IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

REVISION APPLICATION NO. 113 OF 2020

(Original CMA/ARS/ARB/221/2019)

THE HELENIC FOUNDATION OF TANZANIA t/a
ST. CONSTANTINE'S INTERNATIONAL S CHOOL ..... APPLICANT

Versus

JESSICA TEFFE ..... RESPONDENT

JUDGMENT

06/09/2021 & 08/11/2021

GWAE, J

Aggrieved by the arbitral award procured by the Commission for Mediation and Arbitration of Arusha at Arusha ("Commission") procured on the 3rd December 2020 in favour of the respondent, **Jessica Teffe**, the applicant, **The Hellenic Foundation of Tanzania t/a** has brought this application for revision under the provisions of section 91 (1) (a), (2) (a), (b) and (c) of the Employment and Labour Relations Act, No. 6 of 2004 (ELRA), Rules 24 (1), (2) (a), (b), (c), (d), (e), (f), (3) (a), (b), (c) and (d), 28 (1) (a), (c), (d) and (e) of the Labour Court Rules, GN No. 106 of 2007 (Rules), praying for the following Orders:

1. That, this court be pleased to call for the records of proceedings of Employment Cause No. CMA ARS/ARS/ 221/ 2019.
2. That, the court be pleased to set aside the above award so mentioned in paragraph 1 above
3. That, the court quashes the proceedings
4. Any other order/relief this court may deem just to grant.

A brief gist of the dispute between the parties as gathered from the Commission records is as follows; that, the respondent was employed by the applicant for a specific contract from 1st August 2018 ending on the 31st day July 2020, her monthly take home being $1628 USD. That, on the 16th June 2019, the respondent lodged a dispute in the Commission complaining to have been unfairly terminated from her employment by the applicant. She thus claimed to be paid a total of Tshs. 201,069,265/= being thirty-six (36) months' salary compensation, three months' salary pay in lieu of notice to terminate, severance pay, damage and certificate of service. That, However the applicant issued a certificate of service on the 26th June 2019

After hearing the parties dispute, the Commission concluded that, the respondent's termination was both substantively and procedurally

unfair. Invoking provisions of section 40 (1) of the ELRA, the arbitrator awarded the respondent 12 months' compensation being for the remaining period of her contract of employment to its lapse that is when it could automatically terminate. However, he declined awarding the respondent her claim on the payment of notice on the basis of the nature of the contract (specific contract) entered by the parties and in an observance of Rule 4 (3) of the Code of Good Practice Government Notice No. 42 of 2007 (Code) and claim on damages on the reason that the same was not pleaded nor was it proved. Feeling aggrieved by the arbitral award, the applicant challenged the award armed with the following grounds;

1. That, the Hon arbitrator erred in law and fact by entertaining a premature complaint
2. That, the Hon, arbitrator erred in law and fact by failing to acknowledge that the respondent never contested over the notice of termination of the employment contract with the applicant
3. That, the arbitrator erred in law and fact by not considering that, the applicant had reasons to terminate the employment contract by way of notice and hence the termination of employment contract was fair

4. That, the Commission failed to consider the fact that, the respondent accepted the sum of Tshs. 5,085,940/= as a consideration of the terminal benefits.
5. That, the arbitrator erred in law and fact by failing to analyze the evidence tendered by the applicant
6. That, Hon. Arbitrator erred in law and fact by wrongly admitting the exhibits.

On the 6th September 2021 when this application was called on for hearing, the applicant and respondent were duly represented by their respective advocates namely; Mr. Kampilipili Mgalula and Ms. Julian Mollel respectively.

Arguing for the application, Mr. Mgalula stated in respect of the 1st ground that, there was mutual agreement or negotiation for termination of the contract of employment reason being financial constraint which led the applicant to offer the Respondent an alternative job but she rejected it. Thus, she prematurely preferred the complaint on 16/06/2019 as she was still in her employment till 31/07/2019 as per notice of termination. In support of his argument, the counsel for the applicant cited a case of **Arusha Meru Secondary School vs. Francis and another**, Revision Application No. 33/2018 (unreported) at page 14 where the alleged

termination was found to be premature. He also argued that, reasons for termination were uncontested that is why she was given another job which she turned down.

Resisting this application, Ms. Juliana argued that, the respondent's termination was not prematurely referred to the Commission since she was availed with the letter of termination on the 19th June 2019 informing her that, her employment would end up on the 31st July 2019 without any reasons thereof. She further argued that, the issue of financial constraint was not disclosed nor was there mutual agreement between the parties except negotiation by the parties. The learned counsel for the respondent went on submitting that the applicant's proposal of new salary and position were ineffectual since the respondent refused to accept the same.

The respondent's learned counsel further submitted that, there was no evidence that the respondent was paid severance pay and that the Commission was wrong in computing purported monthly salary of the respondent. She also argued that, even if the applicant paid the respondent her severance pay that alone does not preclude her from claiming her arrears as she worked for more than 9 years. Finally, Ms.

Juliana prayed this court to be pleased to vary the award for the sake of justice for both parties.

In his brief rejoinder, Mr. Mgalula stated that, the respondent was paid her severance pay as revealed by DE3 exhibiting that, USD 2241 was paid in her favour as her terminal benefits including Severance pay which was excessively paid. He argued that, the accrual of action, according to GN 64/2007 Under Rule 10 (1) of the Rules, was on the date of termination or from the date the applicant made the decision to terminate whereas in the instant dispute the matter was prematurely referred to the Commission taking into account that, she was paid her July 2019 Salary. He further rejoined that, the reliance of salary by the Commission at the tune of Tshs. 900,000/=is capable of vitiating the award as rightly argued by the Respondent's counsel. Mr. Mgalula also stated that, the respondent's failure to file an application for revision to exhibit her grievances, she should therefore be presumed that, she has been satisfied with the award of the Commission.

This is what in a nutshell transpired before the Commission and this court, I shall herein under dwell into the applicant's grounds for the sought

revision as raised and argued by the parties' advocates during oral hearing of this application.

In the 1st ground, ***on whether, the Hon. arbitrator erred in law and fact by entertaining a premature complaint.***

As revealed by the Referral Form No. 1, that the respondent was terminated on the 16th June 2019 however the termination letter dated 19th June 2019 (PE1&DE1) indicates that the respondent's employment with the applicant would terminate effectively from 31st July 2019. However, I have carefully gone through the applicant's letter dated 3rd April 2019 (DE4) and the respondent's reply letter (DE5) relied by the applicant's counsel and noted that there was an offer and acceptance of the alternative job, salary being Tshs. 900,000/= but there was no any other document exhibiting conclusion of that new contract of employment between the parties as the applicant's letter dated 23rd May 2019 visibly demonstrates that, the intended contract was yet to be accomplished. For the sake of clarity, parts of the said letter is reproduced;

> "I will be sending you your 2019-2020 employment contract with a driver today. Please pick up from Sally.

> Please read it carefully and sign both copies with your witness
> Then return both copies to me for the Headmaster to sign. I will issue you with your copy once signed by both parties".

According to the above quoted words written by the applicant, in absence of any subsequent contract of employment duly signed by the parties replacing the former contract, the proposed new contract cannot therefore prevail. In our instant dispute, none of the parties' witnesses who had been able to produce any contract of the employment subsequent to the letter dated 23rd May 2019.

In the absence of the later contract of employment save the former contract (PE1& DE1), it therefore clearly sounds to me that the respondent did not accept the offered job/ alternative job offered by the applicant. She was therefore not responsible for the non-performance as provided for under section 38 (1) of the Law of Contract, Cap 345 Revised. Edition, 2019 which reads;

> "38 (1) Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for

non-performance, nor does he thereby lose his rights under the contract".

According to the above quoted statutory words, it is plainly envisaged that, a promisee shall have no contractual obligation for the offer which he or she has not accepted as the case here where no evidence of acceptance of the offer by the respondent. This position of the law was stressed in the case of **Khaisa Enterprises Ltd v. Principal Secretary Ministry of Defence International service and another,** Civil Appeal No. 9 of 2016 (unreported) where Court of Appeal of Tanzania held;

> "What is apparent from what was pleaded by the appellant and above quoted paragraph of the plaint is the fact that the offer extended to the appellant by the Eurocopter, through the appellant, was not accepted by the 1st respondent. As such, as it was held by the learned judge, there was no valid contract formulated between them. In the circumstance..."

According to the above precedent and our dispute, a mere invitation to treat or mere correspondences cannot be treated as a complete formulated contract in the eye of the law. That being the case, I am not therefore in agreement with the leaned counsel for the applicant who persistently suggested that the respondent prematurely lodged his complaint in the Commission on the

16th June 2019 since her contract of employment would terminate on the 31st July 2019 as per termination letter dated 19th June 2019 (PE1&DE1). I am saying so simply because;

i. Exhibit D4 and D5 clearly show that, the respondent's contract of employment commencing from 1st August 2018 and ending on the 31st July 2020 was constructively threatened to be prematurely terminated without even disclosure of reason thereof.
ii. The letter of termination dated 19th day of June 2019 was a formal one however constructive termination started since March 2019.
iii. The letter of termination as per (ii) above was issued after the respondent had already referred his dispute to the Commission

In the light of the above findings, I therefore find the arbitrator was justified to hold that, the parties' letters (DE4 &D E5) were not the parties' mutual termination. The 1st ground for the revision is therefore determined not in affirmative.

As to the 2nd ground which reads, ***that, the Hon, arbitrator erred in law and fact by failing to acknowledge that the respondent never contested over the notice of termination of the employment contract with the applicant.***

From the outset, it is clear as admitted by the respondent that the notice to terminate was in the exhibit D2 nevertheless as explained in the 1st ground that, the constructive termination of the respondent's employment had started since March 2019 that is prior to the applicant's issuance of the termination letter which includes notice though not in conformity with clause 33 of the contract since the notice to terminate the contract was of three (3) months' notice as stipulated in the contract of employment. The 2nd ground also lacks merit and it therefore dismissed.

> *Now, to the 3rd ground,* ***that, the arbitrator erred in law and fact by not considering that, the applicant had reasons to terminate the employment contract by way of notice and hence the termination of employment contract was fair.***

~~Though the applicant's counsel had determinedly argued that the~~ applicant had valid reasons for the termination namely; financial constraint and that, there were negotiations that, were undergoing. I am of the view as that of the arbitrator and as correctly submitted by the respondent's advocate that, in the communication letters aforementioned (DE4 &DE5) there is no mentioning of any reason of the termination as required by the ELRA under section 37 (1) & (2) of the ELRA. As duty is imposed to an employer to prove that the reason for the termination that the reason for

termination was valid and since in our case, there is no scintilla of evidence to prove that the reason for the termination was made clearly known to the respondent (See the precedent in **Mussa Andrea Mtunga vs. Tanzania Electric Supply Company Ltd (TANSECO),** Labour Division Case Digest No. 77 of 2015, Revision No. 6 of 2015, 10/06/15). This ground is thus negatively detrmined.

Coming to the 4th ground that, the Commission failed to consider the fact that, the respondent accepted the sum of Tshs. 5,085,940/= as a consideration of the terminal benefits.

Having considered the parties' arguments and reasons thereof, I am of the view that, taking or receipt of terminal benefits by an employee immediately after a termination of his or her employment does not, in law, preclude such employee from subsequently instituting a complaint to the Commission or any appropriate authority provided that, he or she considers that, his or her termination of the employment by an employer was unfair. It is, so simply because an employee may either be properly paid his or her terminal benefits but he or she might be unfairly terminated or fairly terminated but inadequately paid his terminal benefits. I would like to bolster my finding to the judicial precedent in the case of **Jane Chabruma**

vs. National Microfinance Bank, Labour Division Case Digest No. 63 of 2011-2012, Rev. No. 159 of 2010, 05/09/2011, where the late Regina Rweyemamu, J. held;

> "I however confirm the arbitrator's decision that Jane was entitled to rights provided under section 41 which falls under Subpart F of the Act and prescribes for rights pertaining to other incidents of employment termination. In my view, the import of section **41 (7) of the Act is to stress that receipt of terminal benefits specified under the section does not act as estoppels to claims of unfair terminations** (Emphasis supplied)".

In our case it is not in dispute that, the respondent received Tshs. 5,085,940/= as her terminal benefits, thus, the respondent's receipt of her terminal benefits offered by the applicant did not legally impede her from complaining to the Commission if she felt aggrieved by such decision. Therefore, this ground is equally dismissed tsking into consideration of wrong computation basis applied by the Commission

As the issue of complained wrong receiving of exhibits was raised but not argued at all, I would see that no reason to be detained by this ground however I would hold that there is clear procedure or practice in receiving documents for evidential value. Therefore, for the purpose of

judicial consistencies, the arbitrators are urged to procedurally admit documents so tendered including receiving original documents or certified therefore instead of marking documents annexed to the parties' opening statements as admitted documents.

> Lastly, ***in the issue of whether the arbitrator properly evaluated evidence before him, whether he was justified to base his computation for the salary at the tune of Tshs. 900,000/=or $ 1628 USD and whether this court can interfere the Commission's basis for compensation without respondent's application for revision***

According to the testimony of the respondent, the contract of her employment for 2018-2020 was still existing and as determined herein above, the proposed or purporting new contract between the parties was plainly not concluded. Thus, it should not form the basis for computation of the award of the CMA in favour of the respondent. Had the arbitrator been consistent and mindful of his correct holding that, one's appreciation of an offer cannot be equated with an acceptance, he could not have used Tshs. 900,000/= proposed new monthly salary pursuant to the offered new contract of employment as basis of his computation. (See paragraph one pf page 3 of the CMA's typed proceeding).

In the 2nd part of this ground, if the court can interfere with the arbitrator's finding while the respondent did not file an application for revision of the award to challenge it. Generally, in civil litigation whenever a party is aggrieved by a decision or order, such party may file an appeal or an application for revision and if both parties are aggrieved, both parties should exhibit their grievance in same manner. In our case, the respondent had not preferred an application for revision except in her counter affidavit as manifestly depicted in the paragraph 8(1) of her counter affidavit. This kind of pleading is equated to a cross appeal.

Moreover, the error committed by the Commission is so apparent to the extent that this court is justified in invoking provisions of Section 91 of ELRA and Rule 28 the Rules, 2007. The validity of the arbitrator's basis of his computation in the salary of Tshs. 900,000/= is highly questionable since it goes to the root of the case and above all, the arbitrator's finding does not support that, the applicant's assertion that, the respondent was in new contract immediately before the termination of his contract. He should not therefore base his calculations in respect of his award in favour of the respondent based on the proposed new contract which was not concluded.

This position was rightly emphasized by this court in **Rock City Tours vs. Andy Nurray**, Revision Application No. 63 of 2013 (unreported) when dealing with an issue as whether the court could legitimately revise the subsequent proceedings, award, where the question of validity of the contract involved was not part of the issue framed and decided, it was held;

> "My understanding of the law and procedure is that this court has powers to revise a CMA award following an application or issue or suo motto and it has powers to do so where it is of the opinion, that sec. 91 (2) (A) (B) (C) of the ELRA read together with Rules 28 of the Labour Court Rules, ...
> The court went on holding that the question of validity of the contract can be inquired into at any stage of proceedings, including at the revision stage because it goes to the root of the case."

Since this Court has found that there were no any valid reasons for terminating the respondent's employment, who had served the applicant since in the year 2012 till 2019 and being mindful of the universally acceptable legal concept that right to work is a right that cannot be taken away from an individual, unless there are valid reasons for doing so and

fair procedures are followed. Consequently, this Court makes the following orders;

1. That, the arbitral award is partly upheld and partly quashed and set aside
2. That, the respondent shall be paid her compensation for the remaining period that is 12 months based on her salary minus the terminal benefits paid to the respondent (**12 x *$ 1628 USD-Tshs.5,085,940/=***
3. That, each party shall bear its costs

It is so ordered.

M. R. GWAE
JUDGE
08/11/2021

Court: Right of appeal to the Court of Appeal fully explained

M. R. GWAE
JUDGE
08/11/2021