IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 19 OF 2023

(Arising from an Award issued on 19/12/2022 by Hon. Faraja Johson, L, Arbitrator, in Labour dispute No. CMA/DSM/ILA/21/152/21 at Ilala)

ANNANCIA O. MUSHI ..... APPLICANT

VERSUS

SELCOM PAYMENTS LIMITED ..... RESPONDENT

JUDGMENT

Date of last Order: 27/03/2023
Date of Judgment: 28/4/2023

B. E. K. Mganga, J.

Facts of this application briefly are that on 6th January 2020; applicant entered a one-year fixed term contract of employment with the respondent commencing on 1st January 2020 expiring on 31st December 2020. In the said one year term fixed contract, applicant was employed as customer care officer with monthly salary of TZS 750,000/=. The said contract was renewed for another one year expected to expire on 31st December 2021. It happened that employment relationship between the

two did not go well as a result, on 16th March 2021, respondent served applicant with a one-month suspension letter dated 25th February 2021 alleging that applicant disclosed confidential information to a client hence breached confidential obligations to the respondent. On 14th April 2021, respondent terminated employment of the applicant.

Aggrieved with termination of her employment, on 23rd April 2021, applicant filed dispute No. CMA/DSM/ILA/21/152/21 before the Commission for Mediation and Arbitration henceforth CMA at Ilala complaining that respondent breached the contract. In the Referral Form(CMA F1) applicant claimed to be paid compensation of not less than twelve months' salaries, salaries of the remaining period of the contract and leave pay.

On 13th December 2022, Hon. Faraja Johnson, L, Arbitrator, having heard evidence and considered submissions of the parties issued an award in favour of the respondent that there were valid reasons for termination of employment of the applicant because she disclosed confidential information to a third party and further that procedures for termination were adhered to. The arbitrator therefore dismissed the dispute filed by the applicant.

Further aggrieved, applicant filed this application for revision seeking the court to revise and set aside the said award. In her affidavit in support of the application, applicant raised four grounds of revision namely:-

1. *That, the Hon. Arbitrator erred in law and facts for failing to consider sufficient evidential weight on the breach of contract and that the applicant was terminated without due procedure including right to be heard.*
2. *That, the Hon. Arbitrator erred in law and facts in relying on opinion of the respondent that breached contract on ground of confidentiality which was not true.*
3. *That, the trial Arbitrator erred in law and fact in relying on contradictory evidence on the contractual duration of the employment.*
4. *That, the trial Arbitrator erred in law and fats in importing extraneous matters which were never brought by either party or which was never pleaded and basing his decision on the same.*
5. *That, the trial Arbitrator erred in law and facts by not considering all substantiative claims of the Applicant in the CMA F1.*

Respondent resisted the application by filing both the Notice of Opposition and the counter affidavit of Navo Mshana, her principal officer.

When the application was called on for hearing, Mr. Emmanuel Ukashu, learned counsel appeared and argued for and on behalf of the applicant while Mr. Edgar Mgyabuso, learned counsel appeared and argued for and on behalf of the respondent.

Submitting in support of the 1st ground of application, Mr. Ukashu, learned counsel argued that the purported breach of confidentiality did not give power to the respondent to deny applicant right to be heard. To support his submissions, he referred the court to the case of ***Good Samaritan V. Joseph Robert***, Labour Revision No. 165 [2011] LCD No. 109 and prayed that applicant be paid 9 months' salaries being the remaining duration of the contract.

Arguing in support of the 2nd ground, counsel for the applicant submitted that respondent had a duty to prove the alleged breach of confidentiality. He added that, there was only speculation that there was breach of confidentiality and that there is no third party who testified that confidential information was disclosed to him. Counsel for the applicant prayed the court to draw adverse inference against the respondent for failure to call a person who it was alleged that confidential information was disclosed to him. To support that submissions, Mr. Ukashu, learned counsel cited the case of ***Hemed Said V. Mohamed Mbwilu,*** [1984] TLR 114 (CAT).

On the 3rd, 4th and 5th grounds, counsel for the applicant submitted that on 01st January 2019, the parties entered into one-year fixed contract that was renewed in 2020 and 2021. He went on that, the arbitrator used extraneous matters that applicant admitted to have breached confidentiality, but there was no evidence. Counsel for the applicant submitted further that Arbitrator did not consider pleadings in CMA F1. He concluded his submissions by praying that the application be allowed and applicant be paid the remaining period of the contract.

In resisting the application, Mr. Mgyabuso, learned counsel for the respondent argued the 1st and 4th grounds together. Arguing these grounds, counsel for the respondent submitted that there was breach of confidentiality clause by the applicant. He went on that exhibit D3 is the email that contains confidential information that was disclosed by the applicant to the third-party contrary to her employment contract. Counsel for the respondent cited the case of ***Asanterabi Mkonyi v. TANESCO***, Civil Appeal No. 53 of 2019 CAT (unreported) and submitted that principles of fair termination does not apply to fixed term contracts. He submitted further that; the contract of the parties was from 01st January 2021 to 31st December 2021. He added that Section 37 of the Employment and Labour

Relations Act[Cap. 366 R.E. 2019] cannot apply in the circumstances of this application because applicant was employed for a fixed term contract. He argued further that applicant filed the dispute for breach of contract hence the parties were supposed to consider the terms of the contract itself. It was submissions of Mr. Mgyabuso that there was no need of the respondent to give reason for terminating employment of the applicant. he maintained that the contract was terminated due to material breach of the contract by the applicant as per Rule 8(2) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007.

Counsel for the respondent submitted further that on 25th February 2021 applicant was served with one month notice and that on 14th April 2021, respondent terminated her employment. counsel for the respondent went on that upon termination, applicant was paid terminal benefits. He added that applicant (PW1) admitted the authenticity of emails(Exhibit D2) she wrote to the 3rd party implying that she breached the contract. Counsel for the respondent cited the case of ***HJF Medical Research International, INC v. Mergitu Ebba***, Revision No. 257 of 2021, HC (unreported) and ***David Nzaligo v. National Microfinance Bank PLC***, Civil Appeal No. 61 of 2016, CAT (unreported) and submit that parties are

bound by terms of their contract. Counsel strongly submitted that applicant breached Clause 11 of the contract of employment.

Responding to submissions made in respect of the 2nd ground, counsel for the respondent submitted that, Clause 11 of the contract of employment (Exhibit D1) prohibited disclosure of confidential information to a 3rd party. Mr. Mgyabuso submitted further that, applicant admitted to have breached the said clause and added that, procedures for termination of her employment were adhered to. Counsel submitted that the Arbitrator considered evidence of both parties and that respondent proved her case on balance of probabilities and cited the case of ***Light and Hurry Enterprises Ltd v. NMB Bank Public Limited Company,*** Commercial Case No. 157 of 2018, HC (unreported).

Responding to the 3rd ground, counsel for the respondent submitted that this ground has no merit. Counsel for the respondent referred the court to Rule 27(3) of the Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrators Guidelines) Rules, GN. No. 67 of 2007 that provides contents of the award and submit that the award was properly issued.

In rejoinder, Mr. Ukashu counsel for the applicant submitted that ***Mkonyi's case*** (supra) is distinguishable because in the said case, the matter was relating to legitimate expectation for renewal while in the application at hand, it is breach of contract. Counsel for the applicant submitted further that all cases cited by counsel for the respondent are not applicable.

I have carefully examined evidence in the CMA record and considered submissions made on behalf of the parties in this application. It was submitted by counsel for the respondent that applicant breached confidentiality clause of the contract by disclosing confidential information to the third party. In other words, counsel for the respondent was of the view that termination of employment of the applicant was proper in terms of Rule 8(2) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007. That submission was contested by counsel for the applicant. Therefore, the main issue in this application is whether there was material breach of the contract by the applicant warranting termination of her employment or not.

I have examined evidence of Alisson Isapreto (DW1), the only witness who testified on behalf of the respondent and find that, there is no evidence to support the conclusion that applicant materially breached the contract warranting termination of her employment. In his evidence, DW1 testified that, in May 2020, applicant failed to respond to emails and in June 2020, there was credit missing and that she admitted being part to the said missing and promised not to repeat. It was further evidence of DW1 that, in August 2020, applicant did not respond to an email sent by the customer for 7 hours on ground that she was in the washroom. It was further evidence of DW1 that, in June and July 2020, applicant withdrew customer's money without refunding. I should point out that, all these have nothing to do with termination of the contract of the applicant. I am of the view that, if respondent thought that those were justifiable reasons, she was supposed to terminate the contract of the applicant that expired on 31st December 2020 or could have not renewed the contract of the applicant after expiry on 31st December 2021. I therefore find that, that evidence was mere embellishment.

In his evidence, DW1 testified further that in February 2021, applicant wrote emails (exhibit D3) to customers giving them confidential

bank balances. I have carefully examined email correspondences in exhibit D3 and find that on 25th February 2021 at 2:38 AM, payment@betpawa.com wrote:-

" *Hello. Kindly assist with the following missing transactions…"*

The author of the email listed 17 transactions. On the same date at 2:15 AM Kelvin Mrema<mrema@selcom.net wrote:-

"Hi team. Please find the below…".

Mr. Mrema listed the said 17 transactions showing that 8 transactions have been successfully cleared while the rest were being worked on. On the same date at 9:20 AM, payments@betpawa.com, wrote:-

"Hello, Kindly update for this missing WD, client said he has not received it..".

The author indicated only one transaction. On the same date at 09:25 Annancia Mushi<annancia@selcom.net, the applicant wrote to <payments@betpawa.com, and copied the said email to Kelvin Mrema <mrema@selcom.net>; Selcom Helpdeskhelpdesk@selcom.net; Deep Bhana<deep.bhana@betpawa.com, Allan Lyimo<allan@selcom.net,

Sameer Hirji<sameer@selcom.net, and Sebastian Msuya<sebastian@selcom.net, as hereunder:-

"Subject: Re: Missing withdrawals

Hello Team,

Kindly see the below for clarification..."

Exhibit D3 shows further that, on the same date at 9:29 AM < sameer@selcom.net, the executive Director of the respondent wrote:-

" you've just posted our wallet balance! What will it take to get you guys to pay attention?"

It was after the said email, applicant, annancia@selcom.net wrote:-

"my intention was to cut the balance, but unfortunately I just sent it all by mistake".

It is clear from the above evidence(exhibit D3) that, there is no proof that applicant is the one who initiated the alleged missing transactions. More so, there is no proof that the said email was sent to a third party. I am of that view because, all people who were copied the said email, were in continuous communication with the respondent and are members of the respondent. I should add that, there is no proof that in her email, applicant admitted having disclosed confidential information to a third party. It is my

view therefore that, termination of employment of the applicant was not based on material breach of the contract by the applicant. In short, submissions that applicant breached materially the contract and that respondent was enjoyed to apply the provisions of Rule 8(2) of GN. No. 42 of 2007(supra) is not supported by evidence on the CMA record. I therefore hold that, respondent had no valid reason to terminate employment of the applicant.

It was submitted by counsel for the respondent citing ***Mkonyi's case*** (supra) that, principles of fair termination do not apply to fixed term contracts and that the respondent was not required to give reason. That submission, in my view, cannot be correct. In ***Mkonyi's case***(supra), the Court of Appeal did not give a green card to employers to terminate employees employed under fixed term contracts as they wish without justification. That holding would have also been contrary to the provisions of Rule 8 of GN. No. 42 of 2007(supra). In terms of Rule 8(2)(a) and (b) of GN. No. 42 of 2007(supra), the employer can only terminate an employee on fixed term contract if the employee has materially breached the contract or if the employee consent to early termination of employment. In my view, in order to terminate employment of the employee with fixed term

contract based on material breach of contract, the employer must inform the employee the nature of the alleged material breach and the employee is entitled to be heard. There is no room of terminating employment without giving reason to the employee or the employee being not afforded right to be heard as it happened in the application at hand.

In the application at hand, applicant was served with one month suspension letter with ref. No. SELCOM/20210225/2201(exhibit D4) dated 25th February 2021. The said notice was served to the applicant on 16th March 2021. At CMA, it was testified by DW1 that applicant was served with one month notice of termination in compliance with clause 7 of the contract of employment (exhibit D1). With due respect, exhibit D4 is not a one month notice of termination, rather, a one-month suspension because its wordings are clear and loud to that effect. Exhibit D4 reads in part:-

> "...
>
> *Dear Annancia*
>
> ***RE: ONE MONTH NOTICE***
>
> *Please refer to the above.*
>
> *This is to notify you that **you are being suspended** with immediate effect for a period of one (1) month following various warnings around misdemeanors on*

*your part…You are requested not to report to the office anymore but your salary for the month of February 2021 and March 2021 will be remitted to you at the end of the month…"(*Emphasis is mine)

As pointed hereinabove, exhibit D4 cannot be regarded as a notice of termination because it clearly states that applicant was only suspended for one month. I therefore hold that, both ***Ebba's case*** (supra) and ***Nzaligo's case*** (supra) cited by counsel for the respondent are inapplicable in the circumstances of the application at hand.

Evidence shows that, on 14th April 2021, respondent terminated employment of the applicant. Termination letter(exhibit D5) reads in part:-

RE: TERMINATION: ANNANCIA MUSHI

With reference to our letter dated February 25, 2021, with reference SELCOM/20210225/2201, regarding you've your One Month Notice:

You have been paid termination letter dues after applicable taxes as per Law as follows:

1. *Worked days salary in the month of February 25, 2021, has been remitted to you.*
2. *One Month Notice Salary for the month of March 2021 has been remitted to you.*
3. *Leave 2021: Taken*

4. NSSF for months' worked has been remitted on monthly basis to NSSF.

We take this opportunity to wish you all the best in your future endeavours…"

Based on the above quoted letter, Respondent was of the firm view that, she served applicant with a notice to terminate employment and that, she paid the applicant one month salary as notice pay. It is my view that, salary that was paid to the applicant for the month of February and March 2021 cannot be said to be associated with termination of employment because, at that time, applicant was only under suspension and was entitled to receive salary while under suspension. Therefore, since exhibit D4 is not a notice of termination, respondent cannot also rely on the provisions of Rule 8(2)(d) of GN. No. 42 of 2007 (supra) that she gave one month notice of termination of the said fixed contract of employment. For what I have stated hereinabove, I hold that respondent had no valid reason to terminate employment of the applicant. I therefore hold that respondent breached the contract of the applicant by unfairly terminating her employment.

According to the evidence of the parties, it is undisputed that applicant was not afforded right to be heard at the time of terminating her

employment, because she was merely served with a one-month suspension letter followed with termination of employment.

In dismissing the dispute filed by the applicant, the arbitrator held that applicant disclosed confidential information to a third party hence valid reason for termination of employment and that procedures for termination ware adhered to, because applicant was heard when she admitted to have disclosed confidential information to a third party, which amounted to dishonest. With due respect to the Hon. Arbitrator, there is no evidence justifying that conclusion. Since there was no justification for termination of applicant's employment, and since I have held that termination was unfair, applicant is entitled to be paid the remaining period of the contract.

It is undisputed that the parties had one-year fixed term contract and that the said contract was terminated on 14th April 2021. It is also undisputed that the contract of employment was terminated while 9 months' were remaining. It is also undisputed that applicant was paid salary only up to March 2021. Therefore, applicant is entitled to be paid salary for 9 months' remaining period of the contract. It is further undisputed that applicant's monthly salary was TZS 750,000/=.Therefore,

applicant is entitled to be paid TZS 6,750,000/= being salary for the said 9 months' remaining period of the contract.

For the foregoing, I allow the application and order respondent to pay applicant a total of TZS 6,750,000/= being 9 months' salary for the remaining period of the contract.

Dated at Dar es Salaam on this 28th April 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on this 28th April 2023 in chambers in the presence of Emmanuel Ukashu, Advocate for the Applicant and Edgar Mgyabuso, Advocate for the Respondent.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) (Labour Division) DIVISHENI YA MAHAKAMA YA KAZI

B. E. K. Mganga
JUDGE