IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 208 OF 2019

BETWEEN

TMJ HOSPITAL LTD.....APPLICANT

VERSUS

PILI MBENA.....RESPONDENT

JUDGMENT

Date of the Last Order: 26/03/2020

Date of the Judgment: 22/05/2020

A. E. MWIPOPO, J

The applicant in this Revision Application namely **TMJ HOSPITAL LTD** was aggrieved by the decision of the arbitrator in the labour dispute no. CMA/DSM/ILA/R.328/14 dated 29/06/2018 who awarded the respondent Pili Mbena payment of 4,905,108/= being compensation for 12 months salaries for unfair termination. He instituted the present application with four grounds of revision.

When the application came for hearing both parties were represented. Advocate Sabas Shayo assisted by Advocate Alex Felicia appeared for the applicant whereas Advocate Thomas Chubwa appeared for the Respondent.

The first ground of revision as submitted by Advocate Sabas Shayo is that the Commission erred in law and in fact by framing issues outside the scope of pleadings of the parties leaving the relevant issues in dispute undecided. He argued that issues which were framed by the Commission are not addressing the issue raised by the pleadings of the parties. CMA Form No. 1 shows that the respondent had permanent employment. The same was repeated in respondent opening statement. However, the applicant opening statement shows that the respondent had a fixed contract for a term of 2 years. He was of the opinion that issues are framed from the pleadings of the parties. Rule 24(4) of the Labour Institutions {Mediation and Arbitration} guidelines GN. No. 67 of 2007 provides that at the conclusion of the opening statement the Arbitrator shall frame issue to narrow down the factual which need to be proved.

The applicant argued that the expected crucial issue to be framed is whether the respondent had a permanent employment or a fixed term contract. Issues are supposed to be framed from the factual need to be proved. Order XIV Rule (1) (2) and (3) provides for the same position. The CMA decided to frame other issues and leave the crucial issue of whether the respondent was employed permanently. The issue framed were not going to determine the Labour Dispute. Failure to frame the crucial issue

lead to the wrong award by the Commission and he relied to the decision of the CAT in the case of **James Gwagilo Vs. AG {2004} TLR 161.**

The second ground is that the Arbitrator erred in law and fact by relating the issues in dispute with retrenchment which is totally irrelevant to facts in issue. The applicant submitted on this ground that in page 7 and 8 of the Award the Arbitrator was making findings that termination was by way of retrenchment which was not the issue. The termination was by the expiry of the fixed term hence the Arbitrator erred his holding.

The dispute was referred to the Commission by the respondent after she was informed through a letter – exhibit AP1 that the contract will not be renewed after its expiry. The letter informed the respondent that the contract have expired on the same day and she was asked to collect her benefits. The arbitrator in determining this dispute, treated the termination as that of retrenchment. However, the dispute was about the expiry of the fixed contract. The act of the arbitrator to direct himself on the facts of retrenchment was wrong. The Employment and Labour Relations {Code of Good Practice} GN. No. 42 of 2007 in rule 4(2) provides that where a contract is for a fixed term, the contract shall terminates when the agreed period expires excepts where the contract provides otherwise. The position is supported by their court in the case of **National Oil (T) Ltd Versus**

Jaffery Dotto Msensemi and 3 Others, Revision No. 558 of 2016, High Court, Labour Division at Dar Es Salaam where it was held that "I must say the question of previous renewal of employment contract is not an absolute factor for an employee to create a reasonable expectation, reasonable expectation is only created when employment explicit elaborate the intension of the employment to renew a fixed term contract when it comes to an end".

He stated further that the contract which is exhibit D5 provides that the contract shall come to an end upon each of the parties to terminate the same upon giving notice to the other party. The contract was coming to an end automatically on 31/05/2017. The letter was to inform the respondent that there will be no renewal of the contract after expiry of the contract period. The act of the arbitrator to say in the award that there are no other employee who were terminated shows that he failed to understand the nature of the dispute. He emphasized that the dispute was on expiry of the contract and not issue of termination of the contract.

Ground No. 3 is that the Commission erred in law and fact for disregarding the principle of freedom of parties to contract and how it applied to the facts in dispute. The counsel for the applicant questioned the decision of the Arbitrator in the award to hold that there was expectation to renew

contract while the term of contract as found in exhibit D5 expressed on what the parties have agreed on their employment relationship. The act of the renewing the contract several times does not give the employee entitlement for another contract. In the Exhibit D5 there is no indication that the contract will be renewed. To support this position he cited a case of **Printing and Numerical registry Company Versus Sampson [1875] EQ 462** where the Court of Appeal of England held that the doctrine of freedom of contract are based on mutual agreement and free choice. From this principle he was of the view that that the Commission failed to respect the freedom of parties to the contract.

The last ground of revision is that the Commission erred in law and fact by failing to analyse the evidence tendered before it in relation to the issues in dispute. He submitted on this ground that the typed CMA proceedings in page 5 and 6 shows that the applicant witness namely Pasul Nimesh Chya – DW1 when he was testifying he stated that the employee was given 2 years contract which was renewed every time the contract expired from the year 2007 to 2015. Those contracts tendered by DW1 were not considered at all by the Arbitrator. He submitted that the Arbitrator also did not consider what was stated in the CMA Form No. 1 and the opening statement of the respondent before the CMA. The Arbitrator did not consider

the testimony by PW1 that all those contracts were for two years. At page 12 of the proceedings the respondent stated that she was a permanent employee and the contract of 2015 was wrong for failure to take into consideration the permanent contract. The failure of the Arbitrator to consider all the circumstances led to the Commission to deliver illegal Award. He prayed for the Revision Application to be allowed and the award to be set aside.

Replying to the submission by the counsel for the applicant, the counsel for the respondent Advocate Thomas Chubwa contested each of the applicants ground of the revision. On the first ground, he submitted that issues of the dispute before the Commission were framed by all parties. The issues were framed on 30/10/2017 and when the issue where framed the Applicant was represented by Advocate Felician Alex and the respondent was represented by Advocate Thomas Chubwa. Those issues were framed by the Commission with the approval of both parties. It was clear that the respondent {complainant} in CMA dispute had a specific contract. What was said to be the dispute is that she expected the contract will be renewed. Therefore the issues were framed by the Arbitrator assisted by counsels for both parties.

He submitted further that the respondent expected the contact will be renewed because of the letter which was given to the respondent. The **National Oil** case the court held that the fixed term contract come to an end automatically with no need to write a termination letter. This case provides the exception what the letter of termination need not to be written but in the present case it was written.

In the case of **Denis Kalua Said Mngombe Versus Flamingo Cafeteria, Revision No. 210 of 2018, High Court, Labour Division at Dar es Salaam** it was held that "I agree with the proposition that by giving notice to the applicants, it proves that the parties had reasonable expectations of renewal of their contracts. That's why the contract did not end automatically as earlier agreed; the employer had to issue notices".

He was of the opinion that there was no injustice caused in framing issues at the hearing before the Commission.

On the second ground, he submitted that the Applicant terminated the respondent for retrenchment as the termination letter – exhibit AP1 stated that the contract will not be renewed due to current financial situation. Therefore the reason for not renewing the contract is current financial situation and not the end of period of contract. In page 3 of the Award DW1 testified that during 10 years of the respondent contract the management

decided not to give her permanent employment. And the reason for not renewing the contract is financial difficulties caused by reduced number of clients and that NHIF have reduced its payment to the hospital. For the above reason, the Arbitration was justified to consider the issue of retrenchment due to the evidence of witnesses and exhibit AP1 did show that the reason for not renewing the contract was financial constraints.

The counsel for the respondent submitted on the third ground for the revision as submitted by the applicant that the respondent was given by the Applicant two years contract. The fixed term contract is allowed only to professional employees and managerial personnel. The respondent believe that she had a permanent employment as she was paid severance pay which is not paid employees with specific term of contract. This proves that there was permanent employment.

On the last ground, he submitted that the arbitration considered all evidence as it was adduced and tendered in the CMA and came up with justifiable award. He prayed for the court to uphold the CMA Award as the respondent was unfairly terminated.

In rejoinder, Advocate Sabas Shayo retaliated his submission in chief. He emphasized that the severance pay was part of the freedom to contract as it was a term of the contract. He states that there is contradiction on the

respondent submissions. In ground number 1 the respondent claimed that there was no permanent employment but on the 3rd ground he alleges that there was permanent contract.

He also argued that according to rule 24(4) of GN No. 67 of 2007 and order 14 of the CPC it is the duty of the court to frame issues. The parties assist the CMA in framing issues but parties do not frame issues. He was of the view that the **case of Denis Kalua** cited by the respondent is distinguishable to the present case as in this case there was no notice of termination.

After reading the submissions and the CMA record there are four issues for determination of this Revision Application. The issues are as follows:

1. Whether the trial arbitrator framed issues outside the scope of pleadings of the parties leaving the relevant issues in the dispute undecided.
2. Whether the employer terminated the respondent employment.
3. If the answer to the second issue is yes, whether the termination was fair.
4. What are remedies entitled to parties?

The first issue for determination in this dispute is whether the trial arbitrator framed issues outside the scope of pleadings of the parties leaving the relevant issues in the dispute undecided. Framing of the issues is one of the stages of arbitration process according to rule 22 (2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, G.N. No. 67 of 2007. Under the rule there are five stages of the arbitration process. The rule reads as follows;

> ***22(2) The arbitration process involves the following five stages-***
>
> ***a. Introduction;***
>
> ***b. Opening statement and narrowing issues;***
>
> ***c. Evidence;***
>
> ***d. Argument; and***
>
> ***e. Award.***

From above, the opening statement and narrowing of issues are second stage of arbitration process. Narrowing of issues in dispute is done at the conclusion of the opening statement according to rule 24(4) of the G.N. No. 67 of 2007. Its purpose is to eliminate the need of evidence in respect of factual dispute. This means framing of issues helps parties to the dispute to adduce evidence on facts which were disputed. Therefore failure

to frame issues from the opening statement is against rule 24(4) of G.N. No. 67 of 2007. Failure to frame the crucial issue may lead to the wrong award. In **Safi Medics v Rose Peter, Mganga Mussa and Richard Karata, Revision No 82 of 2010**, High Court of Tanzania Labour Division, at Tanga, (Unreported), the Court held that "A successful arbitration requires that both the arbitrator and the parties in the dispute have a common understanding of the issues in controversy".

According to rule 24(4) of the G.N. No. 67 of 2007 it is the arbitrator who shall narrow down the issues in dispute. Parties to the dispute may assist in the framing of issues to the dispute, but it is the duty of the arbitrator to frame issues in dispute. In the present case the applicant was of the opinion that the trial arbitrator framed issues outside the scope of pleadings of the parties leaving the relevant issues in the dispute undecided. He argued that issues which were framed by the Commission are not addressing the issue raised by the pleadings of the parties. CMA Form No. 1 and respondent opening statement shows that the respondent had permanent employment while the applicant opening statement shows that the respondent had a fixed contract for a term of 2 years. Thus, he was of the opinion that the expected crucial issue to be framed was whether the respondent had a permanent employment or a fixed term contract. In

contention the counsel for the respondent submitted that it was clear that the respondent {complainant in CMA dispute} had a specific contract. What was said to be the dispute is that she expected the contract will be renewed.

I have read CMA form No. 1 page 6, Part B, paragraph 4 (b), it shows that the reason for termination was not fair as she was employed on permanent basis. Also in the opening statement the respondent who was the complainant before the CMA stated that that her employment was permanent. Therefore as submitted by the counsel for the applicant the crucial issue to be determined from the opening statement of the parties was whether the respondent employment was permanent or a fixed term contract. Failure of the trial arbitrator to frame that crucial issue have led to confusion and to the wrong award. This can be seen even in respondent testimony at page 10 of the typed proceedings and even in respondent submission on the applicant third ground for the revision. The counsel for the respondent stated in his submission that the respondent was given by the Applicant two years contract, however the fixed term contract is allowed only to professional employees and managerial personnel. The respondent believe that she had a permanent employment as she was paid severance pay which is not paid employees with specific term of contract. Therefore, as submitted by the applicant the issue whether the respondent had a

permanent employment or a fixed term contract which is crucial issue in the dispute was not framed.

The arbitrator framed three issues for determination of the dispute as it is found in page 4 of the typed proceedings and page 2 of the Commission award. The issues framed were whether there was expectation for renewal of the respondent employment; whether procedure for termination was adhered; and what reliefs are entitled to both parties. Those issues do not address the major issue in dispute in the opening statement and on the testimony of witnesses.

The parties also differs as to which is the major issue for determination of the dispute. The applicant stated that the major issue is whether there was a permanent employment contract while the respondent alleges that the issue was whether there was lawful retrenchment. Therefore, the failure of the arbitrator to frame the crucial issue have led to the controversy in understanding of the issues. There was no common understanding of the issues between the arbitrator and the parties. Failure to frame crucial issue according to the opening statement can lead to wrong award (see the decision of the Court of Appeal of Tanzania in the case of **James Gwagilo Versus AG {2004} TLR 161).** As result the CMA proceedings were not kept in accordance with the law.

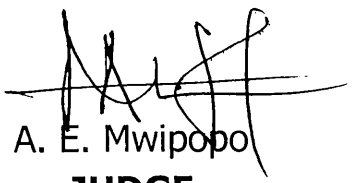
This court in the case of **Bidco Oil Soap Vs Abdu Said and 3 Others, Revision No 11/2008,** held that "the function of arbitration are quasi-judicial, so arbitrators should insist on basic characteristics of orderliness and regularity in execution of their duties. Luckily the Commission has made elaborate rules (published as GN 64/2007 and GN 67/2007). These rules of procedures are subsidiary legislation and arbitrators are bound to follow rules set therein".

The above decision means that the arbitrator bound to keep a proper record according to the provisions of the rules. In the present case the Arbitrator did not follow the mandatory procedure provided by the rules for failure to frame crucial issue after the opening statement of parties. This means that the trial arbitrator failed to keep the record according to the law, as a results, there was no common understanding of the issues between the arbitrator and the parties.

This Court in the case of **Tanzania Leaf Tobacco Company Limited Versus Said Mgemwa, Revision No. 16 of 2016,** in the High Court Of Tanzania Labour Division, at Tabora, (Unreported), where the major issue before the Court was proper recording of CMA proceedings, the Court quashed whole proceedings, their resultant awards were set aside and the disputes ordered to start afresh according to the law.

In the present application the CMA record proceedings was not properly kept by the trial arbitrator. Therefore, I declare the CMA Award was nullity. Accordingly, I quash the whole proceedings before the CMA in Labour Dispute No. **CMA/DSM/KIN/R.730/17/795** and set aside the CMA award. Under Section 91(4) of the Employment and Labour Relations Act 2004, I revert the file to the CMA with an order that the dispute to start afresh before a different Arbitrator of competent jurisdiction. Pili Mbena to file the same for the purpose of arbitration within 30 days from today if she is still desirous to pursue the matter.

As the first issue have disposed the matter, I find no need to determine the remaining issues.



A. E. Mwipopo

JUDGE

22/05/2020