IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION APPLICATION NO. 69 OF 2021

(Arising from labour dispute No. CMA/ARS/ARS/97/20/56/20)

DARAM SINGH HANSPAUL AND SONS LTD.....APPLICANT

VERSUS

OSWALD CHRISTOPHER CHARLES.....1ST RESPONDET

OSCAR PAUL HILLARY.....2ND RESPONDENT

JUDGMENT

28/04/2022 & 16/06/2022

KAMUZORA, J.

This application was brought under the provision of sections 91(l)(a) (b) and (2)(a)(b)(c), 94(l)(b)(i) of the Employment and Labour Relations Act and Rule 24(l) 24 (2)(a)(b)(c)(d)(e)(f), 24(3)(a)(b)(c)(d), 28(l)(c)(d)(e) of the Labour Court Rules. The Applicant in this application is seeking for the revision of the proceedings of the Commission for Mediation and Arbitration (CMA) in Labour dispute No. CMA/ARS/ARS/97/20/56/20 and ruling thereto dated 01/07/2021.

The brief background of the matter as may be depicted from CMA record is such that, the Respondents sued the Applicant at the CMA claiming of the unfair termination of their employment contract. The Applicant adduced the reasons for the termination of the Respondents' employment contract at the CMA to be incapacity and poor performance and that there was a mutual agreement to terminate the employment contract (Exhibit D3). It was also stated that, the Respondents were paid their terminal benefits as per exhibit D4.

The Respondents on the other hand stated that they were terminated from their employment contract which was a fixed term contract for the reasons of poor performance as per exhibit P1 and P2 (termination letters) and stated that what they were paid is their salaries to the whole time they were in service with the Applicant.

The CMA after hearing the evidence tendered by both sides issued its award to the effect that, there was no valid reasons for termination and that the procedure for termination was not followed by the Applicant. That, since the Respondents were paid their terminal benefits then they were only entitled to be paid with the compensation for the remaining period of their contract.

Aggrieved by the CMA award, the Applicant preferred this revision application on the following grounds:

1. *That, the award does not reflect the Applicant's closing arguments.*
2. *The learned arbitrator disregarded the mutual agreement between the parties that terminated the Respondent's employment contract without any legal justification.*
3. *The award is not compatible with CMA F1 and the evidence adduced by the parties. None of the Respondents claimed to had reasonable expectation of renewal of his contract nor led evidence to that effect during the hearing of labour dispute No. CMA/ARS/ARS/97/20/56/20.*
4. *The learned arbitrator gravely misapprehended the evidence before him which was to the effect that the Respondents were not terminated by the Applicant as alleged in the CMA F1.*

Hearing of the revision application was by way of written submissions and as a matter of legal representation, the Applicant was ably represented by Mr. Rodgers Godfrey Mlacha, learned advocate while the Respondents enjoyed the service of Mr. Kapimpiti Mgalula also an advocate.

Arguing in support of the application, Mr. Mlacha submitted for the 1st ground that, Rule 27(3) of the Labour Institution (Mediation and Arbitration Guidelines) Rules, 2007 provides for the necessary contents of the award which are summary of the parties' evidence and

arguments. That, the CMA award does not contain the summary of the Applicant's closing argument and if the CMA decided to reject the Applicant arguments it had to give the reasons for the same but the same was not done. In support of this he cited the case of **Tanzania Breweries Limited v Anthony Nyingi**, 2016 TLS LR 99.

Regarding the 2nd ground Mr. Mlacha argued that, the termination of employment by mutual agreement is a category of lawful termination of employment under the common law which is accepted by our laws, that is, Rule 3(1) and (2) of the Employment and Labour relations (Code of Good Practice) Rules 2007. That, exhibit D3 is a mutual agreement to terminate the Respondent's contract and that no any question was put to DW1 regarding the said contract which implies the acceptance of the truth of witness evidence as per the case of **Bomu Mohamedi v. Hasani Amiri,** Civil Appeal No 99/2018 CAT (Unreported). The counsel for the Applicant claimed that, the arbitrator wrongly dismissed exhibit D3 with the claim that no minute of the consultation meeting to show how parties ended up executing the said contract. In support of the argument, he cited the case of **Mariam E. Maro v. Bank of Tanzania,** Civil Appeal No. 22/2017 CAT (Unreported), **Abualy Alibhai Azizi v Bhatia Brothers Ltd** [2000] TLR 228

Arguing for the 3rd ground of revision Mr. Mlacha submitted that, the CMA F1 is a pleading and the CMA cannot maintain a case not set out in the CMA F1. To cement on that issue he cited the case of **Barclays Bank (T) Ltd v Jacob Muro**, Civil Appeal No 357/2019 CAT (Unreported). He explained that, the CMA F1 indicated the date of termination to be on 11/02/2020 while during hearing, the Respondents tendered exhibits P1 and P2, the notice which indicated that their employment contract with the Applicant was to end on 11/03/2020 and was not a termination letter. That, according to the exhibits tendered the date of termination is 11/03/2020 hence the Respondents prematurely filed a claim before even they were actually being terminated by the Applicant. Hence the CMA award is not compatible with the CMA F1 and the evidence adduced by the parties.

Regarding the 4th ground Mr. Mlacha submitted that, the Arbitrator misapprehended the evidence which is to the effect that the Respondents were not terminated by the Applicant as alleged in the CMA F1. That, the Respondents were terminated by mutual agreement between the parties which was a lawful termination of employment under our laws. He added that, the award by the CMA that the Respondents were terminated on 11/02/2020 is not backed up with the

Respondents' own testimonies when cross-examined. That, the arbitrator in his award ignored exhibits D3 and D4 which shows that the Respondents were paid their terminal benefits and wrongly computed the compensation awarded to the Respondents. That, the 2nd Respondent was awarded 5,304,400 as compensation for 10 months and 19 days. That, since the 2nd Respondent signed a 1year contract and the 2nd Respondent continued to work after the expiry of the said contract the contract was renewed by default as it was supposed to end on 31/12/2021. That, since the 2nd Respondent alleged to have been terminated on 11/2/2020 there remained only 10 months and 17 days since the month of February had 28 days and thus the award of 10months and 19 days was wrong.

Regarding the 1st Respondent he argued that, the Respondent had 7months contract which continued by default as it started from 1/11/2020 and was supposed to end on 21/5/2021. That, in counting, the remaining months is only 3 and not 7 as what the award suggests.

Basing on the submission the Applicant's counsel prayed for this court to find merit in the application and grant the same.

Responding to the 1st ground Mr. Kapimpiti submitted that, Rule 27(3) of the Labour Institution (Mediation and Arbitration) Rules, 2007

GN No. 64 does say anything about the summarization of the Applicants closing submission hence it was wrongly misconceived and the rule was not violated.

That the parties' evidence was recorded by the arbitrator and at page 1, 2, 3 and 4 on the last paragraph, the Applicant's evidence was recorded. That, the final submission of the Applicant was also considered and referred to at page 6, 7 of the award. In support of the issue he cited the case of **Titus Mwita Matinde Vs. Daniel J. Singolile**, Misc. Civil Application No. 3 of 2022. Regarding the case of **Tanzania Breweries Limited** (Supra) cited by the counsel for the Applicant, the Respondents' counsel distinguished it from this case on account that the arbitrator never excluded in the award the Applicant's submissions.

Replying to the 2nd ground Mr. Kapimpiti argued that, in order for the termination to be genuine an employer must have a reason for termination and needs to follow proper procedure/steps to terminate the employer. That, as per the evidence of DW1 it is clear that the reason for termination is poor performance. That, regarding the claim that there was a mutual agreement to terminate the employment contract as per annexure D1 he stated that, there was no such mutual agreement as

the agreement was one sided and that the wordings of the said agreement purported that there was no any mutual consent and the said agreement was witnessed by DW3 who had conflict of interest. He added that, even the reasons for termination of employment were not communicated to the Respondents in the said agreement. That, as per section 37(2) of the Employment and Labour Relation Act, the law requires that there must be valid reasons for termination of employment.

The counsel for the Respondent further submitted that, if there was a mutual contract to terminate the Respondents' employment contract why the Applicant again issued a termination letter stating the last date of employment to be on 07/03/2020. That, the issue of poor performance is elaborated under Rule 17 and 18 of the Employment and Labour Relation (Code of Good Practice) GN. No. 42/2007 which give criteria to be considered by the court and the guidance of the employers before terminating their employee. That, DW1 failed to tender even a single document justifying that the Respondents were under performing their work, neither was the Respondents served with a warning letter justifying that they were under performing. On the cases cited by the

Applicant he submitted that, they are distinguishable as there was no any mutual consent agreement between the parties.

Responding to ground No.3 Mr. Kapimpiti argued that, CMA F1 is not a pleading as the term pleading is defined under Order VI rule 1 of the Civil Procedure Code Cap 33 R. E 2019 and the case of Barclays Bank is distinguishable as it is a civil appeal which had nothing to do with a labour issue. That, as clearly seen in the CMA F 1 the Respondent claimed for unfair termination for failure to comply with the termination procedure and the award itself suggests the dispute was for unfair termination. That, what was claimed under the CMA F1 is what was issued in the award and the CMA did not go out of the agreed issues.

Regarding the date of termination, he replied that, exhibit P1 and P2 was issued on 11/2/2020 while exhibit D4 the petty cash is dated 13/2/2020 the date when the Respondents were paid their terminal benefits and they were not allowed to work again.

Replying to the 4th ground Mr. Kapimpiti submitted that, the Applicant was given a chance of being heard and DW1 stated the reasons for termination to be "utendaji kazi mbovu" meaning poor working performance. That, after analysis the arbitrator found that the procedure for termination was not followed. Basing of the above

submission the Respondents prays that the application to be dismissed with costs.

In a rejoinder submission the Applicant's counsel submitted that, Rule 27(3) (d) of Mediation and Arbitration Guidelines was not complied as the award does not contain the summary of the Applicant's written argument, that the rejection of the same must set out reasons for rejecting. That, the statement in the award that the parties closing arguments were considered cannot by any stretch of imagination be demonstrate that the parties' arguments were considered and that no reasons for rejection of the same was stated.

On the 2nd ground he added that, the Respondent's contract was fixed term contract and that none of them had a reasonable expectation of the renewal of the contract and that at the time of the alleged contract the Respondents were serving their default contract. Reference was made to section 36 of the Employment and Labour Relations Act and the case of **Asanterabi Mkonyi v Tanesco**, Civil Appeal No53/2019 CAT (Unreported). The counsel was of the view that, since the agreements terminating the Respondent's employment was tendered in court unobjected then, the Respondent submission that there was no mutual agreement is an afterthought.

Regarding the issue of conflict of interest, he submitted that the same does not arise and cannot affect the validity of the agreements. That, some of the clause in the agreements may look onerous but can not take away the fact that the Respondents freely signed the agreement and it is not for the court to question the clause in the agreement.

Regarding the 3rd ground he re-joined that, the CMA F 1 is a pleading hence the case of **Barclays Bank (T) Limited** is applicable in this matter and the relevant fact is the admission by the counsel for the Respondents that the Respondents were paid their terminal benefits.

Regarding the 4th ground he agrees that parties were given their rights to be heard but he does not agree that the Applicant failed to prove mutual consent to terminate the Respondent employment contract. That, exhibit D3 was executed at the instance and upon the Respondents being given notice of termination (exhibits P1 and P2). That, there is no any submission by the Respondents' counsel that the terminal benefits were given to the Respondents as per exhibit D4 were taken into consideration by the arbitrator when calculating the compensation awarded to the Respondents. The Applicant thus prays for the application to be granted.

From the analysis of the records, application and submissions for and against the application, there is no dispute that the Respondents were employee of the Applicant working under a fixed term contract for a period of seven months for the 1st Respondent and one year for the 2nd Respondent.

The first ground for revision is centred on the argument that the award does not reflect the Applicants closing submission the act which the Applicant claim that it violated the provision of Rule 27(3) of the Labour Institution (Mediation and Arbitration Guidelines) Rules, 2007 which requires the award to contain the summary of the parties' evidence and arguments. Reading the CMA award, it is with no dispute that the arbitrator did consider the evidence of both parties and did reproduce a summary of the arguments by the parties, the closing submission of the parties was stated to have been considered by the CMA in reaching its decision. This is so reflected from page 1 to 4 of the CMA award. The CMA clearly started that it took into consideration the closing submissions b the parties. I think the Applicant expected the said submissions to be reproduced in the award. That in fact not mandatory because closing submissions are not evidence rather analysis and suggestion of what each party think is a proper position to be adopted

by the CMA/court. Having considered was submitted by the parties, the evidence in record and relevant laws, the CMA made its decision as reflected from page 4 to 9 of the award. That being the case I find no merit in the first ground of appeal.

The 2nd ground is based on the issue as whether the arbitrator disregarded the mutual agreements between the parties. The record of the CMA revels that the Respondents claimed unfair termination based on poor performance. While DW1 was adducing his evidence he stated that the there was no any unfair termination as the Respondents' termination was by mutual agreement between the two sides as per exhibit D3.

As per exhibit D1 and D2, the Respondents signed fixed term employment contracts in which the 1st Respondent signed a seven months contract starting from 1st April 2019 to 31st October 2019 and the 2nd Respondent signed a one-year contract starting from 02/01/2020 to 31/12/2020. Both contracts have the provision for renewal on the employer's option. As shown in exhibit D3, it seems that both Respondents signed an agreement with the Applicant to terminate their contract on 11/02/2020. The said agreement was entered after the lapse of the period of the 1st Respondent's contract. This suggest that

there was an automatic renewal of the 1st Respondent's contract which ended in 31st October 2019 adding other seven months which to end by 31st May 2020.

It is also in records that the Respondents were issued with termination letters on 11/02/2020 starting the reason for termination as under performance and their employment was to end by March 2020. Having the two documents; the one referred to as mutual agreement and termination on reason of underperformance, it becomes obvious that there was contradiction as to whether there was mutual agreement to terminate the contract or the contracts were terminated merely because the Respondents underperformed. In my view, the CMA was right to state that the Respondents' contracts were terminated. I say so because, there cannot be mutual agreement where there is allegation of underperformance. There are clear procedures for termination where there is a claim of underperformance but, where the employment contract is a fixed term contract specified under Section 14(1)(b) of the Employment and Labour Relations Act No. 6/2004, the applicable provisions are Section 36 (a) (iii) of the Employment and Labour Relations Act, No. 6/2004 read together with Rule 4(4) of GN 42/2007. This was also so held in the case of **Mtambua Shamte & 64 others**

Vs. Care Sanitation and Suppliers, Rev. No. 154/2010 at Dar es Salaam, the Court held that:

> *"...the principles of unfair termination do not apply to specific tasks or fixed term contracts which come to an end on the specified time or completion of a specific task. Under specific tasks or fixed term, the applicable principles apply under conditions specified under Section 36 (a) (Hi) o f the Employment and Labour Relations Act, No. 6/2004 read together with Rule 4(4) o f GN 42/2007."*

As the present matter fall under breach of contract, there was need to determine if the Respondents proved the alleged breach as the law requires the one alleging the breach to prove such fact. The records shows that the Respondents submitted termination letters exhibit P1 and P2 showing that their employment was terminated before the time specified on account of underperformance. Since there was allegation of underperformance, the Applicant was responsible to show how the Respondents underperformed. As there was contradiction as to the two letters issued by the same Applicant, the CMA rightly found the breach by the Applicant. The breach of the employment contract was held in the cases of **Benda Kasanda Ndassi Vs. Makafuli Motors Ltd**, Rev. No. 25/2011 HC Labour Division DSM (unreported), and **Hotel Sultan**

Palace Zanzibar Vs. Daniel Laizer & Another, Civil. Appl. No. 104 of 2004, where it was held that: -

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

From the records and the contradiction pointed out above, it is my settled mind that the CMA correctly disregarded the so-called mutual agreement and correctly found that that there was breach of employment contract. I therefore find no merit on the 2nd ground of revision.

On the 3rd ground of revision, it is the claim by the Applicant that the award is not compatible with CMA F1. The Applicant claims that none of the Respondents had a reasonable expectation of the renewal of contract and that no evidence was issued for the same.

This court is aware that CMA F1 is not just a sample but a pleading and all reliefs must come from the said form and that it forms part of the courts record. The Applicants claim has to be pleaded in the referral form and the CMA has to make decision on what has been pleaded under the CMA F1. See the cases of, **Mantra Tanzania Limited Vs. Joaquim Bonaventure,** Civil Appeal No 145/2018 CAT at Dar es

Salaam (Unreported) and **Bosco Stephen V Ng'amba Secondary School,** Revision No. 38 of 2017.

Reading the CMA F1 on the part of nature of the dispute, the Respondents did tick on both termination of employment and breach of contract. It is also without dispute amongst both sided as evidenced by exhibits D1 and D2 the Respondents were employed by the Applicant on a fixed term contract. Although the Respondents pleaded two claims, the CMA was satisfied that what was proved before it was breach of employment contract and ordered for compensation of the remained period of the contract. Section 4(2) (3) of the Employment and Labour Relations (Code of Good practice) GN. No 42 of 2007 provides that,

> "*(2) Where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise.*
> *(3) Subject to sub-rule (2), a fixed term contract* ***may be renewed by default if an employee continues to work after the expiry of the fixed term contract and circumstances warrants it."***
> (Emphasis mine)

Thus, being the fixed term contract, it becomes obvious that the claim for breach could stand. The above quoted provision of law clearly provides for the automatic renewal for a fixed term contract by default. The evidence available at the CMA records, that is, Exhibits P1, P2, D3

and D4 in one way or the other supports the allegation that the 1st Respondent's employment contract renewed by default after the lapse of the former contract that existed between them. However, the 2nd Respondent's contract was still valid by the time of the termination.

The claim by the Applicant that there was no any expectation of the renewal of the contract is unsupported as even the evidence tendered at the CMA proves that the parties renewed the contract by default. As prior explained, the matter at hand fall on the fixed term contract and that being the case, the parties were to be guided by their contract. The records show that, while the 2nd Respondent's contract was still valid, the 1st Respondent's contract came to an end and he continued working meaning that there was expectation that his contract was renewed or was to be renewed. Therefore, the claim that the award is not compatible with the CMA F1 is with no any legal basis.

Reverting to the last ground that the Respondent was not terminated by the Applicant as alleged in the CMA F1. This point won't detain me much. Reading the evidence tendered at the CMA it is the evidence by the Respondent through Exhibits P1 and P2 that on 11/2/2020 they were issued with a notice of termination of employment and it is the evidence of PW1 and PW2 while cross examined that on

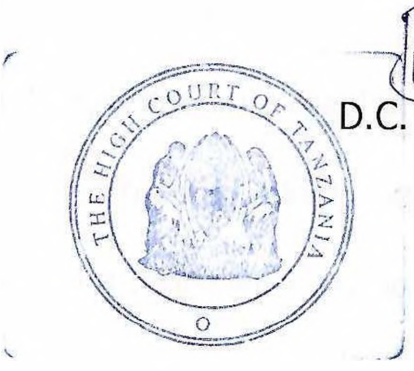
that same date they were required to leave the office. Again, reading exhibit D4 as tendered by the Applicant at the CMA it evidences that on 13/02/2020 the Respondents were paid their terminal benefits. All these are clear proof that the Respondents were terminated on 11/2/2020 and paid their terminal benefits on 13/2/2020. But since they possessed a fixed term contract, the termination amounted to breach of contract thus, the Respondents were entitled to the payment of the compensation of the remained period of contract.

From the above arguments and reasons there to, I find no reason strong enough to make this court temper with the decision by the CMA that the Respondents' contracts were unreasonably terminated before time thus amounting to breach of employment contracts. I agree with the CMA findings that since the Respondents worked for a fixed term contract, the proper remedy was to compensate them for the remaining period of their contract. I however agree with the counsel for the Applicant that, since the records shows that the Respondents' contracts were to end by March 2020, their terminal benefits paid on February 2020 included the month of February. For the 1st Respondent who had a 7 months contract which continued by default from 1/11/2020 and was supposed to end on 31/5/2021, the remaining period was only 3 months

and not 7 months as the award suggests therefore, only the amount of Tshs. 1,224,000/= should be paid as compensation to the 1st Respondent. For the 2nd Respondent whose contract was to end by December 2020, the remained period was 10 months thus, the total amount of 5,000,000/= was to be paid to the 2nd Respondent.

I therefore partly allow the application to the extent of the computation of the compensation which the Applicant is liable to pay to the Respondents. Considering the nature of this case, I make no order as to costs.

DATED at **ARUSHA,** this 16th day of June 2022.



D.C. KAMUZORA

JUDGE