IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 194 OF 2019

BETWEEN

MONICA MOHAMED ..... APPLICANT

VERSUS

LEDGER HOTEL AND RESORT..... RESPONDENT

JUDGEMENT

Date of Last Order: 30/07/2020

Date of Judgment: 30/10/2020

I.D. Aboud.

The Applicant, **MONICA MOHAMED** filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (herein CMA) in labour dispute No. CMA/DSM/ILA/R.273/18 delivered on 28/01/2019 by Hon. H.H. Msina, Arbitrator. The application was made under the provision of section 91(1) (a) (b) 91 (2) (a) (b), 94 (1) (b) (i) of the Employment and Labour Relations Act, [CAP 366 R.E. 2019] (herein referred as the Act) Rule 24(1), 24(2) (a) (b) (c) (d) (e) and

(f), 24(3) (a) (b) (c) (d), 24(11) (c), 28(1)(c) (d) (e) of the Labour Court Rules, GN No. 106 of 2007 (herein referred as Labour Court Rules).

The application emanates from the following background. The applicant was first employed by the respondent as a Human Resources Manager on 2013. The parties entered into numerous contracts of a fixed term of one year. The last contract entered by the parties which is the gist of the present application commenced on 01/02/2017 and ended on 31/01/2018. When the contract came to an end the respondent did not wish to renew the contract. Aggrieved by the respondent's decision the applicant unsuccessful referred the dispute to CMA claiming for unfair termination. The Arbitrator decided on the respondent's favour and dismissed the application. Again being dissatisfied by the CMA's decision the applicant filed the present application on the following grounds:-

i. That the Hon. Arbitrator erred in law to entertain end of contract while there was ample proof of termination of contract.

ii. That the Hon. Arbitrator erred in law to entertain end of contract while there was ample proof of termination of

contract. The Hon. Arbitrator erred in law and fact to entertain the dispute by making reliance on the applicant's end of contract when she was already charged for gross misconduct which was yet to be concluded and when the outcome of disciplinary hearing was not yet released.

iii. The Arbitrator misdirected at law by failing to analyse the evidence tendered by the applicant which clearly proved on the balance of probabilities that there existed reasonable expectation of applicant's employment.

The application was argued by way of written submissions where both parties were represented by Learned Counsels. Mr. Elisaria Mosha, learned Counsel, appeared for the applicant while Mr. Beatus Kiwale, learned Counsel was for the respondent.

Arguing in support of the first ground Mr. Elisaria Mosha submitted that, the Hon Arbitrator was wrong to hold that there was end of contract without addressing why the severance pay was paid to the applicant. He stated that upon termination the applicant was paid severance pay of Tshs. 1,400,000/=.

As to the second ground it was he submitted that, the respondent ought to have proved that the applicant was fairly terminated. It was argued that the applicant termination was based on unfair procedures because the disciplinary hearing was conducted after being accused for allowing the Police officer to enter in the respondent's area and the outcome of the said hearing was delayed without any justification. To strengthen his submission he cited the case of **A One Product and Bottlers Ltd Vs. Flora Paulo and 32 others**, Rev. No. 356 of 2013 (unreported).

It was further submitted that the respondent's failure to proceed to determine the applicant's fate in disciplinary process which he commenced as per exhibits AP2 and AP3 was an irregularity which the Learned Arbitrator ought to have addressed. He added that the Arbitrator failed to perform her task and jumped to analyze about end of contract which was irrelevant in the matter at hand.

Turning to the last ground Mr. Elisaria Mosha submitted that, it is on record at page 4 of the award that every time during renewal of the employment contract the applicant had to undergo a performance appraisal

under which new contract was ensured. He strongly submitted that before expiry of the disputed contract the applicant's performance appraisal was taken on board for the purposes of renewing his contract.

The Learned Counsel went on to submit that, the applicant was granted loan of Tsh. 5,000,000/= which was to be paid from his salary for 14 months from 11/02/2017 to 11/06/2018 the circumstances which created reasonable expectation of renewal of the contract. He further submitted that, the notice of termination and reminder dated 30/12/2017 was acknowledged by the applicant on 05/02/2018 when she was still in her employment the fact which was not disputed by the applicant. He added that if the Arbitrator was minded of making a true analysis of evidence in terms of Exhibit HR-1 she would have noted with concern that the same was tainted with forgery and untruth. He argued that going through its first page it is dated 18/11/2017 and that because the contract was signed on 09/02/2017 was supposed to end on or before 09/02/2018, however looking at Exhibit HR-2 it is stated that the contract ought to have come to an end on 31/01/2018.

It was also submitted that, as per Exhibit HR-4 the applicant was paid severance pay of Tshs. 1,400,000/= signifying that she was terminated from employment based from 5 continuous years of service therefore there cannot be end of contract rather it was termination of contract. To strengthen his argument he cited the case of **Good Samaritan Vs. Joseph Robert Savari Munthu**, Rev. No. 165 of 2011 Lab. Div. Dsm [2014 LCCD 1]. He therefore prayed for the application to be allowed.

In reply the respondent's learned Counsel notified the Court that the respondent has not filed his counter affidavit despite being served, he stated that he was out of time and applied for extension of time to file the same in Application No. 508 of 2019, however his application was dismissed for lack of merit. He therefore prayed to proceed to file his written submission without filing a counter affidavit.

The applicant on the other hand bitterly challenged the respondent's prayer of filling the written submission. He stated that, a fact that misses from an affidavit or counter affidavit cannot be topped up to by mere submissions. To cement his submission he cited number of cases.

Before going further I wish to state that the respondent's prayer of filing submission without filing counter affidavit is declined by this Court. It has been argued in a number of cases that when a party fails to lodge a reply affidavit (counter affidavit) it is taken that he does not dispute the contents of the applicant's affidavit. This was also the position in the Court of Appeal case of **Finn Von Wurden Petersen and another Vs. Arusha District Council**, Civ. Appl. No. 562/17 of 2017 where it was further argued that:-

> "...the respondent who appears at the hearing without having lodged an affidavit in reply is precluded from challenging matters of fact, but he can challenge the application on matters of law."

Being bound by the decision of the Court of Appeal it is my view that, in the matter at hand it is my view that since the respondent has not raised any point of law in his submission then the same will be disregarded by this Court.

As to the merit of the application I find the issues for determination before the Court are whether the applicant was terminated from work and to what reliefs are the parties entitled.

On the first issue as to whether the applicant was terminated from work. The applicant averred in her affidavit that she was unfairly terminated both substantive and procedurally. It is apparent that unfair termination occurs when an employer fails to prove the circumstances provided under section 37 of the Act. Under Rule 3 (2) of GN 42 of 2007 the law provides ways in which employment contracts may be terminated. The relevant provision provides as follows:-

> "Rule 3 (2) - **A lawful termination of employment** under the common **law shall be** as follows:-
>
> (a) Termination of employment **by agreement**;
>
> (b) **Automatic termination**;
>
> **(c)** Termination of employment **by the employee; or**
>
> (d) Determination of employment **by the employee;**"
>
> [Emphasis is mine]

It should be noted that, employment contracts are like any other contracts where parties signing it are bound to its terms. This was the position in the case of **Hotel Sultan Palace Zanzibar Vs. Daniel Leizer and another**, Civ. Appl. No. 104 of 2004 (unreported) where it was held that:-

> "It is elementary that the employer and employee have to be guided by agreed terms governing employment. Otherwise it would be a chaotic state of affair if employees or employers were left to freely do as they like regarding the employment in issue".

Also the Court observes that termination of employment at the employer's will, that the right to hire and fire is not part of the Tanzania Labour Laws. Under the Labour laws of this country the employee has a legitimate right to expect that if everything remains constant he/she will be in the service throughout the contractual period. That is why the employee has remedy where that right is breached by way of special damages,

compensation and reinstatement s orders. The clauses which are in fixed term contracts, for instance 'termination shall be by notice' does not absolve the employer from the duty to observe fair practice in instances of premature termination.

In the application at hand the parties entered into numerous fixed term contracts of one year. The last contract entered by the parties which is the subject matter of this application commenced on 01/02/2017 and ended on 31/01/2018. It is undisputed fact that on 30/12/2017 the applicant was served with a notice of non renewal of the contract (Exhibit HR-2). The applicant alleged that he received the said notice on 05/02/2018 the fact which is not true because in the relevant document it clearly show the applicant received the same on 02/01/2018. After being served with the notice of non renewal the applicant continued to serve the respondent up to 31/01/2018. Upon expiry of the contract the applicant referred the dispute to CMA on 28/02/2018 claiming for termination of contract.

The respondent in his submission strongly disputed that fact and submitted that the applicant's contract expired upon the agreed term. I

have careful examined the record which reveals that indeed the applicant was not terminated from her employment as she claimed. She served the respondent for the whole agreed period of one year but the dispute arose when the respondent decided not to renew the contract into other terms.

It is a settled law that, a fixed term contract shall automatically come to an end when the agreed time expires. This is the position of the law provided under Rule 4 (2) of the Employment and Labour Relations (Code of Good Practice) GN 42 of 2007 (herein GN 42 of 2007) which is to the effect that:-

> "Rule 4 (2)-Where **the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires**, unless the contract provided otherwise".
>
> [Emphasis is mine]

The applicant in this matter claimed that, he had reasonable expectation of renewal of the said contract. The law imposes the duty to an employee claiming for reasonable expectation of renewal to

demonstrate reasons for such expectation. This is provided under Rule 4 (5) of GN 42 of 2007 which provides as follows:-

> "Rule 4 (5)-Where fixed term contract is not renewed and the employee claims a reasonable expectation of renewal, **the employee shall demonstrate that there is an objective basis for the expectation such as previous renewal**, employer's under takings to renew"
>
> (Emphasis added).

In the matter at hand the applicant's basis of expectation of renewal was the fact that she applied for loan payable within 14 months from the respondent which was approved while her contract was only for 12 months. In this allegation it is my view that parties to employment relationship are governed by the employment contracts and not otherwise. Therefore, so long as the contract was for a fixed term of one year, her loan approval by the respondent approval did not automatically change the terms of such contract. In my view parties were supposed to go back and review the terms of the employment contract.

It was claimed by the applicant the applicant that she had reasonable expectation of renewal due to the reason that her performance was under performance appraisal. In my view such reason cannot stand as a reasonable expectation of renewal of the applicant employment contract because the performance appraisal system is for the employers to measure the performance of their employees for the sake of identifying their strength and weaknesses and to take reasonable measures for the development of their businesses. Therefore, so far as the applicant was still an employee of the respondent her performance was rightly examined by the respondent. I fully agree that to some extent employers also use the performance appraisals to determine whether employees' contract should continue or not. However, that approach depends on the agreed terms of such contract as to whether is clearly spelt out to that effect.

I have also noted the applicant's submission that Exhibit HR-1 is forged, in my view such fact should have been raised at the CMA but not at this revisional stage because to be proved by it needs facts and evidence. It is a settled principle of law that at the revisional stage a court of a higher

rank is precluded from determining new issues which were not raised and argued at lower courts unless such issue involves a point of law. In the matter at hand as the record reveals the issue of forgery was not one among the disputed issues at the CMA. Thus, since it is a mere point of fact that need to be proved so the same cannot be entertained by this Court.

I have also considered the applicant's submission on the payment of severance pay. The payment of severance is governed by section 42 of the Act. In my view under the circumstances of this case the applicant was favored by the employer on the payment of severance pay because the same is payable to an employee who has completed 12 months continuous service with an employer, which is not the case in this matter. The applicant at hand was not in 12 months continuous service with the respondent. The applicant's employment contract came to an end in each completed term of 12 months. Thus, it wrong for applicant to claim that such continuous service form the basis of her expectation of payment of severance pay.

The applicant also claimed that the procedures for terminating her were not followed by the respondent. In this aspect the position of the law is very clear that, when the agreed fixed period of contract expires the employer is not obliged to follow the stipulated procedures for terminating the employment contract as the contract itself provides for its termination procedure which is a lawful automatic termination as is provided under rule 3 (2) of the GN. 42 of 2007.

From foregoing it is my finding that the respondent currently was not supposed to follow disciplinary hearing like in other kind of employment contracts which are not on fixed terms. Thus, the applicant contention that disciplinary procedures were not followed, in particular disciplinary hearing was not conducted has no legal basis.

On the basis of the foregoing discussion it is my view that the applicant was not terminated from work as claimed. As stated above her fixed terms contract of one year expired and the respondent did not wish to renew such contract, the decision which had legal justification according to the terms of contract between the parties as rightly found by the Arbitrator. The applicant also alleged that the Arbitrator was wrong to

determine the issue of end of contract. In my view the issue of end of contract was a crucial part of the present application which was rightly decided by the Arbitrator as discussed above.

Under the circumstances and on the basis of the above discussion, I find no reason to fault the Arbitrator's findings that the applicant did not demonstrate any reasonable expectation of renewal of the contract as she wishes this Court to believe. It is my view that, the applicant's contract automatically expired on 31/01/2018 and she was paid all of her dues. Thus, the applicant's claim of unfair termination lacks legal basis.

On the last issue as to what reliefs are the parties entitled, from the CMA F1 the applicant prayed for salaries for the whole period she was out of work, reinstatement, the loan deducted to her unfairly Tshs. 1,600,000/=, damages of Tshs. 20,000,000/= and payment of compensation. The court found that it was proved the applicant was not terminated from employment, therefore she is not entitled to any remedies claimed. Upon termination of the contract the applicant was paid all her dues as reflected in the payment voucher (Exhibit HR4), so she cannot

claim to be entitled to any remedies for unfair termination stipulated under section 40 of the Act.

In the result I find the present application has no merit. The applicant failed to demonstrate reasons for expectation of renewal of her employment contract. Thus, the Arbitrator's award is hereby upheld and this application is dismissed accordingly.

It is so ordered.

I.D. Aboud, J.
JUDGE
30/10/2020