

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 674 OF 2019

BETWEEN

SHIRIKA LA USAFIRI DAR ES SALAAM LIMITED..... APPLICANT

VERSUS

VICTOR ALFRED MILANZI RESPONDENT

JUDGMENT

Date of Last Order: 30/07/2020

Date of Judgment: 30/10/2020

Aboud, J.

The Applicant, **SHIRIKA LA USAFIRI DAR ES SALAAM LIMITED** filed the present application seeking revision of the award of the Commission for Mediation and Arbitration (to be referred as CMA) which was delivered on 09/02/2017 in Labour Dispute No. **CMA/DSM/ILA/R.158/14/1301** by Hon. E. Mwidunda, Arbitrator. The application was made under the provisions of Sections 91 (1) (a) (b) & 91 (2) (a) (b) and 94 (1) (b) (i) of the Employment and Labour Relations Act

[CAP 366 R.E 2019] (herein the Act) and Rules 24 (1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d) and 28 (1) (a) (b) (c) (d) (e) of the Labour Court Rules, GN. No. 106 of 2007, (henceforth the Labour Court Rules).

The present application arises out of the following context. On 01/07/2006 the respondent was employed by the applicant in the position of General Manager in a fixed term contract of five years which ended on 30/06/2011. It was alleged that before expiry of the said contract on 29/04/2011 the respondent's contract was renewed into another fixed term of three years. On 10/06/2011 the respondent was suspended from work where the respondent was promised to be paid his salaries as usual. The applicant failed to honour the agreement of payment of salaries as agreed. Being aggrieved by the applicant's action the respondent referred the dispute to the CMA to enforce the agreement by the parties. The CMA decided on the respondent's favour and awarded him 31 months salaries as compensation, Tshs. 10,000,000/= as an outstanding terminal benefits and Tshs. 65,000,000/= as general damages.

Dissatisfied by the CMA's award the applicant filed the present application. The applicant raised the following issues to be determined by this Court:-

- i. Whether at the time of suspension of the respondent by the applicant, the tenure of the respondent's employment contract was extended for a period of another five years.
- ii. Whether an employee like the respondent who has been suspended but without proper handing over of the office, is entitled to reliefs falling under part III sub part E of the Employment and Labour Relations Act, Act No. 6 of 2004 and the remedies thereof under section 40(1)(c) of the same Act.
- iii. Whether or not under the employment laws of Tanzania, the CMA has jurisdiction to award compensation and general damages to an employee the claims and reliefs which are not specifically stated in the referral of dispute to the Commission Form No. 1.

- iv. Whether the Honourable Arbitrator erred in law and in fact in awarding Tshs. 10,000,000/= without proof thereof.

The matter proceeded by way of written submission. The applicant and the respondent were both represented by Learned Counsels, Mr. Patrick K. Mtani and Ms. Blandina Gwawile respectively.

Submitting on the first issue above Mr. Patrick K. Mtani submitted that, it is undisputed that the respondent was employed by the applicant for a fixed term of five years to the post of General Manager commencing on 01/07/2006 vide the letter of appointment dated 19/06/2006. He further submitted that before expiry of the said contract on 10/06/2011 the respondent was suspended from work.

The Learned Counsel argued that the Arbitrator did not evaluate the evidence properly to arrive to the conclusion that the contract was renewed to another fixed term of five years basing on exhibit P3, thus his decision was unlawful, irrational and illogical suffice to be revised as provided under section 91 (2)(c) of the Act. He said no evidence was tendered to connect the contract of employment (Exh. P1) and the letter of extension of the contract (Exh. P3). He submitted that at clause (e) of the

employment contract it is provided that the renewal of the said contract would only be done by an addendum signed by both parties and not otherwise. He argued that if the parties had intended to renew the employment contract all correspondences would have properly referred to the exhibit P1.

Mr. Patrick K. Mtani went on to submit that, exhibit P3 is a mere letter from the Board of chairman to the respondent which referred to the contract ending on 30/05/2011 while the contract between the applicant and the respondent was ending on 30/06/2011. He added that the said letter extended the contract for the period of three years and not five years as decided by the Arbitrator.

As to the second issue the Learned Counsel submitted that, Part E of the Act applies to employees who alleges unfair termination and upon satisfaction that the employee was unfairly terminated the remedies available are provided under section 40 (1) of the Act. He argued that in the matter at hand the respondent neither alleged unfair termination nor constructive termination as wrongly found by the Arbitrator at page 11 of the impugned award.

Turning to the third issue it was submitted that, the Hon. Arbitrator had no jurisdiction to award general damages which was not stated in the CMA Form No. 1. The learned counsel argued that the nature of the dispute and reliefs claims can only be understood by going through CMA Form No. 1 as stated under section 86(1) of the Act. He strongly submitted that the Arbitrator acted without jurisdiction to award Tshs. 10,000,000/= as general damages to the respondent the relief which was not claimed in CMA Form No. 1. He added that even if the Arbitrator has jurisdiction to award general damages the same should have been stated in the referral form.

Arguing the last issue on record Mr. Patrick K. Mtani, learned Counsel submitted that, the Hon. Arbitrator wrongly awarded the sum of Tshs. 10,000,000/= to the respondent without any evidence. He stated that the Arbitrator awarded the said amount basing on the Staff Advice which was tendered as Exhibit P4 however the said exhibit had no connection to any agreement between the parties. He therefore prayed for the application to be allowed.

Responding to the application Ms. Blandina Gwawile, learned Counsel submitted that, the issues raised by the applicant has no merits as the applicant failed to fault the Arbitrator's award. He stated that the Counsel for the applicant deviated from the issues raised in the chamber summons and he is trying to fish out a verdict by changing the grounds of revision through submission which is illegal and unprocedural.

As to the first issue Ms. Blandina Gwawile responded that, the applicant's contentions are baseless because he never disputed Exhibit P1 and P3. In respect of complying with the requirement of clause (e) of the contract he submitted that the same was complied by both parties through the letter of renewal of the contract addressed to the respondent (exhibit P3). He added that the Arbitrator made a very good analysis of that issue by noting that the witness brought by the applicant was not conversant with what happened in the Board.

Responding to the second issue the Learned Counsel submitted that, the Arbitrator did not mention anything about unfair termination in the award. He stated that the applicant never disputed the issue of suspension. He said as per Rule 27(1) of the Employment and Labour Relations (Code

of good practice) Rules, 2007 the law requires employees suspended to be on full remuneration during the time of suspension however the applicant did not comply with that requirement.

In respect of handling over of office Ms. Blandina Gwawile submitted that, it is on record of CMA proceedings that the respondent's office was invaded, broken and important documents were stolen as well as he was threatened for his life but the applicant never cared and proceeded to employ another General Manager.

It was submitted that in the impugned award the Arbitrator neither mentioned about unfair termination nor relied its decision on the reliefs provided under section 40(1) (c) of the Act rather the award based on the breach of contract.

As regards to the third issue she stated that, the respondent prayed for general damages during his testimony as reflected at page 4 of the award. He added that the general damages were the result of family hardships faced after suspension for all three years. To strengthen her submission she cited the case of **Abubakari Haji Yakubu Vs. Air**

Tanzania Co. Limited, Rev. No. 162 of 2011. She strongly submitted that the Arbitrator was right to award the general damages.

With respect to the last issue she submitted that, the Arbitrator legally granted the right established under the employment contract where it was stated that the respondent was entitled to gratuity of 25% of the accumulated basic salaries for the tenure of service. She added that the Arbitrator was right to grant the outstanding gratuity of Tshs. 10,000,000/= . She therefore prayed for the application to be dismissed.

Before determining the merit of the application I have to say that, I have noted the submission by the respondent counsel that the applicant's Counsel deviated from the issues raised in the chamber summons. I have duly examined the records and the issues argued by Mr. Patrick K. Mtani, learned Counsel for the applicant they are related to the ones reflected in the chamber summons. However, the learned Counsel abandoned the issue of time limit which was raised as first issue in the applicant's affidavit in support of the application. Under this circumstance it is my view that parties are bound by their pleadings in the sense that they have to address

the Court basing on the issues and grounds raised thereto but not jumping on new issues which were not pleaded. Furthermore if one of the issues rose is abandoned a party should state so in his/her submission so as to put the record clear. In the matter at hand the applicant did not submit in regard to the issue of time limit therefore the court considers that the relevant issue has been abandoned by the applicant.

As to the merit of the application I have considered submissions of the parties, Court records and relevant labour laws and practice. I then find the following are the issues for determination before this Court, firstly is whether the contract between the parties was renewed into another term, whether the Arbitrator had jurisdiction to award general damages to the respondent and lastly is whether the respondent is entitled to the relief prayed in CMA Form 1.

On the first issue as to whether the contract between the parties was renewed into another term. The applicant strongly disputed the Arbitrator's findings that the contract between the parties was renewed by the letter dated 29/04/2011 (Exhibit P3). It was the applicant's submission that the said letter had no connection with the respondent's employment contract.

He argued that in the employment contract it was agreed that for the contract to be renewed there must be an addendum which should be signed by both parties as provided under clause (e) of the said contract. I quote the relevant clause for easy of reference:-

"Clause (e) Variation

The benefits, terms and conditions contained in this contract may be varied, altered or changed by both parties to this contract. All communications and changes to this contract must be made in writing and signed by both parties."

In my general understanding to the clause quoted above is that the changes were referred to the terms of the subsisting contract but not to any contract intended to be renewed by the parties. Therefore the argument that for the contract to be renewed there must be an addendum is baseless and lacks legal stance. I had a glance on the letter dated 29/04/2011 of which the respondent claims it is the renewal of the contract. I quote the relevant part of the letter in question:-

“Napenda kukufahamisha kwamba ombi lako la kutaka kuongezewa muda mwingine wa Mkataba wa Kazi limejadiliwa na kikao cha Bodi ya Shirika kwenye mkutano wake wa dharura uliofanyika tarehe 21/04/2011 na kukubaliwa.

Hivyo ninayo furaha kukufahamisha kwamba ombi lako la kuongeza mkataba wa kazi limekubaliwa.

Kwa barua hii unaarifiwa kwamba utajiriwa kwa mkataba wa miaka mitatu kuanzia tarehe 01/06/2011 kwa masharti yaleyale ya mkataba wako uliomalizika tarehe 31/05/2011.”

Loosely translation of the quotation above is that the respondent was informed that his application for the extension of the period of the contract is granted by the Board in a meeting dated 21/04/2011. He was further informed that, his contract will be extended for the fixed period of three years commenced on 01/06/2011 and that the terms of the previous contract will prevail. From the content of that letter it is my view that the respondent's contract was renewed for another fixed term of three years

commenced 01/06/2011 and ended on 31/05/2011. It is my findings that the Arbitrator misdirected himself at page 8 of the award to state that the contract was renewed to another fixed term of five years.

On the second issue as to whether the Arbitrator had jurisdiction to award general damages to the respondent, from the CMA Form No. 1 the respondent prayed for 31 months as salary arrears and Tshs. 10,000,000/= as outstanding terminal benefits. Therefore, it is apparent that the claim of general damages was not stated in the referral form. The respondent strongly submitted that he prayed for that relief during trial. In my view as it is held in a number of cases parties are bound by their pleadings and, judges or arbitrators are not supposed to decide on claims which were not pleaded by the parties. The referral form No. 1 is the document which initiates proceedings at the CMA. Therefore the respondent's prayer of general damages should have been stated in the CMA Form No. 1.

The importance of particulars in pleadings was clearly demonstrated in the case of **Esso Petroleum Co Ltd Vs. Southport Corporation**

[1956] AC AC 218 where in the course of his judgment Lord Normand said (at page 238):-

“...The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.”

On the basis of the foregoing discussion it is my view that the Arbitrator misdirected himself to award the general damages to the respondent because they were reliefs not sought by him in the referral form. The Arbitrator’s powers on the award of remedies is limited to the prayers stated in the referral form save for statutory entitlements which are specifically provided by the law. Therefore, the award of general damages to the respondent is hereby quashed and set aside.

On the last issue as to whether the respondent is entitled to the relief prayed in CMA Form 1. From the CMA records the respondent prayed for

31 months salary arrears and Tshs. 10,000,000/= as an outstanding terminal benefit. As to the claim of Tshs. 10,000,000/= the respondent tendered staff advice (Exhibit P4) to prove the existence of such balance. I have critically examined the record, the applicant never disputed such an exhibit. I have noted the applicant's submission that such an exhibit needed to be corroborated with other evidence. In my view it was the applicant's duty to tender evidence to disprove the existence of that balance however he did not do so. I therefore agree with the Arbitrator that the respondent is entitled to Tshs. 10,000,000/= as an outstanding terminal benefits.

Turning to the payment of 31 months salaries, as discussed above the parties entered into another fixed term contract of three years. As the record reveals the respondent was suspended and promised to be paid his salaries as usual, however the applicant never complied with that agreement. Thus, it is my view that the respondent is entitled to the relief claimed. I have also noted the applicant's submission that the Arbitrator awarded the respondent the remedies provided under section 40 of the Act. With due respect I have cautiously gone through the impugned award

and it is apparent that the Arbitrator did not award the respondent the remedies provided under section 40 of the Act.

In the result I find the present application to have partly succeeded to the extent that the award of general damages to the respondent is hereby quashed and set aside, the applicant is ordered to pay the respondent Tshs. 10,000,000/= as an outstanding terminal benefits and 31 months as salary arrears for the renewed contract as correctly awarded by the Arbitrator.

It is so ordered.



I.D. Aboud

JUDGE

30/10/2020