are not data messages printed from the mobile device. Rather, they are mere photographs which were signed by the applicant before they were admitted as exhibits. On the failure to read them out, the

respondent's counsel argued that the case cited in that respect is distinguishable on the ground that reading of exhibits is a principle that is only applicable in the administration of criminal justice and not in labour matters. He also argued that the cited decision is only applicable in cases where the standard of proof is beyond reasonable doubt, unlike in labour matters when the threshold is lower. Mr. Rwazo further argued that the applicant admitted that the said exhibits were true photographs of the messages sent from his phone, and that DW3 testified to the effect that, in his interrogation with Suleiman Paul, the latter admitted that there was a communication on the theft incident which involved the applicant who has not denied that he was involved. The counsel argued further that the applicant signed exhibit D4. He was of the view that, since this fact was not cross-examined on, the drawn inference is that the said fact was not disputed. On this, the Counsel referred to a text in Sarkar's Law of Evidence, 14th edition, 1993, Vol. 2 at p. 2007.

Still on that point, Mr. Rwazo argued that, having admitted that money was requested to finance execution of the theft incident and that the said sum was requested as loan from Suleiman Paul, the expectation was that the applicant would call him as his witness during the arbitral hearing. The counsel asserted that such failure had the effect of drawing

an adverse inference against the applicant. On this, he relied on the Court's decision in ***Hemed Said v. Mohamed Mbilu*** [1984] TLR 113.

While holding that authenticity of the documents cannot be challenged at this stage, the respondent's counsel held the view that expunging of the said documents would still leave the respondent with sufficient evidence to link the applicant to the theft incident. This includes his own admission. This meant that the arbitrator's finding that the termination was fair cannot be faulted.

The learned counsel held the view that, with the exception of the arbitrator's award of compensation, the rest of the award is quite in order and should be upheld.

In his rejoinder submission, the applicant's counsel refuted the respondent's contention that he had abandoned two of the three grounds of his contention. He held the view that the Court is still empowered to consider the grounds of contention even if the same were not argued upon. Mr. Mwanaupanga was adamant that the decision in ***Jimmy David Ngonya*** was still valid in the circumstances of this case, and that the applicant was prejudiced by the involvement of DW3 in the proceedings. The counsel took the view that the decisions cited by the counsel for the

respondent were decisions of this Court and I am not bound to follow any of them.

Responding to the contention that the applicant had raised new grounds which were not pleaded in the application, Mr. Mwanaupanga drew the Court's attention to the case of ***Hassan Ally Sandali v. Asha Ally***, CAT-Civil Appeal No. 246 of 2019 (MTW-unreported), in which it was held that points of law touching on the competence of the proceedings can be raised at any stage of the proceedings.

On exhibits D3 and D4, the contention by the applicant is that an affidavit was still important as long as the said images were retrieved from the applicant's electronic device. With respect to failure to read out exhibits D3 and D4 after their admission, Mr. Mwanaupanga argued that it would matter less that the requirement was distilled from a criminal case, as long as this is the requirement under the law. The learned counsel argued that admission of exhibit D3 was objected to by the applicant but to no avail, arguing further that, in any case, the mandatory requirements of the admissibility were flouted, rendering the whole process irregular.

Addressing the Court on the alleged failure to call Suleiman Paul as a witness, the applicant's counsel contended that the applicant was free to choose who to call and aid his case, and that adverse inference cannot be

drawn in this case. He argued that the duty of the Court is to weigh the evidential weight of testimony and make its conclusion. He held the view that the ***Hemed Said case*** is distinguishable and irrelevant. The counsel was convinced that short messages, as found in exhibits D3 and D4, were mere assumptions which hardly connected the applicant to the theft incident which was alleged to have occurred. He reiterated the prayer he made in the submission in chief.

The parties' contending submissions boil down to a singular question. This is as to whether termination of the applicant's submission was substantively and procedurally fair.

As we get to the heart of the parties' contention, it is apposite that a general foundation be laid with respect to termination of an employee's services. This is to the effect that, our employment and labour regime recognizes and gives a 'clean bill of health' to a termination of employment, and consider it fair, if two distinct but related limbs of fair termination are proved. These are that, the termination process followed a fair procedure; and that reasons for the said termination were also fair. In legal parlance, these are known as fairness of reason and fairness of procedure.

Whereas fairness of procedure deals with the manner in which the employer effected the termination, fairness of reasons relates to reasons

upon which such termination was based. Proof of compliance with this imperative requirement entails laying bare the facts that enable the employer to not only prove that there was a valid reason, but also prove the existence of that reason. Thus, a tribunal that conducts an assessment of substantive fairness must, inevitably, establish as to why the employer terminated the employee and whether the reason for such termination is sufficient to justify taking the termination route. This necessitates taking stock of the validity of the reasons and ascertain if such reasons are ***sound, defensible, well founded, not capricious, fanciful, spiteful or prejudicial*** (see Grogan, J on ***Workplace Law***, 10th Edition, at pages 217-218). This is gathered from the testimony led by the employer, on the manner in which the employee's indictment was carried out, and circumstances of the commission of the violation (See: ***Geita Gold Mining Limited v. Jongo Mwikola***, HC- Revision Application No. 61 of 2017; and ***Geita Gold Mining Limited v. Winston Nyamakababi***, HC-Revision Application No. 92 of 2017 (both MZA-unreported).

Typical of all labour cases in which termination is contested, the onus of proving that the termination was, in all respects, a fair termination, lies on the shoulders of the employer. This is in terms section 37 (2) of the Employment and Labour Relations Act, 2004, read together with Rules 12

and 13 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, GN No. 42/2007).

The CMA was satisfied that the substantive and procedural aspects of the termination were largely compliant with the requirements of a fair termination, and this justified its conclusion that the applicant's complaint was lacking in merit. The applicant holds a diametric position. He contends that his case was not proved on the balance of probabilities and that the procedure applied was a pale shadow of what the law guides on that. One of the areas of consternation is participation in the disciplinary proceedings by DW3, who doubled as a complainant and an investigator. Going by the ***Jimmy Ngonya's*** reasoning, this was an anomalous conduct that rendered the disciplinary proceedings flawed. The respondent's contention is that this was not irregular.

The general principle, which is a key cardinal principle of natural justice, is that a man should not be a judge in his own cause i.e. *nemo judex in causa sua.* It is a prohibition of a person from meddling in the affairs in which he is interested. This includes getting involved in deliberations in matters from which he derives interest. This is what was held in the ***Jimmy Ngonya*** (supra). In that case, the manager who was also a complainant participated in the deliberations of a matter that

involved the affected employee. In the instant case, evidence is abundant to the effect that DW3 sat on the disciplinary committee as a prosecutor and complainant, and I find that to be perfectly in order. What isn't clear, and the applicant has not come out clean on, is whether DW3 participated in the deliberations made by the disciplinary committee. Having failed to prove that DW3's conduct went far overboard and beyond what an investigator or a complainant should do, I take the view that nothing justifies applicability of the holding in ***Jimmy Ngonya*** in the instant case, and I see no flattery in the applicant's contention, and I reject this argument out of hand.

The next battleground is with respect to the admissibility of Exhibits D3 and D4. These are photographic pictures of a mobile handset which belonged to Paul Suleiman, allegedly containing his exchange with the applicant on the theft incident. The argument by the applicant is that admissibility of these pictures ought to have conformed to the requirements of section 18 (3) of the Electronic Transactions Act, 2005. The respondent holds the view that this provision is inapplicable in the circumstances of this case, and I subscribe to this contention. As argued by the respondent's counsel, correctly in my considered view, this provision would be relevant if what was to be tendered and admitted was an

electronic record. In this case, what was at stake was pictures of what was alleged to be the suspect's mobile phone. This is not an electronic record whose admissibility would have to surmount all the rigours stipulated in section 18, cited by the applicant's counsel. I hold the view that the applicant's contention is, in the circumstances of this case, hollow and failing to resonate.

The applicant is unhappy with the way exhibits D3 and D4 were allowed to constitute the evidence, while they were not read out after they had been admitted. In the counsel's view, this was an affront to the legal requirements as set out in the ***DPP v. Ashamu Maulid Hassan*** (supra). The view held by the respondent's counsel is that this is a requirement that arises from an administration of criminal justice and inapplicable in labour matters. In any case, the Counsel contended the standard of proof in the latter is on the balance of probability.

Before I delve into the thick of the applicant's complaint on this point, it feels apt that the respondent's counsel be reminded of one important aspect. This is with respect to his contention that, since the principle was bred from a criminal matter then the same would not apply in cases outside the criminal domain. In ***James Burchard Rugemalira v.***

Republic & Another, CAT-Criminal Application No. 59/19 of 2017 (DSM-unreported), it was held:

> *"Again we wish to point out that what is distilled from a case, be it civil or criminal, is the principle; which in legal parlance is called ratio decidendi...."*

This means that a principle would be put into application as long as it is relevant, and irrespective of where it was distilled from.

Reverting back to the applicant's complaint, my unflustered view on the failure to read out the statement is that such failure is not, as far as proceedings in CMA are concerned, a violation of any legal requirement. This is in view of the fact that, neither the Criminal Procedure Act, Cap. 20 R.E. 2019 (CPA) nor the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC), or the Evidence Act, Cap. 6 R.E. 2019 (Cap. 6), is applicable in the arbitral proceedings at CMA. It follows, therefore, that the requirements set out under these statutes and the decisions that emanate from the legal position provided in the said statutes, including the principle accentuated in ***DPP v. Ashamu Maulid Hassan*** (supra), are of no relevance to these proceedings. This position is informed by the fact that arbitrators in the arbitral proceedings enjoy a lee way of promulgating a procedure that ensures that matters they adjudicate are disposed of quickly and fairly, and

with a minimum of legal formalities or stringent conditions set out in the CPC, CPA or Cap. 6 R.E. 2002. This position is predicated on what is provided for under section 88 (4) of the Employment and Labour Relations Act, Cap. 366 R.E. 2019 which provides as hereunder:

> *"The arbitrator-*
>
> *(a) May conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly;*
>
> *(b) Shall deal with the substantial merits of the dispute with the minimum of legal formalities."*

The cited provision marries with the substance of section 15 (1) (e) (iii) of the Labour Institutions Act, Cap. 300 R.E. 2019, which guides as follows:

> *"(1) In the performance of its functions, the Commission may-*
>
> *(e) make rules to regulate-*
>
> *(iii) the practice and procedure for arbitrating disputes."*

It follows, therefore, that the procedure enshrined in the cited provisions is what governs the conduct of the proceedings in the CMA. Evidently, this procedure is substantially different from what obtains in criminal or civil procedure statutes cited above. In this case, the arbitrator's

action would be considered anomalous if his decision in that respect was inconsistent with to the procedure that obtains in the Labour Institutions (Mediation and Arbitration) Guidelines, 2007 [GN. No. 67 of 2007], whose Guideline 19, bestows powers on an arbitrator to regulate his own practice and procedure on how the arbitration should be conducted.

This position got the much needed boost from a scintillating position held by the Court of Appeal in ***Finca Tanzania Limited v. Wildman Masika & 11 Others***, CAT-Civil Appeal No. 173 of 2016 (unreported). The upper Bench held in that case as follows:

> *"It is apparent from the quoted provisions that the Arbitrator has the power to regulate and determine the practice and procedure of how arbitration should be conducted ....* ***Moreover, the Rules do not provide for any resort to the CPC where there is a lacuna in the procedure to be applicable in the CMA. Besides, to urge for the application of the CPC strictly where there is a lacuna in the Mediation and Arbitration Guidelines Rules during arbitration process is, in our view, to defeat the very purpose of the said rules which aim to make the procedure as simple as possible to attain substantive justice to the parties in view of the nature of the proceedings.*** *"* [Emphasis is added]

See also: ***Huawei Technologies Tanzania Co. Ltd v. Ramadhani Hassan Mshana & Another***, HC-Revision Application No. 49 of 2018 (MZA-unreported). In my considered view, the arbitrator's finding in this respect is unblemished, and I find the applicant's position on this point lacking what it takes to succeed.

In paragraph 11 of the supporting affidavit, the applicant has contended that the respondent's case was entertained by the arbitrator while the testimony adduced in support failed to meet the threshold required. *i.e.* on the balance of probability. By so alluding, the applicant insinuates that the respondent's burden of proving the fairness of the termination was not discharged. Though the applicant is economical with facts that would inject some sense in what he alleges, I feel obliged to address this contention by first reproducing a splendid excerpt from the commentaries by Sarkar on Sarkar's Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by *Lexis Nexis,* (at p. 1896). The learned authors had the following to say on the burden of proof:

> ***"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof.*** *It is ancient rule founded on*

consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case. ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."*** [Emphasis added].

The quoted excerpt is in sync with the fabulous reasoning of Lord Denning in ***Miller v. Minister of Pensions*** [1937] 2 All. ER 372, cited with approval in the decision of the Court of Appeal of Tanzania in ***Paulina Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (unreported). The superior Court quoted the following passage:

"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches of the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say – We think is it more

probable than not, the burden is discharged, but, if the probabilities are equal, it is not ...."

Reviewing the testimony adduced during the arbitral proceedings, it leaves me with no flicker of doubt, that the applicant's culpability was sufficiently established. DW3 put a stellar performance that left little or no doubt that the applicant was not only aware of what happened with respect to the theft incident, but also a key architect of the entire plan. The testimony of Paul Suleiman in the disciplinary committee, as testified by DW3 with no opposition from the applicant, uncovered the applicant's involvement in the plan. The totality of this testimony, and the applicant's inability to mount a formidable challenge to this implicating account, justified the arbitrator's holding, and I find nothing on which to base a criticism of this finding.

Before I pen off, I propose to say a word or two about what the applicant contends as preference of disciplinary proceedings while he was still facing some criminal proceedings. By this he implied that he was subjected to a double jeopardy. The law, as it currently obtains, prohibits an employer from taking any disciplinary action against an employee who has committed a misconduct of a criminal nature and he is facing court proceedings in respect of the said misconduct. This statutory position was

fortified in the decision of this Court in **Stella Manyahi & Another v. Shirika la Posta**, HC-Reference No. 2 of 2010 (Lab. Div. DSM-unreported), wherein it was held:

> *"When an employee is accused of criminal offence which is also a breach of disciplinary code and the employer has taken the bold step of reporting the incident to the police and the police investigation is commenced, other disciplinary proceedings should not be mounted .... No proceedings for imposition of a disciplinary penalty should be instituted pending the conclusion of the criminal proceedings and of any appeal therefrom."*

Nowhere, in the proceedings that bred the instant matter, has the applicant proved that, at the time of his arraignment in the disciplinary proceedings, he was still facing the criminal proceedings, over the same allegation. The applicant has only stated, in passing, that his charges were terminated through withdrawal thereof by the Prosecution, but he did not tell if such withdrawal came before or after his day in the disciplinary committee. In this respect, the onus of proving the existence of the criminal proceedings, whose institution preceded the disciplinary action, rested on the applicant's shoulders and, in my view, this burden was not discharged. It would be reckless of me to consider reversing the arbitrator's finding merely on the basis of the applicant's casual account.

In the upshot of all this, I hold that this application is barren of fruits. Consequently, I find the Arbitrator's conclusion that the respondent's termination was fair is, on the basis of the available evidence, plausible and based on a sound legal and factual foundation, save for the order for payment of three months' salary which is unjustified and I hereby quash. Accordingly, I dismiss the application and uphold the Arbitrator's award and the resultant remedies.

It is so ordered.

DATED at **MWANZA** this 2nd day of March, 2021.

M.K. ISMAIL

JUDGE

Date: 02/03/2021

Coram: Hon. M. K. Ismail, J

Applicant: Absent

Respondent: Present online. Mobile No. 0754 407 698

B/C: J. Mhina

Court:

Judgment delivered in chamber, in the virtual presence of Mr. Idrissa Juma, learned Counsel for the respondent and in the absence of the applicant, this 02nd day of March, 2021.

M. K. Ismail
JUDGE

At Mwanza
02nd March, 2021