IN THE HIGH COURT OF ZANZIBAR

(INDUSTRIAL DIVISION)

HELD AT TUNGUU

INDUSTRIAL APPLICATION No. 27 OF 2023

(Application to review an Arbitral Award given in the Dispute No. DHU/M.MG/147/2019 on 26/07/2023, Hon. Halima H. Ahmed)

PRISTINE INVESTMENT LIMITED
(MADINAT AL BAHR) ..... APPLICANT

VERSUS

LUCA CALZAVARA.....RESPONDENT

RULING

18th March & 4th April 2025

A. I. S. Suwedi, J

The respondent, **Luca Calzavara,** claimed to be terminated before the expiration of the contract on 07/08/2019 by his employer, the applicant, **Pristine Investment Limited (Madinat Al-Bahr).** In his opening statement before the Dispute Handling Unit (the Unit), he asserted that the applicant employed him as Operation Manager with a two-year contract from 01/07/2018. On 17/02/2019, he was promoted to General Manager and performed well in his service. He further proclaimed that the dispute between him and the applicant started on 05/08/2019 when he received a termination letter from the Labour Officer, **Juma Chum**. Hence, he filed a dispute, No. DHU/M.MG/147/2019 before the

Unit claimed for his benefits, which include ZSSF payment, six months' salary arrears from March to 5th August 2019, 5 days annual leave and advocate costs.

On the other hand, in his opening statement, the applicant denied the claim and asserted that he had found the loss of USD 31,000 in his account in February 2019, but the respondent did not deny it. The applicant gave the respondent a chance so he could pay, but until June 30th he failed to pay, and the respondent further accepted the loss as a debt. On 14/07/2019, the respondent asked to quit his job, and he realised that the respondent was planning to send the applicant's employees to the Plan Hotel. After discovering this, they decided to end the respondent's service peacefully to avoid putting the company at a loss, and he was paid all his entitlements as per the labour laws.

Hon. Arbitrator, after having heard the parties, found that the respondent had been unfairly terminated, and under Regulation 57 (6), the applicant ordered to pay the respondent USD 10,330 as salary for March to July 2019 and 5 days of August 2019 at USD 2,000 per month and USD 330 of August 2019. Further, the Hon. Arbitrator ordered the applicant to pay the respondent USD 1,320 as the leave payment for the 20 days he worked. Aggrieved by the order, the applicant is applying for

a review of the decision given on 26/07/2023 under Rule 41 (1) (3) and Rule 44 (2) of the Industrial Court Rules, 2021.

At the hearing of this application, the applicant was represented by the learned counsel Ali Salum Khamis and the learned counsel, Karume Haji Mrisho, represented the respondent.

Submitting the ground for review, counsel, Ali stated that the Hon. Arbitrator issued an order that is contrary to Regulation 57 (6) of the Labour Relations (Mediation and Arbitration) of 2011 (to be referred to as the Regulations), which discusses unfair termination and its remedies. The Hon. Arbitrator said all the required procedures were followed, but she still awarded the respondent. Besides, a demand letter stated in paragraph 3 of the Counter Affidavit was not brought before the Unit. Counsel Ali further submitted that the Hon. Arbitrator erred in not considering that the respondent was terminated following the offence he committed. He said the respondent was terminated because of the loss of USD 31,000, which the respondent did not object to. Hence, the Hon. Arbitrator erred in awarding compensation. Therefore, he prayed for the award to be set aside.

Counsel Karume, on his side, replied that the Hon. Arbitrator did not commit any error since there was no compensation, but the salary arrears were awarded. He said that the Hon. Arbitrator awarded salary

arrears on page 13 and page 14, and she awarded 20 days' leave payment. Counsel Karume insisted that the salary arrears granted were for March to July 2019, when the respondent was still at work with the applicant. The applicant brought two witnesses before the Unit, and neither had said anything about salary, so the applicant failed to prove that he gave the wages to the respondent. Counsel Karume finally prayed for the application to be dismissed.

Counsel Ali rejoined that Regulation 57 (6) was used to pronounce orders, so the award must be corrected. He prayed for it to be set aside.

From the submission made, the applicant claims that the respondent was awarded. At the same time, the Hon. Arbitrator stated there was a valid reason for termination, and procedures were followed. In contrast, the respondent contended that the Hon. Arbitrator did not award compensation but salary arrears for the months the respondent had worked. This will be the area for my determination. In this context, I will determine whether there was an unfair termination and whether the Hon. Arbitrator awarded compensation or something else. However, before I proceed, I will start with the legal issue I raised.

Upon perusal of the records of the Application, I have discovered that the Hon Arbitrator on 05/09/2022 closed the applicant's case after refusing adjournment. Hence, I asked the parties whether it was correct

for the Hon. Arbitrator to close the case for the party and, if not, what should be done when the Unit encounters a situation of delay when a party with a burden to prove only requests adjournments. Inviting the parties to respond, counsel Ali started, and he stated that what was done was incorrect, as indicated by the Court of Appeal in the case of the **DPP v. Joseph s/o Mseti @ Super Dingi & 3 Others**, Criminal Appeal No. 549 of 2019 (unreported). So, he prayed for the records to be submitted to the Unit to complete the hearing of the witnesses.

Counsel Kimaro, who, on that day, appeared for the respondent, stated that Hon. Arbitrator was proper since adjournments took almost a year. Because regulations are silent on what to do when the Arbitrator faces a situation like that, it was appropriate for the Hon. Arbitrator, as controller of the proceedings, to close the applicant's case. Counsel Kimaro further distinguished the case cited as the party requesting for adjournments was the applicant, who was the respondent before the Unit. Finally, he prayed for this Court to bless what has been done by the Hon. Arbitrator, though he requested a guide to be issued whenever the Unit faces such a situation.

After hearing the parties, I began to examine the current position of the law regarding the presiding officer's ability to close the parties' evidence. It is a well-established law that a presiding officer has no power

to close the case of either party. This principle developed from ordinary Courts where the complainant had a duty to prove, and he is the one who begins to present his case. Unlike before the Unit, the respondent is the one who must prove fair termination if the dispute was unfair termination, and the respondent is the one who begins to present his case. The prominent issue is what should be done if the respondent does not bring his witness and continues asking for adjournments, as in this application.

Under my observation, the principle that the presiding officer is barred from closing the case for the parties is also applicable before the Unit. That is to say, the Hon. Arbitrator has no power to close the case without the parties' consent. If the Arbitrator closes the case for the party, it is an incurable error. However, the Hon. Arbitrator cannot withdraw the dispute as in ordinary Courts because the delay was caused by the respondent who did not institute it.

Now, I need to return to the law to see how I can assist the Unit regarding a situation in this dispute. As counsel Kimaro stated, the Regulations do not specify a remedy when the respondent fails to provide witnesses and continually requests adjournments. Nevertheless, Mediators and Arbitrators are required under Regulation 37 (1) to organize their work schedules to facilitate an expeditious resolution of disputes. The remedy available within the Regulations is where the respondent

failed to appear, Hon. Arbitrator may proceed in the absence of that party or postpone the hearing. Regulation 53 (1) (b) says

> 53(1) When a party fails to attend an arbitration hearing, an Arbitrator may do the following: -
> (a)…….
> (b) Where a party against whom relief is sought fails to attend, the Arbitrator may proceed in the absence of that party or postpone the hearing.

Here, the remedy has yet to be found because the issue lies in the fact that the respondent was present but failed to bring his witnesses and requested a postponement.

Hence, I decided to consult the Civil Procedure Decree, Cap 8 of the Laws of Zanzibar, whereby Order XX, Rule 3 says:

> **Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses**, or to perform any other act necessary to the further progress of the suit, for which time has been allowed**, the court may, notwithstanding such default, proceed to decide the suit forthwith** [emphasis added]

The provision explicitly states that if either party is granted time to present its evidence and fails to do so, the Court is obliged to decide the case promptly. The provision uses the term "Court", which the interpretation clause defines as "the High Court and any Court subordinate thereto." Given that grievances from the Unit's decision lie before this Court, which is a division of the High Court, it follows that the Unit is

implicitly subordinate to the High Court. Therefore, the Arbitrator can invoke the powers of this provision when parties granted time to submit evidence fail to do so.

On this basis, if the respondent, who begins presenting evidence in a case concerning unfair dismissal, has been allowed to submit the evidence but fails to do so, then the Arbitrator should proceed to determine the dispute rather than closing the respondent's case. In this matter, the Hon. Arbitrator closed the respondent's evidence without his consent, which is an error, as I have previously explained. However, after reviewing the decision, I see no reason to quash the proceedings and return the records for continuation before closure. This is because, even if she had chosen to decide from that point, the outcome would have been the same. The applicant, as a respondent before the Unit, was responsible for proving fair termination, and at this stage, he was prepared to present his evidence; had the Hon. Arbitrator decided to issue an award, the decision would have been identical to the one reached. Hence, I chose to proceed with the merit of the application.

After formulating issues, the Hon. Arbitrator allowed parties to present their case and the applicant as respondent before the Unit started to submit. The applicant made his case by two witnesses: one, **Deogratius Mao** (Human Resource Manager) and the second, **Said Ali**

Nyambweda from the Maintenance Department. Their evidence shows that the respondent herein was the General Manager of the applicant and that he left his job due to misunderstanding as it was discovered that he was communicating with the Plan Hotel to send the applicant's staff, who are Managers, to the Plan Hotel. On 01/08/2019, the respondent was given a letter explaining what he was accused of and told the offence committed. On 03/08/2019, he responded by denying the allegations, and because there was evidence, he was terminated on 05/08/2019. The applicant's evidence further shows that the hotel's management followed the employees' promise to be taken to Plan Hotel. They admitted this but apologised and asked to continue working with the applicant.

The evidence was also strengthened by the testimony of one of the employees for whom the respondent was looking for a job elsewhere. DW2, his evidence was that the respondent found the job for him in Mapenzi Hotel, but the process did not continue because the respondent was terminated and did not call them again. Additionally, the applicant tendered email correspondence from the respondent that shows he was contacting other hotels for the applicant's employees to work.

I have also noted that the applicant did not deny the salary claim as demanded by the respondent. When cross-examined, the first witness, a Human Resource Manager, was curious to know if the respondent was

demanding salaries from March to August 2019 since he was not dealing with foreign staff. From his evidence, foreign staff are under the scope of the General Manager.

On the other hand, the respondent built his case through his testimony and claimed that the applicant employed him under a two-year contract starting in January 2018. The agreement was terminated on August 5, 2019, but he refused to sign. He demanded a five-month salary from March to July 2019, amounting to USD 2,000 monthly. He further stated that he received a termination letter after visiting the Labour Commissioner and was paid for 15 days of leave, even though he was entitled to 27 days according to his contract.

After the respondent closed his case, the parties were allowed to present their closing statements. However, I only found the respondent's statement in the records, where he insisted that the applicant unfairly terminated him. He also asserted that he was unpaid for five months, from March to July 2019. Lastly, he prayed for the Unit to order compensation, payment of salary arrears, and leave payment.

On her side, the Hon. Arbitrator held that the applicant terminated the respondent, as shown in the Dismissal letter dated 05/08/2019. Also, the Hon. Arbitrator looked at the reason for termination and saw that the applicant had a valid reason for termination. About the procedure used,

the Hon. Arbitrator said that the applicant followed the required procedures as provided under section 110 (2) (3) (4) of Act No. 11 of 2005. Hence, she did not award compensation.

On the other hand, the Hon. Arbitrator saw that the respondent was not paid his salary for 5 months and 5 days, and it is also proven that he did not get his leave payment. Therefore, she ordered the applicant to pay the respondent USD 10,330 as his salary arrears from March to June 2019, USD 300 as a payment for the 5 days the respondent had worked, and USD 1,320 for 20 days of leave.

The matter was heard with the aid of two assessors as required, and they successfully gave their opinion in favor of the award given.

Now it is my time to say whether the Hon. Arbitrator was correct. Only two things need to be proved when unfair termination is claimed. **One** valid reason for termination, as said by Article 4 of the Termination of Employment Convention, 1982 (No. 158):

> The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

Also, section 112 (1) of the Employment Act, No. 11 of 2005 (the Act) says:

> 112(1) any employee shall not be dismissed, whether adequate notice is given or not, unless **there is a valid reason for termination of employment**, which reason is -
> (a) Connected with the capacity of the employee to do the work the employee is employed to do;
> (b) Connected with the conduct of the employee at the workplace; or
> (c) Based on the operational requirements of the undertaking, establishment or services. [Emphasis Added]

The reasons given relate to the worker's capacity, conduct, and the undertaking's operational requirements. After a valid reason, the second issue is the procedures. Section 110 (1) (2) (3) and (4) of the Act is relevant.

> 110 (1) An employee who commits a disciplinary offence or is suspected to commit a disciplinary offence other than an offence punishable by verbal warning shall be notified in writing of the offence and the disciplinary penalty which the employer intends to take against the employee
> (2) An employer shall be given not less than three days to defend himself or herself before the employer depending on the gravity of the offence
> (3) An employee shall be given not less than three days to defend himself or herself before the employer depending on the gravity of the offence.
> (4) If within the prescribed period of three days, the employee fails to give an explanation or gives an explanation which is not satisfactory to the employer, the employer may proceed to impose a disciplinary penalty in accordance with the Schedule to this Act.

The applicant's evidence shows the mistake that the respondent committed. The applicant noticed that the respondent was taking the applicant's staff to the Plan Hotel for work. The applicant learned this fact via email correspondence between the respondent and the Plan Hotel. In my opinion, this is a valid reason under section 112 (1) (b) as it is connected with the respondent's conduct at his workplace.

Regarding the procedure used by the applicant, the evidence shows that after detecting the offence, on 01/08/2019, the applicant gave the respondent a letter explaining the offence that he committed, and he was told to explain himself about the allegation. On 03/08/2019, he responded by denying the claims, and because there was evidence, he was terminated on 05/08/2019 under section 110 (4) of the Act.

Either, the law requires the employer to notify the employee of his termination as per section 112 (2) of the Act. It says:

> 112 (2) An employer who dismisses an employee is required to notify the employee in writing of the dismissal, the reasons for dismissal, and the date on which that action shall take effect.

As regards this requirement, the applicant's evidence shows that on 05/08/2019, the applicant notified the respondent of the dismissal, and the letter was accepted as "**P3**." Based on this evidence, the Hon. Arbitrator decided that the applicant had a valid reason and that the

termination procedures were under the law. I also support this position, and the Hon. Arbitrator's was correct, as opined by the two assessors.

Regarding the award given, the Hon. Arbitrator did not award compensation, only salary arrears, as said earlier. The applicant was ordered to pay the respondent USD 10,330 as salary for March to July 2019 and 5 days of August 2019 at USD 2,000 per month; USD 330 for August 2019 and USD 1,320 as the leave payment for the 20 days the respondent had worked. Again, I have noted no mistake here since the applicant failed to counter that claim from the respondent.

Finally, on the use of Regulation 57 (6) of the Labour Relations (Mediation and Arbitration) Regulations of 2011 in the pronouncement of the order of salary arrears payment. The records show it is true that Hon. Arbitrator used that Regulation when giving her orders. Records show:

> Kwa mamlaka niliopewa na Kanuni ya 57 (6) ya Kanuni za Mahusiano Kazini (Usuluhishi na Uamuzi) Tangazo la kisheria nmaba 107 la mwaka 2011, naamuru kama ifuatavyo:

The quoting shows that the Hon. Arbitrator decided under the authority given to her by Regulation 57 (6) (supra). The Regulation empowers the Unit to award compensation only. It says:

> 57 (6) Notwithstanding any provision of this Regulation, the Arbitrator **may grant the award of compensation to an employee whose dismissal is found to be unfair** either because the employer did not prove that the reason for dismissal

> was a lair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not allow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be less than the equivalent of six months' remuneration calculated at the employee's rate of remuneration on the date of dismissal. [Emphasis is given]

In my observation, using the quoted provision to give an order other than a compensation order is wrong. The Hon. Arbitrator should not have used this provision while she did not award compensation. However, it is not a mistake that has affected the entire Unit's proceedings and decisions, and thus, I see this ground as baseless.

Consequently, for the reason stated, I agree with the assessors' opinion. The application lacks merit, and it is hereby dismissed without costs.

DATED at TUNGUU ZANZIBAR, this 4th April, 2025

A. I. S. Suwedi

JUDGE – INDUSTRIAL COURT