

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

*(Original Complaint No CMA/DSM/KN-ILA 2152,
Rafael Luvakubusa vs Mkurugenzi wa Jiji)*

IN THE MATTER OF REVISION NO 149 OF 2008

DAR ES SALAAM CITY COUNCIL - APPLICANT

VERSUS

RAFAEL RUVAKUBUSA – RESPONDENT

RULING

31/10/2008 & 14/11/2008

Rweyemamu R.M. J.;

On 30/11/2007 the Respondent **Rafael Ruvakubusa** referred a labour dispute to the Commission for Mediation and Arbitration (CMA or the Commission) against his employer **Dar es salaam City Council** – the applicant. The claim comprised of two causes of action, one was based on the contract of employment namely

unfair termination and under- payment of salary, the other was found on tort specifically defamation where relief's sought were reinstatement; refund of unpaid salary arrears and damages for defamation.-

The dispute was unsuccessfully mediated and a non-settlement certificate issued 18/2/2008 as per legal requirement. Thereafter, the dispute was arbitrated and an award on the main in favour of the respondent made on 29/7/2008. In the award subject matter of these revision proceedings the arbitrator granted the following relief's: Compensation for unfair termination – shs 129,560; Damages for consequential injury shs. 4 million; unpaid salaries shs 5,300,000 and damages for defamation in the sum of shs.10 Million.

Dissatisfied with the both the procedure and award arrived at, the applicant filed a chamber application under Rule 28 (1) (a-e) of the Labour Court Rules, GN 106 of 2007 seeking revision. The application was supported by affidavit of Mr George Dogani Mwalali counsel for the applicant where he raised the following concerns against the arbitrator's decision/award:-

- (i) That the trial Chairman of the Commission erred by **failing to record, to evaluate, as well as to act on no evidence** as regard to:-

- (a) The employment status of the Respondent; and
 - (b) The interpretation of the method used to terminate the Respondent's employment as envisaged by the law
- (ii) Having ventured to entertain tortuous liability against the Applicant, the liability in which the damages awarded is always lump sum of general damages the Chairman erred in law giving the same in aggregate and without proof for each.
 - (iii) Having ventured to entertain specific damages as claimed by the Respondent, the trial Chairman ***erred to award the same without even piece of evidence to support the same.***
 - (iv) The Trial Chairman erred in law to deliberate on matter of tortuous liability in the context of common law without involving the **opinion of gentlemen assessors.**
 - (v) The Trial Commission chairman erred in law to hold that the act of publishing the name of the Respondent on the Local Newspaper was defamatory without analyzing the contents of the advertisement by itself.
 - (vi) The trial chairman of the commission erred in law and fact to make the question of ABSENTISM of the Respondent **to be an issue in the matter while it was not.**
 - (vii) The trial chairman erred in law and fact to mix specific damages as pleaded by the Respondent with general damages, which is generally awarded in a lump sum way in tortuous liability.

(viii) The trial Chairman of the Commission erred in law and fact by **basing on unfounded allegations**; the Applicant being expelled from Church services, in turn to order a lot of money to be paid to the Respondent as damages without any logic or proof. (Emphasis mine for reasons explained below).

The application was opposed by the respondent who filed a counter affidavit, appeared in person at the hearing where, while opposing grounds raised by the applicant, also faulted the arbitrator for failing to decide the issue of, illegal deductions of salary; payment of allowances and wrongly calculated the amount of compensation under S.40 (1) (i) of Act 6 of 2007.

I have checked the arbitrator's record of proceedings and it is obvious that it does not qualify as a proper record of proceedings as required under Rule 32 (1) and (2) of the Labour Institutions (Mediation and Arbitration) Rules) GN 64 of 2007. The said rule mandates the arbitrator to keep a record of arbitration with legible handwritten notes or by other means of electronic recording. What is a proper record of proceedings? To answer this question I wish to refer to, associate and borrow an instructive part of the Judgment by my brother Mandia J, in **BIDCO Oil and Soap V. Abdu Said and 3 Others**; LC Revision 11 of 2008 where he considered an arbitration proceedings which had scanty

It is only where the above is adhered to when the resultant award, whose contents are prescribed under rule 27 (3) of the guidelines, can be understood and evaluated. Adherence to rules and guidelines provide certainty and decency of proceedings which are vital for credibility of any legal process.

In the arbitrator's record of proceedings under revision I have noted the following irregularities; it is not clear from the proceedings at what point hearing commenced, what issues were in dispute; what facts and evidence were adduced by each of the parties on the said issues. With such state of affairs, it is easy to understand the applicant's complaint against the arbitrator's award for **"failing to record, to evaluate, as well as to act on no evidence;** that he ***"erred to award the same without even piece of evidence to support the same"*** or that he made **"the question of ABSENTISM of the Respondent to be an issue in the matter while it was not"**; in a way an issue of concern also raised by the respondent in is his counterclaims to this application.

I have seen written submissions of parties in the file record but it is not clear to me how the same were incorporated or made part of the record of proceedings and may be more important, it is

proceedings: I find it useful to quote extensively from the said judgment:

“The procedure for processing labour grievances are set out in the Employment and Labour Relations Act. The institutions for putting into effect the provisions of the Employment and Labour Relations Act are created by the Labour Institutions Act. Under the above quoted laws subsidiary legislation has been made in the form of the Labour Court Rules (GN 106/2006); The Employment and Labour Relations (Code of good Practice Rules (GN 42/2007), The Labour Institutions (Mediation and Arbitration Rules (GN 64/2007), The Employment and Labour Relations (Forms) Rules (GN 65/2007), The Labour Institutions and Code of Conduct for Mediators and Arbitrators Rules (GN 66/2007) and the Labour Institutions (Mediation and Arbitration Guidelines) Rules (GN 67/2007.

In the Labour Institutions (Mediation and Arbitration) Rules GN 64 of 2007, there is Rule 32(1) and (2) which provide thus:-

(1).An arbitrator shall keep a record of the arbitration proceedings with legible hand-written notes or by other means of electronic recording.

proceedings: I find it useful to quote extensively from the said judgment:

“The procedure for processing labour grievances are set out in the Employment and Labour Relations Act. The institutions for putting into effect the provisions of the Employment and Labour Relations Act are created by the Labour Institutions Act. Under the above quoted laws subsidiary legislation has been made in the form of the Labour Court Rules (GN 106/2006); The Employment and Labour Relations (Code of good Practice Rules (GN 42/2007), The Labour Institutions (Mediation and Arbitration Rules (GN 64/2007), The Employment and Labour Relations (Forms) Rules (GN 65/2007), The Labour Institutions and Code of Conduct for Mediators and Arbitrators Rules (GN 66/2007) and the Labour Institutions (Mediation and Arbitration Guidelines) Rules (GN 67/2007.

In the Labour Institutions (Mediation and Arbitration) Rules GN 64 of 2007, there is Rule 32(1) and (2) which provide thus:-

(1).An arbitrator shall keep a record of the arbitration proceedings with legible hand-written notes or by other means of electronic recording.

(2) Where the arbitrator records the proceedings through hand written notes, the arbitrator may not be required to record the proceedings word by word.

The emphasis here is on keeping a permanent and retrievable record of proceedings. What, if we may ask, are "proceedings" as referred to in Rule 32(1) and (2) of GN 64 of 2007? The Judicial Dictionary, 2nd Edition, authored by Mr. Justice L.P. Singh and P.K. Majumdar defines proceedings" at page 1069 thus:-

"PROCEEDINGS in Black's Law Dictionary, it is explained as in general sense, the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment. (P.M.A. Metropolitan V Moran Mathona. AIR 1995 S.C. 2001 at 2023).

The above quotation puts emphasis on regular and orderly progress in law and procedure from commencement of an action to execution of judgment as the basic attributes of any legal proceeding.

— The functions of arbitrators are quasi-judicial, so arbitrators should insist on the basic characteristics of

orderliness and regularity in execution of their duties. Luckily for them the Commission has made elaborate rules of procedure which have been published as GN 64 of 2007. The rules of procedure are subsidiary legislation and all arbitrators are bound to follow the rules of procedure set therein."

For practical application of Rule 32 cited above, the Commission using powers granted to it under Section 15 (1) (f) of the Labour Institutions Act, published the Labour Institutions (Mediation and Arbitration Guidelines) Rules under GN 67/2007 whose rule 22 explains the necessary stages of any arbitration process, while rule 23 to 26 thereof explains in general detail what is required under each of the said stages.

While under the guidelines the arbitrator has general powers to determine how arbitration should be conducted, that power does not permit the arbitrator to ignore laid down procedures which define tenets of a legal arbitration process. Put differently the guideline seeks to ensure that the arbitration process apart from being orderly, has a starting point, clearly reflect the issues between the parties, indicate facts and evidence adduced by them and the manner the same were received in the cause of proceedings and parties' addresses/submissions.

It is only where the above is adhered to when the resultant award, whose contents are prescribed under rule 27 (3) of the guidelines, can be understood and evaluated. Adherence to rules and guidelines provide certainty and decency of proceedings which are vital for credibility of any legal process.

In the arbitrator's record of proceedings under revision I have noted the following irregularities; it is not clear from the proceedings at what point hearing commenced, what issues were in dispute; what facts and evidence were adduced by each of the parties on the said issues. With such state of affairs, it is easy to understand the applicant's complaint against the arbitrator's award for **"failing to record, to evaluate, as well as to act on no evidence; that he *erred to award the same without even piece of evidence to support the same*"** or that he made **"the question of ABSENTISM of the Respondent to be an issue in the matter while it was not"**; in a way an issue of concern also raised by the respondent in is his counterclaims to this application.

I have seen written submissions of parties in the file record but it is not clear to me how the same were incorporated or made part of the record of proceedings and may be more important, it is

not clear which facts were believed and why; consequently it is impossible to evaluate the arbitrator's reasons for the subsequent award.

Before concluding, I feel obligated to discuss the issue of jurisdiction of the CMA in arbitrating a dispute found on the tort of defamation. I am aware that disputes which the commission may arbitrate under section 88 of the Employment and Labour Relations Act were amended by the Written Laws (Misc. Amendments) Act 8 /2006, to include *'any employment or labour matter falling under common law, tortuous liability and vicarious liability in which the amount claimed is below the pecuniary jurisdiction of the High Court'*. That amendment seems to confer jurisdiction to the Commission in defamation disputes arising in the context of employment.

That position however, does not seem to be a correct one in view of the Newspaper Act, 3 of 1976 as amended by Act 10/1994. Part VIII of the Act confers jurisdiction to the High court and district court but provides for a special procedure requiring the court to sit with not less than three assessors *'in every proceedings in respect of any action for libel arising out of anything or matter published in a newspaper..'* Now, since assessors are not part of the arbitration process, I find that arbitrators under the Commission have no

jurisdiction to arbitrate disputes found on libel when the same arises out of "*anything or matter published in a newspaper...*".

The position is different for the Labour Court. Under section 50 of the Labour Institutions Act, 7 of 2004, which provides that the court is constituted when sitting with at least 2 assessors- although the same is not mandated where parties consent. In view of that, the Labour Court can adjudicate matters of defamation which arise in the context of an employment relationship.

What then should be the procedure to be followed when a labour dispute involving or including a claim found on defamation is referred to the Commission? Since all employment based disputes have to pass through the mediation door, the same should apply to defamation cases between employers and employees, but when mediation fails, the matter should be referred to the Labour court where the matter can proceed with assessors. That procedure necessarily means disputes found on the tort of defamation based on anything published in a newspaper can not be joined with other strictly labour claims.

To conclude, I return to the immediate subject of this application and find that in view of the shortcomings pointed out in

14/11/2008
the record of arbitration, the same, amounted to a material irregularity such that the award made there from can not have been properly arrived at. For that reason I quash the impugned proceedings including the award and orders made therein. The record should be sent back to the CMA with an order that the arbitration process start afresh and be conducted according to law.

R M Rweyemamu
Judge
14/11/2008

