IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION NO. 26 OF 2022

(Arising from Labour Dispute No.CMA/ ARS/ARS/312/20/202/20 at the Commission for Mediation and Arbitration at Arusha)

MWIBA HOLDINGS LIMITED.....APPLICANT

Vs

RAYMOND WANKYO MNIKO..... RESPONDENT

JUDGMENT

Date of last Order:19-10-2022

Date of Judgment:2-12-2022

B.K.PHILLIP,J

Aggrieved by the award made by the Commission for Mediation and Arbitration of Arusha at Arusha (" CMA"), the applicant herein lodged this application under section 91(1) (1) (a) (4) (a) (b) of the Employment and Labour Relations Act, (ELRA) and Rule 24 (1) (2) (3), 28 (1) (a) (c) (d) (e) of the Labour Court Rules,2007. The application is supported by an affidavit sworn by the learned Advocate Timon Vitalis, the applicant's advocate. The respondent filed a notice of opposition and a counter affidavit in opposition to the application. The learned advocate Leserian Nelson, appeared for the respondent.

The grounds for revision are stated in the affidavit in support of this application, to wit;

i) That the Arbitrator entertained and determined the employment dispute founded on a breach of contract contrary to the provisions of section 94 (1) of the ELRA that gives Labour Court exclusive jurisdiction over such disputes.

ii) That the Arbitrator misconceived the complaint, hence made erroneous factual and legal findings that goes to the fairness of the employment termination while the cause of action was a breach of contract and not unfair termination.

iii) That the Arbitrator shifted the burden of proof to the applicant, the employer as if the complaint was founded on unfair termination by holding the later failed to prove the reason for retrenchment.

iv) That the Arbitrator misconceived the evidence by holding that the applicant breached the contract by her failure to prove valid reason and fair procedure for retrenchment whereas substantive and procedural unfairness of the respondent's retrenchment was not disputed and was neither pleaded nor proved by the respondent.

A brief background to this matter is that initially, the respondent was employed by the applicant's sister Company known as Ker and Downey Safaris (T) Limited for a two years contract commencing from 9th April

2017. In May 2019, the respondent was transferred to the applicant herein where he worked up to the termination of his employment. The applicant's stance is that the respondent's employment was terminated due to operational requirements on the ground that since March 2020 the applicant's business experienced economic hardship due to the outbreak of Corona pandemic . Thus, the applicant was compelled to retrench his employees including the respondent herein after following all the required legal procedure in retrenchment of employees. The decision to retrench his employees was reached after applying all possible ways of mitigating the impact of the Corona pandemic but were ineffective.

Aggrieved by the termination of his employment the respondent lodged his complaints at the CMA. During the hearing the Arbitrator framed two issues , to wit;

i) Whether the respondent's contract of employment was breached
ii) What reliefs were parties entitled to.

Upon receiving the evidence from both sides, the Arbitrator ruled in favour of the respondent. He made a finding that the respondent's employment was breached by not observing the procedures for retrenchment and ordered the applicant to pay the respondent seven months' salary being the salaries for the remaining period before the expiry of his employment contract to a tune of 4,260,827:= making a total of Tshs 29,825,789:=, leave pay for the year 2020 to tune of Tshs 4,260,827:= The applicant was not amused by that decision, hence lodged the instant application.

This application was disposed of by way of written submissions. Submitting for the 1st ground of revision, Mr. Vitalis argued that the respondent signed a two years contract (exhibit P1) with the applicant's sister Company Ker and Downey Safari (T) Limited, which was to expire on 9th of April 2019 but the same was changed from fixed term contract to permanent employment contract/contract for unspecified period. The change was approved in writing (Exhibit D1) . In May 2019 the respondent was transferred from Ker and Downey Safari (T) Limited to the applicant herein where he worked up to 2020, when his employment was terminated following the retrenchment of employees at the applicant's Company due to the outbreak of the Corona pandemic. Mr. Vitals went on arguing that the Arbitrator acted without requisite jurisdiction for entertaining and making determination of an employment dispute founded on the breach of contract contrary to section 94(1) of the ELRA, which vests exclusive jurisdiction to the Labour Court for any employment and Labour matters in which the cause of action is founded on the breach of contract, tortious liability , vicarious liability or common law. He contended that this matter was supposed to be adjudicated by Labour Court.

Moreover, Mr. Vitalis argued that the evidence adduced showed that the respondent had signed a two years contract (exhibit P1) which was to expire on 9th April 2019. Since the respondent claimed that his contract of employment was breached , then he was duty bound to prove that the initial fixed term contract was renewed by the applicant herein after its expiry on 9th April 2019. He contended that the respondent failed to prove the renewal of his initial contract. The initial contract stipulated

clearly that it was not renewable. Furthermore, Mr. Vital contended that the Arbitrator erred in law to disregard clause 2 of the contract (Exhibit P1) and exhibit D1 as a result he made an erroneous decision by his failure to make a finding that at the time of his retrenchment the respondent was employed under a permanent contract.

With regard to the second ground of revision, Mr. Vitalis submitted that the respondent's case was founded on breach of contract not unfair termination. The Arbitrator wrongly attributed the breach of contract to unfairness of retrenchment which was not an issue before him.

Submitting for the 3rd ground of revision Mr. Vitalis argued that the Arbitrator wrongly shifted the burden of proof to the applicant since the respondent's complaint was on breach of contract not unfair termination. Thus, he was required to prove the allegedly breach of the employment contract.The burden of proof was upon the respondent who alleged the breach of contract. He cited the case of **Upendo Malisa Vs Kassa Charity Secondary School , Labour Revision No.68 of 2019**, (unreported) , to cement his arguments. Moreover, he submitted that it was wrong for the Arbitrator to make a finding that the applicant failed to prove the reason for termination as if the applicant had a burden of proof of the fairness of retrenchment. In addition, he pointed out that clause 15(b) of the contract produced as Exhibit P1 allowed the retrenchment of employees.

In addition , Mr. Vitalis submitted that in his complaint/CMA form No.1 and testimony before the CMA the respondent did not dispute the fairness of

the reason or procedure for retrenchment. He only claimed that he had a fixed term contract, thus he was not liable to retrenchment. Mr. Vitalis contended that the Arbitrator misconceived the respondent's claims/ complaints.

With regard to the 4th ground of revision, Mr. Vitalis submitted that since the respondent did not plead unfair termination , the Arbitrator wrongly decided the dispute before him on the basis the fairness of the reason and procedure for retrenchment. He contended that even if it is assumed that Arbitrator's approach was factually correct, still his findings were legally wrong .Section 38 (2) of ELRA and Rule 23 of the Employment and Labour Relations (Code of Good Practice) Rules,2007 which provides for the guidelines for the retrenchment procedures do not impose a condition that the consulting parties should reach a consensus or when they do not reach an agreement the employer should stop the process and refer the matter to CMA. To bolster his arguments , he referred this Court to the case of **Solidarity Obo Members Vs Barloworld Equipment Southern Africa and 5 others , Case CCT 102/201**, in which the Constitutional Court of South Africa when interpreting section 189 (2) of the Labour Relations Act , which is *in pari materia* to section 38 (2) of the ELRA held as follows;

"Although the purpose of consultation is to seek consensus, there is no requirement under the law that the parties should reach an agreement. Failure to reach an agreement does not mean there was no consultation or that the consultation was not meaningful"

Another case that was referred to this Court by Mr. Vitalis is the case of **Association of Workers and construction Union and others Vs Chamber of Mines of South Africa and others (2017) BLLR.** He beseeched this Court to set aside the decision of the CMA.

In rebuttal, Mr. Nelson started his submission by pointing out that most of the issues raised by Mr. Vitalis were not among the issues framed by the Arbitrator.He went on submitting that the Arbitrator's findings and the answers to the issues he framed were to the effect that the reason for retrenchment was not proved and there was no consensus/ agreement to retrench the employees. According to the contents of Exhibit D5 (the minutes of the consultation meetings), the existence of financial constraints due to corona outbreak was not proved. The applicant was trying to deceive the respondent by blaming the corona out break without demonstrating the claimed financial constraints. The Arbitrator rightly made a finding that the financial statement for the year 2019 was not yet completed and there was no reason for retrenchment. Moreover , he submitted that Exhibit D5 indicates that in the year 2018, the applicant got loss but there was no corona outbreak in 2018.Corona outbreak was in the year 2019 but the applicant increased the respondent's salary handsomely in the 2019. He maintained that the financial statement was intended to deceive the respondent and failure to provide audited account report to prove financial constraints faced by the applicant makes the reason for retrenchment wanting. He cited the case of **Sharaf Shipping Agency (T) Ltd Vs Bacilia Constantine and 5 others, Civil Appeal No.56 of 2019** (unreported) .

Mr. Nelson's refuted Mr. Vitalis' stance that failure to reach a consensus during the consultation meeting pertaining to the retrenchment of the employees is not fatal and does not bar the employer from proceeding with the retrenchment of employees. He was of view that once the reason for retrenchment is not proved there cannot be an agreement for retrenchment of employees and the employer is barred from proceeding with the retrenchment of employees. He was emphatic that the purpose of consultation is to reach an agreement between the employer and employees. He cited the provisions of Rule 23 (4) of the Employment and Labour Relations (Code of good practice) Rules, 2007 to cement his arguments. He insisted that in this case the consultation meeting was conducted of 19th June 2022 and 22nd June 2022, and no agreement was reached .Another consultation session was scheduled to take place on 29th June 2020, but the respondent's employment was terminated on 24th June 2020 (exhibit P.9) before the consultation session that was scheduled on 29th June 2020 took place. Thus, the reason for retrenchment was not proved and timing of retrenchment was not ascertained. There was no agreement to retrench. The whole procedure for retrenchment was in violation of Rule 23(4) (a) and (d) of the Employment Labour Relation (Code of Good Practice) Rules, 2007 .He cited the case of **Godfrey Shuma Vs AI Door (T) Limited , Revision No.303 of 2021** (unreported) , to cement his arguments.

With regard to the issue on the CMA's jurisdiction, Mr. Nelson submitted that pursuant to section 88 (1) (b) (ii) of the ELRA ,the CMA has jurisdiction to try disputes founded on breach of employment contracts.

In addition, he pointed out that the CMA Form No.1 indicates that complaints founded on breach of contract are among the complaints that can be entertained by the CMA.

On the type of respondent's employment contract, Mr. Nelson submitted that the respondent had a fixed term contract (Exhibit P.5). He was in agreement with Mr. Vitalis that the respondent was transferred from Ker & Downey Safaris (T) Ltd to the applicant in 2019.He referred this Court to paragraph 2 of Exhibit P5 to cement his arguments. Expounding more on this point, Mr. Nelson argued that the Exhibit D1 which was relied upon by Mr. Vitalis in his submission was written on 12th July 2018, and its effective date was 12th July 2018, that is, before the respondent was transferred to the applicant's Company. The respondent joined the applicant in February 2019.The effective date of the respondent's transfer to the applicant was 1st February 2019.That is why the respondent's salaries for the month of January and February 2019 were paid by Ker & Downey Safari (T) Limited as evidenced by Exhibit P4, argued Mr. Nelson. He maintained that the applicant's employment could not change into a permanent contract of employment when he had not yet joined the applicant's Company. The respondent's contract of employment was a fixed term contract.

Furthermore, Mr. Nelson argued that the Arbitrator never made any finding regarding the fairness of the reason and procedure for retrenchment. He contended that the Arbitrator made a finding on whether or not there was a reason to retrench employees and found out that no reason was adduced by the applicant to justify the

retrenchment of employees. To cement his arguments he referred this Court to paragraph 5 of the CMA Award.

On Mr. Vitalis' concern that the Arbitrator shifted the burden of proof to the applicant, Mr. Nelson submitted that the Arbitrator never shifted the burden of proof. The CMA proceedings show clearly that the respondent is the one who began to testify and he produced before the CMA exhibit P2 to demonstrate that the applicant had no financial constraints. Also, he proved that there was no agreement to retrench employees. Thus, he discharged his burden of proving the breach of his employment contract since no consensus was reached before he was retrenched and that there was no reason to retrench him.

Moreover, Mr. Nelson submitted that the Arbitrator's findings that the applicant did not refer the matter to CMA after failure to reach a consensus on the retrenchment of his employees and proceeded to retrench them while there was no any consensus was not justifiable .Pursuant to the provisions of section 38(2) of the ELRA, the Arbitrator expected that upon failure to reach a consensus with the employees, the applicant would refer the matter to CMA contended , Mr. Nelson. At the end of his submission he prayed for the dismissal of this application.He maintained that the Award is not tainted with any material legal error(s).

Having analyzed the submissions made by the learned Advocates appearing herein, let me embark on the determination of the merit of this application. Starting with the issue of jurisdiction, in his submission in support of his contention that the CMA had no jurisdiction to entertain the

respondent's complaint, Mr. Vitalis cited the provisions of section 94(1) of the ELRA. I have read the whole of section 94(1) of the ELRA between the lines and am in agreement with Mr. Nelson that the same does not provide for exclusive jurisdiction to this Court (The High Court) on matters pertaining to breach of contract as alleged by Mr. Vitalis. As correctly submitted by Mr. Nelson, CMA Form No.1 indicates clearly under item 3 that breach of contract is among the disputes that can be adjudicated by the CMA. Therefore this ground has no merit and is hereby dismissed. The Arbitrator had jurisdiction to entertain the respondent's complaint.

With regard to the issue on whether the respondent's contract was a fixed term contract or not , my observations are as follows; It is not in dispute that the respondent was employed by Ker & Downey Safaris (T) Limited, the applicant sister Company for fixed term contract of two years from 9th April 2017 to 9th April 2019 (exhibit P1) . In 2019 he was transferred to the applicant as per Exhibit P5 (the Contract between Raymond Wankyo Mniko -the respondent herein , Ker and Downey Safaris (T) Limited and Mwiba Holdings Limited).Item "D" in the recitals in exhibit P5 states that the respondent's transfer was effective from 1st February 2019. The respondent was supposed to be under the employment of the applicant and was supposed to enter into an employment contract with the applicant in the same position and terms as he was employed by Kery & Downey Safaris (T) Limited. Item 1.3 of exhibit P5 talks about the contract that was supposed to be entered into between the respondent

and the applicant. For ease of reference let me reproduce hereunder the said item "D" and 1.3.

"D- Due to the change of operation , the parties have mutually agreed that the Employee shall be transferred from KDT to MHL effective from 1st February ,2019 from the effective date, the Employee will therefore be under the employment of MHL ***and shall enter into an employment contract with MHL*** *in the same position and terms as he/she was employed by KDT"*

"1.3 –The place of recruitment (Arusha) stated in the employment contract between KDT and the employee shall be adopted as the place of recruitment ***in the employee's employment contract with MHL"***

(Emphasis is added)

According to exhibit P5 , KDT and MHL are abbreviations for Ker & Downey Safaris (T) Limited and Mwiba Holding Limited respectively.

Upon reading the contents of exhibit P5, I noted that the same was a contract for the transfer of the respondent from his first employer Ker and Downey Safaris (T) Limited to the applicant and it was envisaged that the employment contract between the respondent and applicant herein was to be signed after the transfer of the respondent into the applicant's Company, with the same terms as it was the first employment contract. I have also noted that no contract of employment between the respondent and applicant was tendered before the CMA, though it is not in dispute that the respondent was working with the applicant since February 2019, when he was transferred to the applicant as per Exhibit P5 which was signed in May 2019, but indicates that its effect date is 1st February 2019.

Let me point out here that, I am in agreement with Mr. Nelson that exhibit D1 relied upon by Mr. Vitalis in his submission to support his contention that the respondent's employment was changed into permanent employment contract is not a valid document because it indicates that it was written on 12th July 2018, before the transfer of the respondent to the applicant's Company. In addition, the same is not an employment contract. It is just a letter written by the applicant and is not signed by the respondent. By all standards, that document cannot be relied upon to prove that the respondent's employment contract was changed into permanent employment contract.

From the foregoing, in my considered opinion, since there is no any employment contract that was signed by the applicant and the respondent herein for a specific period after the expiry of his first contract in April 2019 which was for fixed term of two years. Frankly speaking, there is no any fixed term employment contract between the respondent and the applicant. In other words the respondent's employment contract with the applicant was a permanent employment contract which was for unspecified period. Under the circumstances, it is the finding of this Court that the respondent was employed by the applicant under a permanent employment contract which was for unspecified period of time. Thus, it goes without saying that the applicant's claim for breach of contract is unfounded. As alluded earlier in this judgment the respondent did not produce any employment contract between him and the applicant to prove the alleged breach of fixed term employment contract. With due respect, the Arbitrator's assumption and finding that Exhibit P5 was the

respondent's employment contract was erroneous since the same states explicitly that it is was for the purpose of setting terms under which the respondent was being transferred to the applicant's company. The applicant and the respondent were supposed to enter into an employment contract for a fixed term but they did not do so. I am not supposed to speculate why they opted not to enter into employment contract as agreed in Exhibit P5. Be as it may, the bottom line is that there is no any fixed term employment contract between the applicant and respondent.

With regard to Mr. Vitalis's concern that the Arbitrator shifted the burden of proof to the applicant , the CMA records show that the respondent is the one who started to give his testimony. This means that he had the burden of proving his claims. However, I agree with Mr. Vitalis that in his decision the Arbitrator misconceived the respondent's complaint as result he made erroneous factual and legal findings that goes to the fairness of the termination of employment as a result he ended up making a finding that the applicant failed to prove the reason for retrenchment while the respondent's complaint was on breach of contract not unfair termination. Had it been that the complaint before the CMA was on unfair termination then, the applicant was the one supposed to start giving his testimony and would have the burden of proving whether or not termination was fair by adducing the reason for retrenchment (See Rule 23 of the Labour Institutions (Mediation and Arbitration) Rules , G.N. No. 67 of 2007.

In addition to the above, upon perusing the CMA form No.1 filed by the respondent at the CMA and the opening statements from both sides, I noted that the Arbitrator failed to frame appropriate /relevant issues. I am

saying this because the 1st issue, framed by the Arbitrator ,to wit; *"whether the contract was breached"*, was supposed to be preceded by an issue on "whether the respondent's contract was a fixed term contract or a contract for unspecified period" because in his opening statement the applicant stated categorically his contention that the respondent's employment contract was not a fixed term contract. It was for unspecified period. Whereas the respondent's prayer for payment of seven months' salary was clearly hinged on the allegation that his employment contract for a fixed term that is why he was claiming to be paid salaries for the remaining period of his contract. So, it was imperative for the Arbitrator to determine the type of employment contract between the respondent and applicant before making the determination on whether the same was breached or not. In addition, the respondent's claims for payments for untaken leave were not proved.

Now, since I have made a finding that the employment contract between the respondent and the applicant was for unspecified period, therefore the award made by the Arbitrator is erroneous since it was based on a none existing fixed term employment contract. My findings herein above suffices to dispose of this matter. Thus, I do not see any plausible reasons to embark on the determination of the arguments raised by the learned advocates on the retrenchment procedures , since whatever finding I will make will not change my finding I have already made that there was no fixed term employment contract between the applicant and respondent.

In the upshot, the award made by the Arbitrator in employment dispute No.CMA/ ARS/ARS/312/20/202/20, dated 11th January 2022 is hereby set aside. This being a labour matter, each party will bear his own costs.

Dated this 2nd day of December 2022

B.K.PHILLIP

JUDGE.