IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA
LABOUR REVISION NO. 62 OF 2020.

(Application from the decision of CMA Shinyanga in CMA/SHY/159/2020, Dated the 13th day of November,2020)

LAKIMALILI CONSTRUCTION LIMITED..... APPLICANT

VERSUS

1.HEZEKIA MATHAYO.....1ST RESPONDENT

2.LEONARD JOHN MAYUNGA.....2ND RESPONDENT

3.ESTA LUKAS DOTTO.....3RD RESPONDENT

4.PETER BUNDALA NYASHA.....4TH RESPONDENT

5.DANIEL THIMOTH EZRA.....5TH RESPONDENT

6.JULIUS ZENGO GAMBESHI.....6TH RESPONDENT

JUDGEMENT

20th June, 2022 & 15th August, 2022

A. MATUMA, J.;

This labour application has been filed by the Applicant by way of chamber summons as well as Notice of application in terms of the provisions of sections 91(1)(a)(b), (2)(a)(b)(c) and 94(1)(b)(i) of the Employment and Labour Relations Act, Cap 366 R.E 2019 read together with Rules 24(1), (2), (3) and (11), Rule 28(1)(a)(b)(c)(d) and (e) of the Labour Court Rules,G.N. No. 106 of 2007. The application is supported by an affidavit sworn on 24th December, 2020 by Pharles Focas Malengo, Learned Advocate for the Applicant.

The application is seeking an order revising the CMA award entered in favour of the respondents on the 13th November, 2020 (CMA/ SHY/159/2020) by Massay A, who was the arbitrator to the same. The respondents as herein above named are; Hezekia Mathayo, Leonard John Mayunga, Esta Lukas Dotto, Peter Bundala Nyasha, Daniel Thimoth Ezra and Julius Zengo Gambeshi.

In a nut shell, the Respondents were employees of the Applicant in various positions and for a number of different years. Thus for instance the 1st respondent Hezekia Mathayo worked with the Applicant for three years, the 2nd respondent Leonard John Mayunga (three years and eight months), the third respondent Esta Lukas Dotto (eight years), the fourth respondent Peter Bundala Nyasha for almost sixteen years as he was employed by the Applicant since 2005 when the Applicant was still using the names MAMCO before changing into Lakimalili, the fifth respondent Daniel Timoth Ezra for almost eight years and the sixth respondent Julius Zengo Gambeshi worked with the Applicant for five years. But at all times the Applicant was giving them contracts of service for a period of six months only. She used to renew such sixth months contracts from time to time after their expiry until on the 30th June, 2020 when the last sixth months contracts expired. Upon

such expiration of such last contracts the Applicant did not renew the same as it was used to be. Instead, she terminated the services of the respondents hence a dispute between them which resulted into the CMA dispute as stated above in which the Hon. Arbitrator determined that the six months' contracts were in themselves illegal because fixed terms contracts in law are reserved for those who are employed on professional and managerial cadre. The respondents who were just cleaners and Daniel Timoth who was a technician in the Applicant's area of work (plant at Mwadui Williamson Diamonds) did not qualify to be employed under fixed term contracts and thus their contracts were illegal. The arbitrator found as such relying on the provisions of section 14 (1) of the Employment and Labour Relations Act supra for the types of employment contracts known in law.

The learned arbitrator then determined that the respondents deserved contracts for unspecified period of time under section 14 (1) (a) of the ELRA supra which in accordance to regulation 11 of the Employment and Labour Relations (General Regulations), GN no. 47 of 2017 should not be less than twelve months.

In the circumstances, the learned Arbitrator concluded that the expiration of such six months contracts issued to the respondents should have not been relied by the Applicant to end the services of the respondents as such expiration was automatically unfair for they deserved no such contracts hence unfair termination. He then awarded the respondents terminal benefits such as twelve months remuneration to each, Tshs. 150,000/= in lieu of notice, Tshs. 150,000/= as leave pay, severance pay to the respondents at Tshs. 80,700/=, Tshs. 161,500/=, Tshs. 282,700/=, Tshs. 403,800/=, Tshs. 242,300/= and Tshs. 201,900/= respectively. It was further ordered that the Respondents be issued with Certificates of Service.

The Applicant's grievances to the arbitrator's award supra which was entered in favour of the respondents are coached in the following grounds/issues as per paragraph 7 of the Applicant's Affidavit;

(a) *Whether the employment contract between the Applicant and the Respondents are of six months hence void in the eyes of the law.*

(b) *Whether it was proper for the Arbitrator to hold that the Respondents were unfairly terminated.*

(c) *If the above issue is in the affirmative whether the reason for termination was based on coming to an end of six months contract*

and not frustration of the said contract brought by the eruption of Covid 19 Pandemic.

(d) *Whether the Respondents are entitled to notice pay despite conceding to be given two months' notice by the Applicant to the effect that on 30th June,2020 Williamson Diamonds Limited will close its mining operation due to eruption of Covid 19 Pandemic.*

(e) *Whether the 4th Respondent is entitled to Tshs 403,800/= as severance pay taking into account the fact that he was employed by the Applicant in 2012 the year when the Applicant was incorporated and his last salary was Tshs.150,000/= per month.*

(f) *Whether by considering the evidence on record the Applicant did not contest the grant of 12 months remuneration to the Respondents as held by Honourable Arbitrator.*

At the hearing of this Application, the Applicant was represented by Mr. Pharles Malengo Learned Advocate while the Respondents appeared in person without any legal representations.

Mr. Pharles Malengo learned advocate abandoned grounds (d) and (e) and argued grounds (a), (b), (c) and (f). He submitted that the employment contracts between the Applicant and the Respondents were of six months. They were fixed term contracts which automatically comes to an end on its expiry date. He cited the case of ***Serenity on the Lake Ltd***

v Dorcus Martin Nyanda, Civl Appeal No. 33 of 2018 (CAT) to the effect that; unfair termination of employment does not apply to employees whose employment contracts are less than six months. He further argued that the contracts below 12 years are legally recognized and thus it was wrong for the arbitrator to interpret such six months' contracts as illegal to constitute unfair termination. He also cited the case of ***Ibrahim s/o Mgunga and 3 others v African Muslim Agency, Civil Appeal No. 476 of 2020*** to the effect that; failure to renew a fixed term contract in the circumstances where the employee reasonably expected the renewal may be considered unfair termination but in the instant case the Respondents did not established their expectations for the renewal of their contracts which expired on 30/06/2020. He was of the arguments that there was no such expectation as the employer had issued the Respondents a one month notice prior to the expiry of their contracts. He made reference to Exhibit D2 titled **"Makubaliano ya marekebisho ya mkataba".** He further argued that despite of such notice, a fixed term contract needs no notice.

He further faulted the trial commission that the Arbitrator erred to rule out that there was unfair termination because the principle of unfair

termination does not apply to those who holds fixed term contracts like the Respondents herein.

The learned advocate finally faulted the findings of the trial arbitrator that it was wrong for him to rule out that the Applicant did not object the grant of 12 months remuneration to the Respondents because it is in evidence at page 5 of the trial proceedings that the Applicant testified that the Respondents were not terminated but their contracts came to an end. That with such evidence the Applicant contested all the prayers of the respondents because there was no unfair termination. He faulted the grant of severance pay because section 42 (3) of the Employment and Labour Relations Act provides that there is no severance pay to an employee whose contract is fixed and expired by reason of time and therefore according to him it was wrong to grant the Respondents 12 months remuneration because their contracts expired by reason of time. The learned advocated with such submissions prayed that I allow the application and revise the CMA Award and subsequently set aside the orders thereof.

Replying to the Applicant's submissions, the Respondents did not have much to say but adopted their joint counter affidavit. They further

added that there was no notice issued to them as contended by the learned advocate because the document relied by the learned advocate was not a notice. That they had legitimate expectations for the renewal of their contracts as it used to be for years and years. That the Applicant caused them to sign illegal contracts to deny them their lawful entitlements for the years they worked with her. They finally mentioned the period each worked with the Applicant as herein above stated. Finally they prayed for this Application to be dismissed.

In his rejoinder submission, Mr. Pharles Malengo learned advocate conceded that the Respondents worked with the Applicant for years and years. That the respondents' services depended on the contracts of service between the Applicant and Williamson Diamonds. That the Applicant could not renew the contracts of the Respondents because even herself did not get a renewal of contract with Williamson Diamonds.

I have carefully gone through the records of the trial Commission and taken into considerations the parties' submissions together with the cited cases.

Without chewing words, this Application is devoid of any merits and thus it deserves nothing but a complete dismissal. I am of the firm view

that the learned arbitrator rightly arrived to his decision. The trial commission's decision was just and fair in the circumstances of this case.

It is undisputed fact that the respondents worked with the Applicant for years and years as stated herein above. They were made to believe that they had permanent employment despite of being issued six months contracts which were renewed after each expiry. They were made not to find other jobs or other employment from other employers as the Applicant maintained them for years and years. In the circumstances the respondents had reasonable ground to believe that the last contracts would as well be renewed. Under the provisions of section 36 (a)(iii) of the Employment and Labour Relations Act supra, failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of the renewal is regarded as termination of employment and the employer may be held liable for unfair termination if he fails to renew a fixed term contract where there was a reasonable expectation for the renewal on the part of the employee. The arguments of the learned advocate for the Applicant that the renewal of contracts depended the Applicant's contract of service with Williamson Diamonds does not hold water. This is because the Respondents' contracts were not tied or subjected to a third party

contract between the Applicant and the alleged Williamson Diamonds. The Respondents were not party to such third party contract nor they were told in any of their contracts that their services would seize if the Applicant's contract with Williamson Diamonds seizes. If that was an important aspect to the Applicant it was open to her to make it plain in the respondents' contracts so that whoever would not be ready to work under such condition would trace another job to another employer. Shortly the contract between the Applicant and the said Williamson Diamonds was none of the businesses of the Respondents. They cannot be attached to it and thus cannot benefit or affected by the same under the doctrine of **Privity to Contract.**

The provisions of Rule 4(4) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, GN No.42 of 2007 are also very clear that;

> "*4. Subject to sub rule (3),* ***the failure to renew a fixed term contract in circumstances where the employee reasonably expects a renewal of the contract may be considered to be an unfair termination."***

That was as well held in the case of ***Ibrahim s/o Mgunga and 3 others v African Muslim Agency supra.***

In the instant case, the Respondents as I have said above had expectations that their fixed term contracts would be renewed after their expirations because it was the normal game between them and the Applicant for years and years. There was nothing according to the records at hand which seriously alerted the Respondents that this time, their fixed term contracts would not be renewed. Even the alleged exhibit D2 **"Makubaliano ya marekebisho ya mkataba..."** as rightly argued by the Respondents was not a notice for termination of their employments. It was an arbitrary order by the Applicant to reduce the working days and salaries of the Respondents with a forcing clause threatening the Respondents to sign it; ***"kama utaridhia makubaliano haya tafadhari weka saini yako hapa chini"*** meaning that whowever would not sign was in danger of being fired out. Good luck the respondents signed it. By signing it they maintained their contracts as such exhibit in its clear words states that the reducing of the number of working days and salaries per month would only be temporally; *"..... makubaliano yafuatayo... mwajiri (Lakimalili) ....na kila mfanyakazi atapaswa kuyatekeleza* ***ndani ya***

kipindi hiki cha mpito *ambacho kitaanza rasmi tarehe 01/05/2020.* It then concludes under agreement number 3 that;

> *"Wakati wowote uchumi wa dunia utakapoimarika kutokana na madhara ya janga hili (Corona) na kupelekea mteja wetu (WDL) kuanza uzalishaji, makubaliano haya yatakuwa ndo ukomo wake* ***na kila mfanyakazi ataendelea kufanya kazi kwa utaratibu wa kawaida wa mkataba wake wa awali"***

The respondents were thus maintained to their employments and not alerted that their contracts would come to an end on the 30/06/2020. Agreement number 6 and 7 insists that the agreements were made just temporarily and during such period still the respondents could work for more than the agreed days. Such exhibit was thus not a notice at all. It was making the respondents to believe that their contracts would continue as usual save for some changes during the hard times of Covid 19. In the circumstances, there was reasonable expectations on the party of the Respondents that their contracts would be renewed as usual and failure to do so the Applicant unfairly terminated them from service.

Even though, the learned arbitrator made a very good analysis on the types of contracts and whether the Respondents deserved fixed term

contracts. The respondents were not employed under professional duty or managerial cadre. They were normal staffs and therefore not in law entitled to be employed under fixed term contracts. They follows under the category of those who are to be employed for unspecified period of time whose minimum period is twelve months as stated supra.

Therefore the Applicant to subject them into a fixed term contract was illegal and was a clear violation of the law just to frustrate and deny the respondents their employment benefits and or terminal benefits when need arises as rightly argued and submitted by the 5th Respondent Mr. Daniel Thimoth Ezra. The learned arbitrator was thus right to hold that expirations of those contracts could have not been legally relied to terminate the services of the Respondents as they were in the circumstances of this case, illegal.

In regard to the complaints under paragraph 7 (f) of the Applicants Affidavit, I agree with the learned advocate for the Applicant that indeed the Applicant disputed each and every prayer by the Respondents including compensations of 12 months' remunerations by her evidence on record when tried to argue that there was no unfair termination. Despite of such a denial the respondents gave strong evidence to warrant them such

compensation as herein above analyzed because they ought in law to have been issued contracts for unspecified period of time.

All having said and done, this application is hereby dismissed in its entirety. Since the Applicant by employing the respondents had bad motive which instigated her to make some calculations violating the law by issuing six months contracts to each of the respondents just to deny them the legal benefits as I have said, I find that she and her representative acted in frivolous and vexatious manner. In that regard the Respondents are awarded against the Applicant costs of this case both the costs at the trial commission and in this Court. Right of Appeal is hereby explained to the parties.

It is so ordered.

A. MATUMA
JUDGE
15/08/2022

DATED at **SHINYANGA** this 15th day of August, 2022.

THE HIGH COURT OF TANZANIA

A. MATUMA
JUDGE
15/08/2022