

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
AT MOSHI**

LABOUR REVISION NO. 19 OF 2019

(C/F Commission for Mediation and Arbitration of Moshi at Moshi in Labour Dispute
No. CMA/KLM/ARB/9/2109)

ARUSHA REGION EXPRESS SERVICES

COOPERATIVE SOCIETY LIMITED APPLICANT

VERSUS

DAVID ERNEST KALANDAI AND 34 OTHERSRESPONDENTS

8th July & 17th September, 2020.

RULING

MKAPA J:

The applicant aggrieved by the Award of the Commission for Mediation and Arbitration of Moshi (the Commission) in **Labour Dispute No. CMA/KLM/ARB/9/2019** delivered on 14th August, 2019 preferred this application seeking the Court to quash and set aside the said Award.

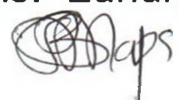
This application by way of chamber summons is supported by an affidavit of Ms. Shamim Maria Kora, applicant's board member and is brought under section 91 (1) (a), 91 (2) (b) and 94 (1) (b) (i) of the **Employment and Labour Relations Act** No. 6 of 2004 (ELRA) together with Rule 24 (1), (2) (a), (b), (c), (d), (f), (3) (a), (b), (c), (d) and 28 (1) (c), (d), (e) of the **Labour Court Rules**, GN No. 106 of 2007 (Labour Court Rules). The

respondents disputed the application through a counter affidavit filed by Mr. David Ernest Kalandai.

Brief facts of the matter which gave rise to the present application is the fact that, the respondents were employed by the Applicant to provide sanitation and cleaning services at Kilimanjaro International Airport after winning a two years tender from the Kilimanjaro Airports Development Company (KADCO). It is alleged that initially the respondents were employed by the applicant for a two years contract term. Later on the contract was changed into monthly extended contract.

It is alleged further that, on 31st October, 2018 applicant's contract was terminated without notice which resulted into applicant's loss of business consequently, the respondents were automatically terminated and M/S Care Sanitation Company from Dar-Es-Salaam were awarded the tender. Aggrieved by the termination the respondents filed complaint at the Commission which decided in their favour by awarding each respondent one month salary as compensation, one month salary in lieu of notice, one month salary leave compensation and severance. Aggrieved, the applicant preferred this application.

On the date when this application was set for hearing parties consented the application be argued by filing written submissions. The applicant was represented by Ms. Zuhura



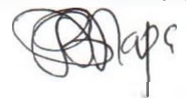
Twalibu learned advocate while the respondents were jointly represented by Mr. Lucas Nyagawa, also learned advocate.

Arguing in support of the application Ms. Twalibu submitted that there were valid and fair reasons for the respondent's termination which was occasioned by the applicant's loss of business profession following applicant's failure to win a tender for another term without notice. To support her argument Ms Twalibu cited **Rule 5 (1) (2) of the Employment and Labour Relations (Code of Good Practice)** GN No. 42 of 2007 (the Code) which provides that;

"5 (1) the contract of employment may be terminated automatically in certain circumstances such as death or loss of profession of business or (sequestration) of the employer.

5 (2) subject to the sub rule (1) of the act, a person taking over the business in such circumstances, shall first consider the employment of the employees whose employment have been terminated as the result of the death or sequestration, before any other employees are hired."

It was Ms. Twalibu's further contention that applicant's business of cleaning and sanitation through a tender arrangement was awarded to M/S Care Sanitation of Dar -Es- Salaam without

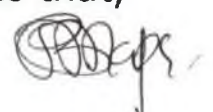


interim period to the applicant for handing over the business thus resulted into applicant's loss of business.

She went on explaining the fact that the applicant was facing financial constraints due to insolvency thus unable to pay the respondents their terminal dues. She finally prayed for this court to set aside the Commission's Award.

In reply Mr. Nyagawa submitted that the applicant claims to have been survived through tender contract with a third party (KADCO) on specific tasks is not revealed in the proceedings at the Commission hearing and had it been the case, the respondent's contracts would have been for a specified task hence Mr. Nyagawa considered the argument as an afterthought as it contradicts applicant's testimony at the Commission hearing where the applicant testified the fact that the respondents' contracts were for unspecified period of time.

Mr. Nyagawa contended further that **Rule 5 (1) and (2) of the Code** which the applicant had referred to is misplaced as the only reasons given by the Applicant is failure by the applicant to win tender and the same does not amount to loss of profession of business. Mr. Nyagawa went on arguing that there was no evidence of the applicant being sequestrated that led to automatic termination of the respondents' employment. He referred to **Rule 8 (2) (c) of the Code** which provides that;



"Where a contract is for an indefinite duration, the employer must have a fair reasons to terminate and follow a fair procedure"

Mr. Nyagawa finally submitted in relation to the above provision the fact that the applicant should have opted for retrenchment, failure of which renders the termination unfair as was decided by the Commission. He thus prayed for this application be dismissed. There was no rejoinder.

Having carefully considered both parties' submissions for and against the application the question for determination is whether the respondents were terminated fairly both procedurally and substantively. It has been alleged by the applicant the fact that respondents' employment was terminated by the applicant without notice allegedly for the reasons of applicant's loss of profession business. It is also on record at page 16 of the Commission's typed proceeds the fact that, at the Commission's hearing the Commission did admit into evidence employment contract for unspecified period of time as Exhibit P1. I think it is opportune for me to point out in passing the provision of **Rule 8 (2) (c) of the Employment and Labour Relations (Code of Good Practice) GN No 42 of 2007** which provides that:

"Where a contract is for an indefinite duration, the employer must have a fair reason to terminate and **follow a fair**



procedure. [Emphasis mine]. In **Hotel Sultan Palace Zanzibar V. Daniel Laizer and another**, Civil Application No.104 of 2004 (unreported) also the Court had this to say:

"It is elementary that the employer and employee have to be guided by agreed terms governing employment. Otherwise it would be chaotic state of affair if employees or employers were left to freely do as they like regarding the employment in issue"

As mentioned earlier the reason for termination as averred by the applicant is loss of profession business resulted from termination of tender contract without a notice. Further that the applicant relied on the requirements of Rule 5 (1) (2) (supra) to the effect that "*contract of employment may be terminated automatically in certain circumstances such as.....loss of profession business*"

My perusal of the Commissions' records has revealed at page 2 of the Award the fact that, the Applicant was given a notice on the non-award of the tender on 20/8/2018 which implies the fact that the applicant had also tendered knowingly there was a possibility of losing the tender and that is what actually happened as the tender contract was terminated on 30/10/2018. Also it is settled the fact that, Tender is a process from the time of bid invitation to the time of tender award thus the applicant had all the time to prepare for the worst including issuance of notices and institution of fair termination procedures.




On the argument by the applicant that the termination was occasioned by loss of profession of business as per **Rule 5(1)** (supra), I found the argument misplaced and just an afterthought as the applicant continued to exist and functioning as a legal entirety.

In the circumstances, I am satisfied the fact that respondents termination was procedurally unfair hence, I have no ground to fault the Commissions' Award. Thus the Commission's Award is hereby upheld while the present application is dismissed accordingly.

It is so ordered.

Dated and delivered at Moshi this, 17th day of September, 2020




S.B. MKAPA
JUDGE
17/09/2020