IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

REVISION APPLICATION NO. 12 OF 2019

(Arising from Labour Dispute Reference No. CMA/MZ/ILEM/ARB/638-171/2018)

LUCY MARK SULULU ..... APPLICANT

VERSUS

PLANET PHARMACEUTICAL LTD ..... RESPONDENT

RULING

24th November, 2020 & 26th January, 2021

ISMAIL, J.

This is a ruling in respect of an application for revision, preferred by the applicant, moving the Court to call upon and examine the records of the Commission for Mediation and Arbitration at Mwanza (CMA), and revise the proceedings and the award issued in respect of Dispute Reference No. CMA/MZ/ILEM/ARB/638-171/2018. The ground for such revision is that the said award, delivered by the CMA on 30th January, 2019, is laden with material errors to the merits of the dispute, thereby breeding an erroneous conclusion which has caused injustice to the applicant.

The impugned award allegedly gave a verdict on a breach of contract while the applicant's complaint was that her employment was unfairly terminated. The contention by the applicant is that determination of the matter was predicated on an issue that was never raised during the hearing. Instead, the same was raised *suo motu,* in the course of composing the decision, and the parties were not called upon to address the Arbitrator on this new issue. This, in the applicant's view, constituted a denial of the right to be heard.

The application is supported by an affidavit sworn by Godfrey Martin, the applicant's legal counsel, setting out grounds on which the prayers are sought. The applicant's affidavit was stoutly opposed by the respondent, through a counter-affidavit affirmed by Juma Said Obote, the respondent's principal officer. The respondent firmly believes that the CMA was quite in order in striking out the application after a discovery that the applicant had not properly moved the CMA.

Disposal of the matter was done through written submissions, preferred by the parties in conformity with a schedule for the filing of the submissions. In her brief submission, the applicant began by reproducing issues which were framed before commencement of the hearing, arguing

that they all touched on the fairness of the termination. She argued that, instead of being led by the issues which were drawn at the commencement of the hearing and against which the parties presented their cases, the arbitrator made a new discovery that led to a different proposition and conclusion that dwelt on breach of contract. While conceding that her contract was initially a fixed term contract, she asserted that the subsequent renewal raised the expectation of further renewal, effectively turning it into a contract for an indefinite period of time.

The applicant's contention is that, since the question of breach of contract was alien to the parties, then the proper procedure was to call on the parties to address the arbitrator on the issue after which a finding would be made. To buttress her contention, the applicant cited the decision of the Court of Appeal in **Jamal Ahmed v. The CRDB Bank Ltd**, CAT-Civbil Appeal No. 52 of 2010 (DSM-unreported), wherein such conduct was considered to amount to a denial of the right to be heard. The decision emphasized that where new issues not found on the pleadings are raised, the parties should be given the opportunity to address the court.

In view thereof, the applicant implored the Court to revise and set aside the proceedings and ensuing award of the CMA.

The respondent's submission was equally concise. While admitting that the question of breach of contract was introduced in the course of composing the decision, the respondent found nothing flawed in the arbitrator's conduct. The respondent held the view that the arbitrator was justified to right the wrongs spotted in the applicant's CMA F1 which treated the matter as a fit case for unfair termination while in fact the same was a clear case of breach of contract. The respondent argued that this was a typical case in which the court's powers were exercised rightly with a view to correcting errors of law on the face of record. To cement its argument, the respondent made reference to an English case of ***Anisminic Ltd v. Foreign Compensation Commission*** [1969] AC 147 The respondent submitted that such inherent powers were widely resorted to by the Court of Appeal of Tanzania to fill the vacuum in the procedure and time limitation. As such, presenting the applicant an opportunity to be heard would amount to an abuse of the court process.

Perceiving that the right to be heard is a mere technicality, the respondent contended that Article 107A (1) (2) (e) of the Constitution of the United Republic of Tanzania bestows powers on the courts to dispense justice without being tied to undue technicalities. The respondent held the

uliwasilishwa Tume mlalamikaji alikuwa na mkataba wa muda maalum hivyo nafuu pekee ambayo alistahili kupewa ni baada ya kuthibitisha kwa uvunjwaji wa mkataba wake katika uwiano ulio sawa hivyo ni dhahiri kuwa kiini cha mgogoro katika shauri hili kilipaswa kuwa kuvunjwa kwa mkataba na sio usitishwaji ajira usio halali "unfair termination" kama ambavyo mlalamikaji ameainisha katika CMA F1.

Kwa mujibu wa CMA F1 imainisha kabisa asili ya mgogoro kila kimoja kwa kutenganishwa hivyo ni wazi kuwa mlalamikaji ili kupata nafuu iliyoshaihi (sic) na nafuu anayostahili alipaswa kujaza kikamilifu na kuchagua asili ya mgogoro iliyo sahihi ambayo ni kuvunjwa kwa mkataba "Breach of contract.

Tume ili kutenda haki kila upande uweze kupata stahiki sahihi na kwa haki, Tume ina struck out mgogoro huu. Ili mlalamikaji aweze kuleta mgogoro wake kwa usahihi kwa kuainisha kiini sahihi cha mgogoro "nature fo dispute", na haki iweze kutendeka kila upande kwa kupata stahiki zao.'

[Emphasis is added].

It should be noted that one of the cardinal principle of natural justice is what is known, in Latin, as *audi alteram partem,* which literally means, ***hear the other side***. It requires that every party be afforded an opportunity to be heard before a determination is made on their rights. In respect of courts or quasi-judicial bodies such as

tribunals and commissions, this principle bestows a responsibility on the presiding judicial officers to give the parties the right to be informed of any adverse point that the judicial officer is going to base his decision on. This is in line with the holding of Lord Diplock in ***Hadmor Productions v. Hamilton*** [1982] 1 ALL ER 1042 at p. 1055. He stated as follows:

> *"Under our adversary system of procedure, for a Judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what is his answers to it".*

Consequences of denial of the right to be heard are dire, and this Court and the Court of Appeal have countlessly emphasized the fact that such failure renders the proceedings discrepant and a mere parody which should not be left to see the light of the day. Such decisions include: ***Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma*** [2003] TLR 251, quoted in ***Ausdrill Tanzania Limited v. Mussa Joseph Kumili & Another***, CAT-Civil Appeal No. 78 of 2014

(MZA-unreported); and ***Margwe Erro & 2 Others v. Moshi Bahalulu***, CAT-Civil Appeal No. 111 of 2014 (ARS-unreported).

In ***Scan – Tan Tours Ltd v. The Registered Trustees of the Catholic Diocese of Mbulu***, CAT-Civil Appeal No. 78 of 2012 (ARS-unreported), the upper Bench held:

> *"We are of the considered view that in line with the audi alteram partem rule of natural justice,* ***the court is required to accord the parties a full hearing before deciding the matter in dispute or issue on merit*** *- See* ***Shomary Abdallah v. Hussein and Another*** *(1991) TLR 135;* ***National Housing Corporation versus Tanzania Shoes and Others*** *(1995) TLR 251 and* ***Ndesamburo v. Attorney General*** *(1977) TLR 137.* ***The right to be heard is emphasized before an adverse decision is taken against a party.*** [Emphasis added].

See ***Mire Artan Ismail & Another v. Sofia Njati***, CAT-Civil Appeal No. 75 of 2008 (unreported).

As clearly quoted above, the decision by the arbitrator took no heed to the demands of a fair hearing as encapsulated in the cited decisions. The contention by the respondent is that the quest for a fair hearing is a technical issue which is abhorred by the provisions of Article 107A (1) and

(2) of the Constitution of the United Republic of Tanzania. With respect, this contention is utterly fallacious and I refuse to go along with it. The importance of a right to a fair hearing cannot be decimated and considered as a mere technical slip that can be wished away by citing Article 107A. It is a crucial pillar of the rule of law and a vital component of a justice dispensation.

By choosing to give this requirement a wide berth, the arbitrator indulged in a flagrant infringement of the applicant's right. Her actions are simply a parody of justice that is abhorrent, and the decision that came out of it is a mere sham which cannot be allowed to stand.

Consequently, I hold that the award that was distilled from this ignominious process is a nullity. Accordingly, I grant the application and order that the said award be immediately set aside as prayed. I make no order as to costs

It is so ordered.

Right of appeal duly explained.

DATED **at MWANZA** this 26th day of January, 2021.

M.K. ISMAIL

JUDGE

Date: 26/01/2021

Coram: Hon. M. K. Ismail, J

Applicant: Absent

Respondent: Absent

B/C: B. France

Court:

Ruling delivered in chamber, in the absence of parties this 26th day of January, 2021.

M. K. Ismail

JUDGE

At Mwanza

26th January, 2021