

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION APPLICATION NO. 365 OF 2022

(Arising from the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Kinondoni dated 15th day of September 2022 in Labour Dispute No. CMA/DSM/KIN/R. 197/17/390 by (Ndonde: Arbitrator)

VIETTEL TANZANIA PLC (HALOTEL).....APPLICANT

VERSUS

LYDIA DOMINIC MASSAWE.....RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J.

03rd March 2023 & 22nd March 2023

The applicant filed this application for revision challenging the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Kinondoni (CMA), issued by Hon. Ndonde S, Arbitrator. The applicant is praying for this court to call for the records of the CMA **in Labour Dispute No. CMA/DSM/KIN/R.197/390**, revise the proceedings and set aside the Award therein. The Applicant further prays for any other relief as the Court deems just to grant.

The application advanced out of the following background. The respondent was employed by the applicant from **15th February 2016** on yearly fixed term contracts until on **14th February 2017**

when his employment terminated due to contract non-renewal. (See **Exhibit D-1** - notice of intention not to renew). Being not satisfied by the way the employment ended, the respondent filed **Labour Dispute No. CMA/DSM/KIN/R.197/17/390** complaining against the non-renewal of the employment contract asserting unfair termination of contract and claiming for 12 months remuneration as compensation and annual leave payment. In the CMA, the arbitrator found that there was employees reasonable expectation of renewal of the contract and awarded **TZS 29,887,000.00** as a Compensation for unfair termination.

Aggrieved by the CMA award, the applicant filed the present application. In her affidavit, the applicant is challenging the CMA award basing on 7 grounds of revision contained in Paragraphs 5 (i) to (vii). The grounds were condensed to the following grounds;- that the award is tainted with errors, the arbitrator failed to analyse evidence, the validity of reason for termination was not considered, that the Honourable arbitrator erred in law in holding that the respondent had expectation for renewal, the arbitrator erred in law by not considering the notice of intention not to renew, the arbitrator acted illogically and irrationally and the award was improperly procured.

In this application, the applicant was represented by **Mr. Maige Sylivester**, The Applicant's Principal Legal Officer whereas **Mr. Stephen Ally Mwakibolwa**, Advocate from Alley Associates represented the respondent. Parties argued the application by a way of written submissions.

In the Applicant's submissions, Mr Maige condensed the seven grounds into 5 grounds which he substantively argued. In the **first** ground Mr. Maige submitted that the arbitrator erred in law for having failed to consider that the applicant had a valid reason of terminating the employment. According to him, the contract terminated itself for being fixed term contract which stated its expiry date as per **Rule 4 (2) of the Employment and Labour Relations(Code of Good Practices) Rules (G.N No. 42 of 2007)**. He stated that the respondent was aware of that expiry date. He is of the view that the principle of unfair termination does not apply to the contract of fixed term or specific task. Supporting his stand, he cited three cases including the case of **Asanterabi Mkonyi v. Tanesco**, Civil Appeal No. 53 of 2019, Court of Appeal of Tanzania, at Dar es Salaam, (Accessed in Tanzlii). He quoted the words which shows that unfair termination applies to fixed term contract only when there is a legitimate expectation of renewal.

On the **second** ground as to whether there was expectation of renewal, Mr. Maige submitted that the principle of unfair termination applies only under circumstances provided under **Section 36 (a) (iii)** of the **Employment and Labour relations Act, Cap 366 RE 2019 (ELRA)**, which states that, the employee may claim for unfair termination where the employer has failed to renew fixed term contract in the circumstances where there is a legitimate expectation of renewal. He stated that the evidence in the CMA, including warning letter, shows that things were not in order between the respondent and applicant for any legitimate expectation to arise. Bolstering his position, he cited the case of **Dierks v. University of South Africa** (1999) 2001 LT 1227. He quoted the words which established criteria which may influence the finding of existence of legitimate expectation.

Mr. Maige further submitted that all the grounds advanced by the respondent are defeated by one month notice of intention not to renew. He further added that the duty to prove existences of reasonable expectation, rests on the respondent as it was held in the case of **Medicins Sans Frontiers (MSF) Belgium v. Vengai Nhopi and Eleven Others**, Civil Appeal No. SC 278/16.

On the **third** ground, Mr. Maige submitted that the arbitrator erred in law and fact for failure to consider that the respondent was issued with a notice of non-renewal and not notice of termination. He challenged the arbitrator for having considered the notice of non-renewal as a notice of termination. He denied the assertion of that Applicant having ever issued a notice of termination. According to him, the employer issued a notice of non-renewal. He submitted that the employer was not satisfied with respondent's performance and that is why he opted not renew the contract hence the contract terminated by its time lapse.

On the **fourth** ground, Mr. Maige submitted that the award was not properly procured because it based on unfair termination while the principle of unfair termination does not apply to fixed term contract. He is of the view that the respondent cannot claim reliefs provided under **Section 40 of (ELRA)**. He thus prayed for the application to be allowed.

Opposing the application, Advocate Mwakibolwa submitted that since the applicant issued a notice of intention not to renew adducing the reason of unsatisfactory performance and letters of warning, according to him, she ought to have followed the procedures provided under **Rule 18 of G.N No. 42 of 2007**.

In his view, by issuing a notice of non-renewal, it proved that there was no automatic termination rather it brings a legitimate expectation of renewal. He cited the case of **Denis Kalua Said Mngombe vs. Flamingo Cafeteria**, Rev. No. 210 of 2012, High Court of Tanzania, Labour Division, at Dar es salaam, (unreported).

Mr. Mwakibolwa submitted that during the hearing, it is undisputed that the respondent was prepared to hold the position of the Head of Legal Department after performance review, as the basis of promotion and contract renewal. Advocate Mwakibolwa tried to establish grounds to justify legitimate expectation of renewal. He mentioned such conducts as promotion expectation subject to performance review, the existence of good employer employee relationship, the contract itself providing renewable clause, renewal of other employees' contracts and other assigned duties which extended contract expiry date. He stated that all the mentioned conducts fall under the ambit of **Section 36 (a)(iii) of the ELRA and Rule 4 of G.N No. 42 of 2007**. On that basis he is of the view that the arbitrator acted logically and rationally in his finding that there was an expectation of renewal.

The Applicant filed a rejoinder. It will be considered in determining this matter.

Being guided by parties' submissions, pleadings, and the CMA record, I noted two issues for determination. The **first** issue is **whether the applicant adduced good grounds for this Court to exercise its revisional power to interfere with the CMA award**, and the **second** issue is **what reliefs are parties entitled to**.

In resolving the **first** issue, all the grounds of revision listed in the affidavit will be considered. Basing on parties' submissions on these issues and grounds, I find worth to start with second ground from the parties' submission as **to whether there was expectation of renewal**, because its conclusion may resolve some other grounds of revision if answered affirmatively.

Battling in a bid to establish legality of Respondent's exit from the employment, the applicant alluded that the respondent's employment automatically came to an end after the expiry of its fixed term contract and that the arbitrator erred in law by holding that there was a reasonable expectation of renewal. He denied existence of such expectation in this matter since the evidence including warning letters **(Exhibit D2)** indicated that things were not in order between the respondent and the applicant for a legitimate expectation to arise.

On the other hand, the respondent maintained that by issuing notice of intention not to renew on the reason of unsatisfactory

performance, then there was no automatic termination rather it brings a legitimate expectation of renewal. He further added that applicant's conducts against the respondent created a reasonable expectation of renewal.

It is an established principle of law that employment of fixed term contract comes to an end when its time lapses. The relevant provision is **Rule 4 (2) of G.N No. 42 of 2007** which provides: -

"4(2) where the contract is of a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise."

From the above cited provision, the employment contract comes into an end when the agreed period expires unless the contract provides otherwise.

The **ELRA** provides for a renewal expectation. **Section 36 (a) (iii) of the ELRA No. 6/2004 and Rule 4(4) of G.N No. 42 of 2007** provides; -

"Section 36 (a) Termination of employment includes: -

(i)

(ii)

(iii) *a failure to renew a fixed term contract on the same or similar terms, if there was reasonable expectation of renewal”.*

Rule 4(4) of G.N No. 42 of 2007 provides thus: -

"4 - an employer and employee shall agree to terminate the contract in accordance with agreement.

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

At this point, the questions to be asked by this Court are - ***Does the parties' contract defines conditions for renewal expectation? Is there a reasonable renewal expectation established by respondents conducts in line with Section 36 (a) (iii) of the ELRA and Rule 4(4) of G.N No. 42 of 2007?*** These are questions need to be addressed.

It is not disputed that, parties had yearly fixed term contract which commenced on **15th February 2016** and to lapse on **14th February 2017**. Vide **Exhibit D-2** (notice of intention not to renew) the

applicant notified the respondent about her intention not renewing the contract.

The employment contract was not tendered as exhibit in the CMA. DW1 stated that it was lost. However, none of the parties stated any clause therein which defined the circumstances of expectation of renewal apart from the duration of its existence where it commenced **15th February 2016** and expected to lapse on **14th February 2017**. This means the situation is silent as to whether the contract created renewal expectation. The only thing certain in the contract has specified its time under which parties should be bound with and provided for a possibility of renewal.

In the case of **Miriam E. Maro vs. Bank of Tanzania**, (Civil Appeal 22 of 2017) [2020] TZCA 1789 (30 September 2020). where it was held; -

*"It is the law that parties are bound by the terms of the agreement they freely enter into. We find solace on this stance in the position we took in **Unilever Tanzania Ltd v. Benedict Mkasa t/a Bema Enterprises**, Civil Appeal No. 41 of 2009 (unreported) in which we relied on a persuasive decision of the supreme court of Nigeria in **Osun State Government v. Dalami Nigeria Limited**, Sc. 277/2002 to articulate:*

Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed between themselves, it was up to the parties concerned to negotiate and to freely rectify clauses which find to be onerous. It is not role of the courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute.”

In the matter at hand the parties freely agreed on yearly fixed term contract which lapsed after a period of one year. This needs to be respected and I hold that no expectation of renewal is proved from the terms of the contract.

According to the Respondent's evidence adduced in the CMA and the Respondent's submissions in this revision application, there are several circumstances under which the respondent tries to justify renewal expectations. The Circumstances, according to the Respondent, constitute the allegations of various parties' conducts including promotion expectation, pending performance review, existence of good employer employee relationship, renewal of other employees' contracts and other assigned duties which extended contract expiration date. At the CMA, the arbitrator found those

mentioned factor sufficient to justify reasonability of renewal expectation.

It is my considered view that the above circumstances could have legal stance if backed by the terms of the contract. In their own, they do not supersede the inviolability of terms of the contract.

Should the Respondent's claimed factors by any chance create a legitimate expectation, then the same should have been cleared by the notice of non-renewal intention which was issued to the Respondent a month before the expiration of the contract. This is despite the position that the contract itself acts as a notice of termination as it specifies the commencement date and the end date.

It is my holding that the circumstances claimed by the Respondent should not have been superseded the terms of the contract.

The Respondent treated the notice of non-renewal as a termination notice which he considered to have not followed the procedure. It is apparent that the notice was issued purposely to notify the Respondent about non-renewal intention and not to terminate the employment contract. The said notice is a commendable practice of courtesy where the employer draws the attention of the employees to remind them on such an important clause of a contract. The Applicant should not be penalised for exercising such a good practice

to draw the attention of an employee to the substantial terms of contract. The case **Denis Kalua Said Mngombe vs. Flamingo Cafeteria cited by Mr. Mwakibolwa** could not be accessed to study the principle stated in the quotation made in his submission. It was not appended in the submission, and neither is it found on TanzLii. He did not make full citation of it. I therefore conclude that the notice of non-renewal should not have been treated as a notice of termination.

This above findings answer the issue as to **whether there was expectation of renewal** negatively.

From the above findings since the second issue is answered negatively, the answer to the 1st issue as to **whether there was a fair reason for termination** will have to be answered affirmatively.

The Arbitrator, having found legitimate expectation of renewal, concluded that there was still employment relationship which was terminated without a fair reason. In absence of such expectation, there can be no employment relationship which could be terminated. This means there was no termination as the contract terminated automatically by the terms of the contract.

Regarding the 3rd and the 4th issues, the Applicant challenged the Arbitrator for failure to consider that the Respondent was issued with

a notice of non-renewal and not a notice of termination and for having based the award on unfair termination which does not apply in a fixed term contract. He further challenged the award of compensation under **Section 40 (1) (c) of the Employment and Labour Relations Act, Cap 366 of RE, 2019.**

It is already found in the above that the notice of non-renewal was not a notice of termination. I agree with the Applicant that it was not a harm to issue the notice of non-renewal to prepare the respondent for her exit. There was no termination and therefore, the Respondent could not have the right to enjoy any remedy of compensation under unfair termination. The case of **Ibrahim Mgunga and 3 Others versus African Muslim Agency, Civil Appeal No 476 of 2020** cited by both parties is relevant in the matter. In this case the Court of Appeal held that the *"Principle of unfair termination do not apply to a fixed term contract unless it is established that the employee had a reasonable expectation of renewal of the contract"*. (See also **Asanterabi Mkonyi v. Tanesco cited supra**)

From the foregoing, I find that all the Applicant's grounds of revision to have been well founded and this answers the first issue that the applicant managed to adduce good reason for this Court to exercise

its revisional power granted under **Section 91 of the ELRA, Cap 366 R.E 2019** to interfere with the CMA award.

Regarding the second issue on relief, CMA awarded a compensation of 12 months salaries which totalled to **TZS 27,558,000.00**. It is already found that the parties' contract terminated automatically by the expiration of its term, and that there was no reasonable renewal expectation and therefore the Applicant should not have been awarded any compensation.

Consequently, I revise the CMA proceedings, quash and set aside the award therein. The Respondent is not entitled to any compensation apart from the statutory benefits falling under a fixed term contract. This Application for Revision is therefore allowed to the extent discussed. I give no order as to cost. It is so ordered.

Dated at Dar es Salaam this 22nd day of March 2023.



KATARINA REVOCATI MTEULE

JUDGE

22/03/2023