IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 230 OF 2020

CRJE (EAST AFRICA) LIMITED..... APPLICANT

VERSUS

BURHANI MOHAMEDI & 23 OTHERS..... RESPONDENT

(From the decision Commission for Mediation & Arbitration of DSM at Temeke)

(Amos: Arbitrator)

dated 20th March 2020

in

No. CMA/DSM/TEM/371/2018/133/2018

JUDGEMENT

21st October & 10th December 2021

Rwizile, J

The applicant is a foreign construction company doing business of construction in Tanzania. It is going by the name of China Railway Jianchang Engineering (EA) Ltd which for the purposes of this application has been abbreviated as **CRJE (EAST AFRICA) LIMITED.**

The parties to this application had employer- employee relationship that commenced by contracts in 2016. According to clause 1 of the same, contracts were to last until terminated. Their employment was however terminated in 2018 for no apparent reasons. This is alleged to have been for the reason that they refused to be transferred to another company that subcontracted the duties of the applicant. Not satisfied with what happened they referred their dispute to the Commission for Mediation and Arbitration.

After taking on the matter, it found that the respondents were unlawfully terminated. The commission awarded each of them an amount of 4,775,000/= to cater for a notice of 4 days, severance pay, leave and 12 months compensation, their salary being calculated at 350,000/= per month. In total therefore the applicant was ordered to pay the sum of 109,825,000/=.

Not satisfied, the applicant has preferred this application to challenge the terms of the award. Mr.Rico Adolf learned advocate stood for the applicant. Mr. Evodi Mushi learned advocate was for the respondents

The applicant advanced the following issues for this court to determine;

i. *That the Honourable Arbitrator erred in law and fact by holding that there was termination of employment without proof in accordance with the law that the respondents were in fact terminated; hence material irregularity.*

ii. *That the Honourable Arbitrator having understood the nature of the applicant's business and status of its employees, erred in law and fact in holding that the respondents were offered a permanent contract instead of contracts for specific task.*

iii. *That the Honourable Arbitrator erred in law and facts by holding that an administrative change does not constitute a proper reason to justify termination of employment.*

iv. *The Honourable Arbitrator erred in law and fact by failing to consider the undisputed fact that it is the respondents themselves who blatantly refused to be issued with the contracts from the applicant's subcontractor, despite the fact that the contracts so offered would provide same terms and entitlements to the respondents. Therefore, it is the*

respondents themselves who prematurely breached their contract.

v. *That the Honourable Arbitrator erred in law and facts by unreasonably awarding the respondent the sum of* ***Tshs. 109,825,000/****= without there being any breach of contract.*

vi. *That the Honourable trial arbitrator erred in fact and law in granting reliefs for unfair termination while the dispute was related to breach of contract.*

vii. *That the trial arbitrator erred in law and fact by disregarding the fact that the applicant followed proper procedures to consult, meet and approach the respondents and their representatives in a bid to affect Mutual Agreement which is well accepted under the law.*

viii. *That the Honourable Arbitrator erred in law and fact by delivering a problematic and self-contradictory award.*

When parties were afforded a hearing, the applicant's counsel argued only two points out of 8 stated in para 16 of the affidavit supporting the application. These are No.(ii) and (vi) as follows;

ii. *That the Honourable Arbitrator having understood the nature of the applicant's business and status of its employees, erred in law and fact in holding that the respondents were offered a permanent contract instead of contracts for specific task.*

And

vi. *That the Honourable trial arbitrator erred in fact and law in granting reliefs for Unfair Termination while the dispute was related to Breach of Contract.*

When arguing the first point, it was stated that the nature of the complaint in CMA form1 is tort and breach of contract. It was argued further that the commission did not address the issues but delt with unfair termination of contract. The commission in its finding, he submitted, found it was unfair termination as under section 37 of the Employment and Labour Relations Act. Having so found, he went on submitting, the commission granted prayers under section 41(1) (c) of the Act. This in his view, contravenes what is stated in part B of Form1 which does not refer to termination of contract reliefs. He was of the firm view that this is a fatal irregularity that vitiates the proceedings as held in the case of **Judicate**

Rumishael and 64 others vs The Guardian Limited, Revision No. 80 of 2010, reported in the labour case digest 2011-2012 case No. 20.

He said reliefs have to come from CMAF1, and the case of **James Renatus vs Cata Mining Co. Ltd**, Revision No. 01 of 2021, is an authority, where it was held that unfair termination and breach of contract cannot be determined together. In his view, since key issues were not determined these proceedings must be nullified as held in the case of **Mantrac (T) Ltd vs Joachim Bonaventure, Civil** Application No. 385 of 2020.

Arguing the second point, Mr. Rico was of the view that Pw2 admitted payment of 12,500/= as a daily pay. In his view, this shows, he was a casual labourer since respondents were carpenters, welders, cleaners and cooks. He said, they were for a specific task and were paid on daily basis. I was asked to refer to the case of **Wilbroad Mzeran vs Sharly Construction Engineering and Mineral Co. Ltd** and therefore grant this application.

Mr. Mushi for the respondent argued the second point first as follows; He said, the applicant attached to his application, contracts of the

respondents. He said referring to clause one of the contracts, it refers that the same were for unspecified period. The learned counsel held the view that the mode of payment does not change the terms of the contract. He said, they were paid after every two weeks as per clause 5.4 of the same. In his view, therefore, since they agreed on the terms of payment, then cases cited in this point are irrelevant.

Turning back to point one, the respondent was of the view that indeed the there was an issue of breach of contract framed and determined at page 15 of the award.

The learned counsel submitted, further that after determining the issue of breach of contract the commission granted compensation as the result of breach since the Employment and Labour Relations Act and The Code of Good Practice are silent on reliefs for breach of contract. In his view, the breach of contract of unspecified time is unfair termination which has its consequences. The learned counsel argued further that, if it is found that the Commission did not properly deal with the reliefs, let this court award the compensation for breach of contract which in his view has been proved. Otherwise, he held the view, that this application be dismissed.

By way of rejoinder, Mr. Rico submitted that the consequence of breach of contract and tort is under section 73(1) of the Law of Contract Act. He said, the reasons for doing so are that they have different time limitations as 30 and 60 days respectively, they have different burden of proof and the reliefs are re-engagement and compensation for 12 months while payment of damages is a consequence of breach of contract as under section 76 of the Law of Contract Act.

Having heard the submissions of the parties, it is important to note here that based on the evidence given by Pw1, Pw2 and Pw3. The same evidence being confirmed by Dw1, Dw2 and Dw3, there is not disputed that the respondents were employees of the applicant. What is in dispute is based on the nature of the contract.

The applicant's counsel submitted that their contract was for specific task and so were casual labourers. He said, the respondent being carpenters, welders, cooks and cleaners were paid on daily basis and so were not and had no permanent employment.

I think this argument is not backed by evidence. Their contracts were written, apart from being annexed to the affidavit supporting this

application, they were admitted as P1. In its award, the commission referred to clause one. It states that the contract entered on 23rd March 2016, will continue until lawfully terminated. This is in line with section 14 (1) of ELRA. From the terms of the same, it was agreed that the respondents will be paid as per clauses, 5.1 that the daily wages will be 12,500/=. This according to clause 5.4 to be paid with overtime after every two weeks through M-pesa. The other terms included over time payment, annual leave, sick leave, maternity and paternity leave and severance pay.

By its letter and spirit the respondents were employed in permanent term. I therefore agree with the commission on this fact that they were indeed so employed. To add, I have to say therefore that the mode of payment was subject to contract, mode of payment does not change the terms of the agreement as submitted by the respondent. This is true because it did not contradict dictates of section 27 of the Act, which leaves to the parties to agree on how payment of wages may be paid. Therefore, the first point has no merit, it is dismissed.

The second issue as shown before is *whether the trial arbitrator erred in fact and law in granting reliefs for Unfair Termination while the dispute was related to Breach of Contract.*

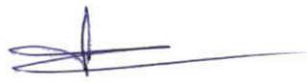
It is clear, that disputes in the Commission are commenced by CMF1. The same form is simple and one needs to key in the information needed. The respondents filed their claims on two allegations. It was based on tort and breach of contract. This means, on the nature of the dispute, they were specific on the two parts.

According to the form, if one complains about termination, he has to willy-nilly fill part B of the same. On the outcome, the parties sought for the following reliefs; an order for payment of compensation in accordance to the terms of their contract of unspecified period of time, they also asked for terminal benefits and general damages for breach of contract to the tune of 15,000,000/= to each employee and 12 months' salary for that matter. It is therefore clear to me, that the applicant was wrong in thinking that the respondents made claims of unfair termination and breach of contract together. The form is clear and that the same only claimed for tort and breach of contract. It is not stated anywhere in the claims that they are for unfair termination.

The commission, held that there was termination of their employment and that termination was unfair. It is therefore held that the applicant did not prove that the same were fairly terminated as under section 37 of the ELRA. It was ruled out that there was breached, which was claim not pleaded in the CMA Form1.

Since the respondents claimed for breach of contract, but brought evidence to showing that the applicant terminated their contract. Compensation for breach of contract has the remedy of payment of damages. There are different from of damages. In the employment contract, damages should not be far beyond what the terms of contract dictate. The commission was therefore right to discuss an issue of whether there was a contract and if so, if it was terminated. It went on and came to the conclusion that the respondents were terminated. Termination is in itself breach of the terms of the contract. Unless one party or some parties of the agreement are in question that is what may attract separate claim of breach but when it deals with the whole contract of employment, termination is forms of breach of contract. That has to be proved to be fair or otherwise. In my considered view, the commission was right, to proceed in the manner it did. I agree with it and find that

the cases cited by the applicant are distinguishable. The application is therefore dismissed. I make no order as to costs.



A.K. Rwizile

JUDGE

10.12. 2021