IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

LABOUR REVISION NO. 13 OF 2023

(C/F Labour Dispute No. CMA/KLM/MOS/ARB/01/2023 in the Commission for Mediation and Arbitration for Moshi)

TUSONGE COMMUNITY DEVELOPMENT ORGANIZATION..... APPLICANT

VERSUS

FRANK GODSON LENGWANA ..... RESPONDENT

JUDGEMENT

Last Order: 25.01.2024
Judgment: 27.03.2024

MONGELLA, J.

In this application, the applicant is seeking for this court to call, examine and revise the proceedings of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/KLM/MOS/ARB/01/2023 in order to satisfy itself as to its correctness, legality, regularity, and propriety; and to overrule the whole decision of CMA award which granted reliefs to the respondent. She has moved this court vide **Section 91(1) (a), 2, (c); section 94 (1) (b) (i) of the Employment and Labour Relations Act, 2004** (ELRA) and **Rule 24 (1), (2), (3) and; 28 (1), (c), (d) and Rule 55 of Labour Court Rules, 2007, GN No. 106 of 2007.**

The applicant's chamber summons was accompanied by the sworn affidavit of Mr. Elikunda George Kipoko, her counsel. The application was contested by the respondent as reflected in the notice of opposition duly filed by his Counsel, Mr. Emmanuel Anthony. In the said notice of opposition, Mr. Anthony also raised a legal issue to wit, the application is bad in law as it was filed without notice of intention to seek revision of an award. The court ordered for the legal issue raised to be argued by the parties alongside the main application.

The facts of the case are to the effect that the applicant employed the respondent in the capacity of Programme Officer Business Development and Marketing in 2020 for a fixed term from February to December 2020. The contract was renewed from January to December 2022. On 22.12.2022, the applicant notified the respondent on end of employment contract project A-TZA-2020-0368. It was communicated in the said letter that his contract would officially end on 31.12.2022. It was also stated that if he wished to continue contributing to the applicant's vision, then he should communicate such intention to the Managing Director before 04.01.2023.

The respondent expressed his intention to continue working in the role of business development and marketing officer vide a letter addressed to the Managing Director on 30.12.2022. The applicant however, on a letter written on 16.01.2023, expressed that she had no intention to renew his contract. Aggrieved, the respondent filed

a dispute in the CMA alleging that the applicant had breached the contract for employment. He was of the view that his termination was unfair substantively and procedurally and thus sought compensation. The respondent testified as PW1 and presented six (6) exhibits. He had no other witness. The applicant too, had one witness - DW1, her managing director.

The CMA found in the respondent's favour declaring the termination unfair. It awarded him twelve months' salary equivalent to T.shs. 16,800,000/= as compensation. The applicant being aggrieved by said decision, has now filed this application on six legal issues to wit:

a) Whether under the material facts there was unfair termination and breach of contract.

b) Whether the arbitrator erred in law to find that from material facts of the complaint there was unfair termination and breach of contract.

c) Whether the Respondent herein was entitled to be paid compensation from breach of contract and unfair termination.

d) Whether, the arbitrator erred in law to find that from the material facts the employee was entitled to compensation for unfair termination and breach of contract.

e) Whether the arbitrator was right to find there was reasonable expectation of renewal of the one-year fixed term contract of employment.

f) Whether, the arbitrator erred in law and facts by finding that there was reasonable expectation of renewal of the fixed term contract of employment.

The application was argued orally with both parties being represented by learned counsels. The applicant being by Mr. Elikunda George Kipoko and the respondent by Mr. Emmanuel Anthony.

Mr. Kipoko first addressed the competence of the application in regard to there being no notice of intention to seek revision of the CMA award. He averred that **Regulation 34(1) of the Employment and Labour Relations (General) Regulations GN. No. 47 of 2017** was only intended to expediate the transfer of files from the CMA to the High Court. He had the stance that filing of Form No. 10 or not does not affect the competence of the application. He supported his stance with three cases being: **Godwin Rwegoshora vs. Mantrac Tanzania Ltd** (Labour Revision 26 of 2022) [2022] TZHC 14816; **Tanzania Revenue Authority vs. Mulamuzi Byabusha** (Revision No. 312 of 2021) [2022] TZHCLD 597 and; **Arusha Urban Water Supply and Sanitation Authority vs. Hamza Mushi & 7 Others** (Labour Application 15 of 2020) [2022] TZHC 14219 (all from TANZLII).

Mr. Kipoko called the court to be persuaded with the three decisions and concluded that non-filing of notice to seek revision of the CMA award did not occasion miscarriage of Justice, delay or any unnecessary costs to any parties or the court. He was of the view that taking such approach would be in line with the oxygen principle.

Addressing the merit of the application, Mr. Kipoko referred the case of **Ibrahim s/o Mgunga & Others vs. African Muslim Agency** (Civil Appeal 476 of 2020) [2022] TZCA 345 TANZLII whereby the Court of Appeal addressed a similar issue. He alleged that in the said case, the appellants had claimed that since their annual leave did extend beyond the fixed term contract, that gave them ground to believe that their contract of employment would be renewed. That the apex court found such facts not constituting grounds for reasonable expectation for renewal of the fixed term contract. Relying on such decision he asked the court to allow the revision.

In reply, Mr. Anthony first noted that Mr. Kipoko had not submitted on the 1st, 2nd, 3rd and 4th issues he raised in his affidavit. He thus informed that he would not discuss the said issues either.

With regard to the legal issue he raised concerning notice, Mr. Anthony asked the court to borrow the wisdom of **Amina Sangali & 200 Others vs. St. John's University of Tanzania** (Revision Application No. 100 of 2023) [2023] TZHCLD 1382 TANZLII. He held the view that filing of notice is a mandatory requirement. He challenged the

decisions cited by Mr. Kipoko on the ground that they were made prior to the one he cited, thus the current one should prevail as this a court of record.

Regarding the merit of the application, Mr. Anthony supported the award for being in conformity with the law. He averred that parties were given an opportunity to be heard and the award was issued. Thus, as far as **Section 91 of the ELRA** is concerned, the award was procured legally. He challenged the applicant on the ground that he did not submit anything on the illegality, impropriety or irrationality of the award.

He further averred that the applicant submitted rather on the reasonability of the award. He said that in his notice of opposition, he notified the court and applicant that the issues raised by the applicant are not in conformity with the facts of the application. He challenged the issue argued by the applicant's counsel in his submission regarding expectation of renewal on the ground that the same was not featured in the facts deponed in the supporting affidavit. He made reference to **Rule 24(3) of the Labour Court Rules** to cement his point.

He further averred that the circumstances in **Ibrahim Mgunga** (supra) differ from the ones in this case. That, in this case, the applicant issued notice of intention to end contact and intention to renew the contract. In the premises, he called for the dismissal of the application for want of merit.

Rejoining, Mr. Kipoko averred that there is a connection between statement of facts and legal issues thereby making reference to paragraph 4(v) of his affidavit. He alleged that the statement of facts centers on whether there is reasonable expectation for renewal. That, Paragraph 4(v) relates with paragraphs 5 and 6 which provide for legal issues. With regard to the award, he contended that had the trial arbitrator properly applied the laws of the country, she would have found that there was no reasonable expectation for renewal.

As to the import of **Regulation 34**, he submitted that this court is at liberty to choose between the two schools of thought. However, on the other hand, he urged the court to find in favour of the school of thought propounded in **Arusha urban Water Supply and Sanitation** (supra).

Concerning issuance of notice to end of contract with an invitation to renewal; Mr. Kipoko had the stance that the issuing of the notice did not amount to invitation as the relationship was under fixed term contract. Without citing any law, he contended that according to the laws of this country, these facts do not constitute reasonable expectation for renewal.

After considering the rival submissions of both parties' counsels, I shall start with resolving the legal issue pertaining the implication on failure to file notice of intention to seek revision and if need be, address the revision on merit.

It is clear from the legal issue that the parties are not contesting the fact that the applicant did not file the notice of intention to seek revision. The issue in question is whether the omission renders this application incompetent. The question of notice of intention to seek revision of the CMA award is based on **Regulation 34 (1) of the Employment and Labour Relations (General) Regulations** which states:

> "34.-(1) The forms set out in the Third Schedule to these Regulations shall be used in all matters to which they refer."

The notice of intention to seek revision is found under CMA Form No. 10 of the said Regulations. The same appears to be a document by a potential applicant addressed to the CMA in which he or she informs the CMA of his or her intention to seek revision or review to the High Court Labour Division and requesting the same to expeditiously forward certified copies of the award and proceedings to the relevant court.

On this issue, I subscribe to the reasoning in decisions by my learned brothers and sisters in **Godwin Rwegoshora vs. Mantrac Tanzania Ltd** (supra), **Tanzania Revenue Authority vs. Mulamuzi Byabusha** (supra) and **Arusha Urban Water Supply and Sanitation Authority vs. Hamza Mushi & 7 Others** (supra). In the said decisions, notice of intention to seek revision of the CMA award was declared not mandatory and, in that regard, non-filing of the same was not found to render the application for revision incompetent before the High Court. The common arguments advanced in said decisions are that

Regulation 34 (1) merely requires that notices found in the Regulations are used in relevant circumstances and not that the notice must be used in every circumstance, including instituting matters in the High Court. In **Tanzania Revenue Authority vs Mulamuzi Byabusha** (supra) Hon. Rwizile J explained:

> "Having considered the wording of regulation 34(1) and the wording in the notice itself that is CMAF.10. I find nothing that suggests that the application before this court becomes incompetent merely because, the CMAF10 was not filed. I think so because, what the regulation insists is that forms named shall be used in all matters to which they refer. The words shall be used to matters which they refer, are plain and need no construction. It means in my view, for instance, one should not use CMA.F1 to file an application for condonation or where it is directed that CMAF.3 has to be used, it should be used for that purpose only. There is nowhere in the law, where it is categorical that CMA.F10 institutes a revision before this court."

In **Arusha Urban Water Supply and Sanitation Authority vs. Hamza Mushi & 7 Others** (supra) my Learned brother Hon. Tiganga J. reasoned that the notice of intention to seek revision of an award was not a mandatory requirement and the omission could be cured by the overriding objective principle. The Hon. Judge, further referred to the case of **Joseph Simon Mwandambo vs. Tata Africa Holdings (T) Ltd**, Labour Revision No. 21 of 2022, HC-Labour Division

(unreported), in which the requirement to file notice as prescribed under CMAF10 was analyzed. The court in said case found that such notice was merely informative, addressed to the CMA so as expediate revision proceedings by having necessary records sent to respective court. Thus, the omission to file the same would not render the application incompetent. The court finally stated:

> "From the above exposition, a conclusion may be made that, a Notice under Regulation 34 (1) as contained in the CMA Form No. 10 is not a motional document without which the proceedings filed are vitiated. It is an informative Notice informing the CMA to prepare and transmit the record to the Labour Court because the applicant intends to file revision against the award."

In the foregoing, I maintain the view that the notice of intention to seek revision is not a mandatory requirement having not being expressly so set under the relevant laws under which this application was preferred. The notice as adjudged in the above authorities is meant to only facilitate expeditious determination of reviews or revisions in the High Court by requiring the CMA to facilitate the High Court with necessary copies after being notified. As to Mr. Anthony's argument that the case of **Amina Sangali & 200 Others vs. St. John's University of Tanzani**a (supra) is latest and thus should be adopted, I find such reasoning misconceived on the ground that the decision is from the High Court thus, not binding upon me.

Further, the proceedings before this court are regulated by **section 91 and 94 of the ELRA and Rule 24 and 55 of the Labour Court Rules** under which this application was preferred. The requirements set under the said provisions are mandatory and were observed. In that regard, the omission to file notice to seek revision of an award was not fatal rendering this application properly before this court. The raised legal issue is thus without merit and overruled accordingly.

Moving on to the merits of this application, it appears that both parties do not contest that the applicant had employed the respondent for a fixed term from February to December 2020 as witnessed under Exhibit F-1. It is also not contested that another fixed term contract was signed between them from January 2022 to December 2022 as seen in Exhibit F-2. Also, that from January 2021, the respondent had served the applicant in the same position but without a fixed contract signed between them. What is contested is whether the respondent had reasonable expectation for the contract to be renewed in 2023?

In his arguments, Mr. Kipoko did not specify as to which of the issues he stated in his counter affidavit he was submitting on. He generally contested that the respondent had no reasonable expectation for renewal. While Mr. Anthony contended that the issue of renewal was not raised in Mr. Kipoko's affidavit, it is clear on the statement of legal issues that such matter was raised in his affidavit. Besides, it was on this issue/fact that the dispute was centered. In that respect, Mr. Anthony's argument is found to be misplaced.

Termination of a fixed term contract upon expiry of the contract can be unfair where there is expectation for renewal. This circumstance is covered under **Section 36(iii) of the ELRA** and **Rule 4 (4) of the Employment and Labour Relations Act (Code of Good Practice) Rules G.N 42/2007** which state:

> *"36 for purposes of this sub-part (a) "termination of employment" includes;*
>
> *(i) NA*
>
> *(ii) NA*
>
> *(iii) a failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal."*

Rule 4(4) states;

> *"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."*

The burden to proof of existence of expectation for renewal lies on the party claiming unfair termination on such ground. This was well explained in **Ibrahim s/o Mgunga & Others vs. African Muslim Agency** (supra) where the Court of Appeal stated:

> "...we are alive to section 39 of the ELRA which imposes the onus of proof on the employer to prove fairness in the termination of the employee's contract. However, in the circumstances such as the ones obtaining in the instant case, where an employee

> challenges the fairness of termination on the grounds of reasonable expectation of renewal of a fixed term contract, in terms of rule 4(5) of the Rules, it is the employee who assumes the duty to prove the basis of his expectation and this cannot be said to be a shift of the burden of proof as it is an elementary principle that he who alleges is the one responsible to prove his allegations."

However, as well discussed in **Ibrahim s/o Mgunga & Others vs. African Muslim Agency (**supra), the Court made reference to the case of **Médecins Sans Frontiers (MSF) Belgium vs. Vengai Nhopi and Eleven Others**, Civil Appeal No. SC.278/16 whereby the Supreme Court of Zimbabwe approved the assertion by a Zimbabwean Author one **Prof. Lovemore Madhuku** in ***Labour Law in Zimbabwe*, Weaver Press, 2015**, at page 101, that:

> 'The test for legitimate expectation is objective: would a reasonable person expect reengagement? This requires an assessment of all the circumstances of the case. To be legitimate, the expectation must arise from impressions created by the employer. "

In **Asanterabi Mkonyi vs. TANESCO** (Civil Appeal 53 of 2019) [2022] TZCA 96 TANZLII, the Court of Appeal, drew inspiration from a South African case of **Dierks vs. University of South Africa** (1999) 20ILT 1227 in which the Court set criteria to be considered in determining whether reasonable expectation for renewal exists. The Court held:

> "[133] A number of criteria have been identified as considerations which have influenced the findings of past judgments of the Industrial and Labour Appeals Courts. These include an approach involving the evaluation of all the surrounding circumstances, the significance or otherwise of the contractual stipulation, agreements, undertakings by the employer or practice or custom in regard to renewal or re-employment, the availability of the post, the purpose of or reason for concluding the fixed term contract, inconsistent conduct, failure to give reasonable notice, and nature of the employer's business."

Mr. Kipoko challenges the finding of the CMA that there was reasonable expectation for renewal. His argument is centered on two notions: one, that the annual leave extension beyond contract period did not give the respondent expectation for renewal and; two, that the contract being signed twice did not give the respondent reasonable expectation. Mr. Kipoko was of view that the circumstances of this case are as those in **Ibrahim Mgunga and 3 Others vs. African Muslim Agency** (supra). On the other hand, Mr. Anthony maintained that there was reasonable expectation for renewal as the applicant had issued notice of end of contract and intention to renew the contract.

Upon observing the records, I find that at the CMA, the respondent relied on three arguments in proving his expectation for renewal. One, that his leave was extended beyond the contract period; two, that he was required to file a letter expressing his intention to

continue working for the applicant and; three, that the organization structure did not change. The CMA found all three reasons proving that there was expectation for renewal. I will briefly address the three arguments.

As to the leave extending beyond the contract period, it is apparent on Exhibit F-3 that the respondent did apply for leave on 23.12.2022. The same was for 24 days commencing from 23.12.2022 to 15.01.2023. On the other hand, the contract was to end on 31.12.2022 as evidenced by his contract (Exhibit F-2) and the letter informing him of end of employment contract for project A-TZA-2020-0368. This shows 15 days of the leave being extended beyond the expiry of the contract.

While extension of leave beyond contractual period could be interpreted as signifying the possibility of renewal of contract, the same depends on circumstances of the case. As I observed Exhibit F-2, the contract of employment, leave has been provided for under paragraph 7. The same states:

> *"7. LEAVE*
>
> *You are entitled to 28 days paid leave per full calendar year. Mostly leave will be subject to discussion depending on the office workloads. To qualify for this, you must apply in an advance of one month for better sorting of your roles.* ***At least you should have seven days during the year and the remaining days will be***

approved during end of year for the whole TUSONGE team"

From the above clause, I gather that the respondent ought to request for leave a month before and he could be awarded at least 7 days during the year and the rest would be approved at the end of the year. The respondent requested for leave on 23.12.2022 not a month before as required in his contract. The same was also approved for the same dates applied for. This clearly shows that both parties were aware of the extended leave period. However, I do not find the same to qualify as a sign of expecting renewal. I find so because it is unclear why the respondent never requested for leave before the end of year or why the applicant did not follow up on the same. It appears that there was unspoken tradition in regard to grant of leave at the end of the year and the respondent was well aware of the same. In the foregoing, extension of leave alone could not reasonably suffice as proof of expectation for renewal.

The case of **Ibrahim s/o Mgunga & Others vs. African Muslim Agency** (supra) is distinguished in the sense that while in the said case notice of termination was served prior to grant of leave, in this case, notice of termination contained an invitation to seek for renewal, thus creating expectation for renewal. It is the invitation that served as the second ground for expectation.

As found under Exhibit F-4 titled "End of Employment Contract Project A-TZA-2020-0368" issued on 22.12.2022, the applicant's managing director did not only express that the respondent's

contract with her would officially end on 31.12.2022, but also noted that the respondent could express intention to continue working for the applicant. The same is found under the NB section in the said letter, which states:

> "NB:
>
> If you still feel you would wish to continue contributing to TUSONGE Vision given opportunity, please send your letter of intention to Managing Director before 4th January 2023
>
> You will have notified through phone call or WhatsApp on the progress."

After the said notice, the respondent communicated his intention to continue working for the applicant vide his letter titled "Employment contract renewal" authored on 30.12.2022 (Exhibit F-5). The respondent however received a reply on 16.01.2023 (Exhibit F-6) that there will not be any renewal. In my considered view, presence of an invitation to the respondent to express his intention to continue working for the applicant clearly created expectation for renewal of his contract.

Further, it appears that the organization structure did not change and respondent's position was never filled by any other person. DW1 could not prove otherwise at the hearing in the CMA. In fact, it seems that the respondent had performed multiple tasks in the applicant's organization, but there was no clear specification as to which role he was acting and in what project. It is because of such

situation that the CMA found the allegation that the termination was because the project had come to an end, unproved. If in any case it was true that the respondent was employed under a project that ceased to exist, there would have not been any invitation to seek renewal. From the record, there is a great possibility that the respondent held other posts unrelated to the project that allegedly came to an end, hence the invitation.

Exhibit F-4 did not only show that there was a project coming to an end, it also showed the said project was from 2020 to 2022. While DW1 recognized the respondents' contribution in said letter for the whole duration, the respondent had no contract in 2021. This proves that he worked in 2021 though without formal written contract. A formal written contract was then signed for the year 2022 something which insinuated continuation of his employment with the applicant and considering the role he served in the three years. This conduct by the applicant plus the letter inviting the respondent to apply for renewal of the employment contract for year 2023 vividly created expectation for renewal.

In the premises, I therefore find that the respondent proved that there was expectation for renewal of his employment contract and the expectation was built by the applicant. That being the case, the respondent's termination was thus unfair as correctly found by the CMA. In that respect, I further find that the respondent was rightfully awarded the twelve (12) months' salary as compensation for unfair

termination. The application is thus without merit and is hereby dismissed. Being a labour matter, I make no orders as to costs.

Dated and delivered at Moshi on this 27th day of March 2024.

L. M. MONGELLA

JUDGE