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# LEGAL NEWS

8 January 2023



## Court of Appeal Determines Controversial Off-Duty Insubordination Matter in Favour of the Employer

On 4 January 2024, the Court of Appeal of Tanzania (the Court) delivered its judgment in the case of PanAfrican Energy Tanzania Limited. vs. John Msigala, Civil Appeal No. 163 of 2020. In its decision, the Court examines the off-duty insubordination circumstances and provides guidance on the legality of termination of employment based on insubordination which happened after working hours.

### Background of the Case

The respondent (John Msigala) was employed by the appellant (PanAfrican Energy Tanzania Limited) in 2003 as a Senior Operator and Plant Controller. He was terminated from employment in May, 2016 following charges on disciplinary offences, namely poor work performance, gross insubordination, gross disrespect and verbal assault to the Site Manager (his immediate supervisor). Before such termination took place, a disciplinary committee was formed to deliberate on the matter of which the committee found him guilty as charged, and he was thereafter terminated. Dissatisfied with the termination, the respondent filed a complaint before the Commission for Mediation and Arbitration (CMA) challenging the legality of the termination. After a thorough analysis of the law and the tendered evidence, the CMA dismissed the complaint on the ground that the termination was, both procedurally and substantively, fair after being satisfied, based on the evidence on record, that the respondent was guilty of gross insubordination as he used pejorative language against his supervisor in the presence of other staff. The arbitrator considered, more importantly, the fact that the respondent admitted in his testimony to have used derogatory and disrespectful language against his supervisor. The respondent was dissatisfied with the award issued by the CMA, thus filed a review application at the High Court Labour Division (the High Court).

The High Court reversed the award issued by the CMA and upheld an unfair termination claims by the respondent and made a decision against the appellant. It primarily reasoned that since the misconduct the respondent was accused of was committed off-duty and outside the workplace, the appellant could not have lawfully disciplined him for the same. Displeased by such decision, the appellant lodged an appeal to the Court challenging the decision of the High Court.

### Arguments Raised

At the Court, two issues were raised that required court's indulgence. The first one was whether gross insubordination, gross disrespect and verbal assault to a supervisor cannot be committed by an employee after working hours and outside the workplace. The second issue was whether a dining hall commonly used by employer's staff is a workplace.

The appellant contended that the law does not limit such disciplinary offences to acts that occur during working hours and at the work site only. It was his argument that the test concerns the relationship between the complainant and the accused employee and its effect to the continued employment relationship, but not the place and time of the act constituting the misconduct. As to what constitutes gross disrespect or gross insubordination, the appellant argued that everything depends on the facts of a particular case. The appellant supported his position by citing rule 12(3) of the Employment and Labour Relations (Code of Good Practice), GN. 42 of 2007. Further, the appellant relied on a precedent from South Africa in the case of Mthuthuzeli George Ndwanya v. South Africa Local Government Bargaining Council & 2 Others where the Labour Court of South Africa held that the conduct of challenging a superior in front of other employees undermines the authority of the superior and constitutes the offence of insubordination. With regard to the second issue, the appellant argued that no law barred the appellant's employee, as the respondent's immediate supervisor, from querying his supervisee over work-related matters at a dining hall located away from the work site. The appellant was emphatic that the dining hall commonly used by the staff was a workplace in the circumstances of the case.

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The respondent on his side contended that when he was confronted by his supervisor, he did not disobey or disregard any order issued to him and on that basis, there was no insubordination at the material time. Referring to the appellant's Code of Conduct and Ethical Practices, the respondent claimed that the Code does not cover acts or conduct of employee during off-duty hours. While citing rule 12(1)(a) and (b) of the Code of Good Practice, GN. 42 (cited above), it was his submission that an employer must show that the rule the employee contravened regulates conduct relating to employment and that the rule is reasonable, clear, and unambiguous; that the employee was aware of it; that the rule has been applied constantly and that termination is an appropriate sanction for contravening it. Further, it was his argument that what an employee does off-duty is of no concern to his employer and that the employer has no right to institute any disciplinary proceedings against the employee unless the off-duty misconduct constitutes a criminal offence; or where the employee's behaviour involves gross dishonesty or corruption; or where the nature of such off-duty misconduct is to destroy the relationship of trust between the employer and the employee. Looking at what happened inside the dining hall, the respondent argued that the heated conversation he had with his supervisor fell short of what could have destroyed the working relationship between him and his employer, a relationship that had spanned over thirteen years.

On the applicability of the South African precedent relied upon by the appellant, the respondent argued that while the cited case involved on-duty misconduct, the instant case involves off-duty transgression and that the same was inapplicable to the present case. With regard to the second issue, the respondent argued that the dining hall was not a workplace and that it was wrong for the supervisor to confront the respondent at the hall querying him over work-related matters. It was his contention that a workplace is a place where a person works for a living or gain, thus the termination was unfair.

## Determination of Issues and Decision of the Court

When dealing with the first issue, the Court cited rule 12(1)(a) of the above-referred to Code of Conduct, and observed that a disciplinary offence must arise from violation of a rule or standard regulating an employee's conduct relating to his employment. This implies that there must always be a link between a misconduct and the employment relationship regulated by the rule or standard alleged to have been contravened. The Court added that, the Code as cited above, does not limit any of the enumerated disciplinary offences to acts that occur during working hours and at the work site only. Even though an employee's private life should be separated from his work life, there is a very thin line between the two. Thus, an employee's misconduct off-duty or outside the workplace may be a reason for termination under certain circumstances if it is likely to cause serious damage to the business of the employer. The Court referred to several decisions from South African courts in which it was held that an employer can exercise discipline over an employee for any misconduct committed off-duty or outside the workplace as long as there was a connection between his conduct and the employment relationship.

The Court held further that the respondent's conduct was calculated at challenging his superior in front of other employees and that it effectively undermined the supervisor's authority. The supervisor had a legitimate cause to find out why the respondent had neither taken proper measures nor reported the declining gas pressure issue to his immediate supervisor. However, the respondent, in response, unleashed a verbal defiance showing rudeness and extreme disrespect. The Court, therefore, held that, that conduct constituted gross insubordination, as found by the CMA, even though it was committed off-duty. The fact that the offence was perpetrated in the dining hall away from the usual workplace is of no consequence. Much as the act was committed in the presence of some of the appellant's staff and guests, evidently, there was a sufficient nexus between the respondent's conduct and the business of the appellant given that the respondent's act aimed at weakening his superior's authority. Consequently, the appeal was allowed and CMA's award was restored.

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