IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

LABOUR REVISION NO. I47 OF 2020

BETWEEN

FELIX EZEKIA MAKETA ..... 1ST APPLICANT

DOTTO WILBARD MAZIGO ..... 2ND APPLICANT

VERSUS

TANZANIA INTERNATIONAL

CONTAINER TERMINAL SERVICES (TICTS) ..... RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J

The applicants herein were employed by the respondent as Terminal Tractor Drivers from 01/08/2016. On 19/01/2018, the applicants were terminated from employment on the ground of failure to perform their work as required. Aggrieved by the termination, they referred the matter to the Commission for Mediation and Arbitration (CMA) VIDE Labour Dispute No. CMA/DSM/TEM/484/18 ("THE Dispute") where it was found that their termination was unfair. The CMA awarded them compensation instead of reinstatement as prayed in CMA F1. Again, being resentful by the CMA's award, the applicants filed the present application raising the following legal issues: -

i. Whether the trial Arbitrator properly calculated the reliefs entitled to the applicants.

ii. Whether the trial Arbitrator properly exercised her powers in holding that the applicant's claims are time barred.

iii. Whether the applicants are covered and entitled packages provided under collective bargaining agreement dated 23rd October, 2013.

The application was argued by way of written submission. Before this court the applicant was represented by Mr. Frank Kilian, Learned Counsel whereas Mr. Issa Mrindoko, Learned Counsel appeared for the respondent.

On the first ground Mr. Killian submitted that in their CMA F1, the applicants prayed for reinstatement, an order which was not granted by the Arbitrator despite the findings that they were unfairly terminated both substantively and procedurally. Mr. Killian submitted further that the Arbitrator was duty bound to reinstate the applicants and if not, he ought to have stated the reasons thereof. To support his submissions, Mr. Killian cited the decision of the Court of Appeal the case of **Mantra Tanzania Limited v. Joaquim Bonaventure, Civ. Appl. No. 145 of**

2018 and the case of **National Bank of Commerce Vs. Eliamin Mbeo, High Court Labor Division No. 55 of 2013** where the said position was held.

On the second ground, Mr. Killian submitted that pursuant to section 7 of the Law of Limitation Act, Cap. 89 RE 2019, the time limitation for action against breach of contract start to run in each day the employer continues to breach the said agreement. He insisted that it was wrong for the Arbitrator to dismiss their salary claims resulted from Collective Bargaining Agreement signed on 23rd October, 2013.

As to the last ground, it was submitted that the applicants were employed as normal drivers named into their employment contracts as TT Drivers. He stated that looking at grading structure (exhibit T2) column C, it indicates several grades of employee for each department and drivers are indicated to be grade TCII-B. He submitted further that the Collective Bargaining agreement for the year 2009 to 2013 indicates that salary for drivers started from Tshs. 467,360/= and ended to Tshs. 722,938/=. He added that the same column indicates that the salary scale for TCII-C started from Tshs. 722,938 to a maximum of Tshs. 1,504,839/= however the respondent unnecessarily refused to pay the

applicants the agreed salary. He therefore asked the court to grant the claimed salary arears.

In the upshot, Mr. Killian urged the court to reinstate the applicants into their former positions without loss of remunerations and order the respondent to pay them their salaries in accordance with grade TC2-B of the collective bargaining agreement.

Responding to the first ground Mr. Mrindoko submitted that the Arbitrator properly calculated the reliefs entitled to the applicants. He argued that basing on the nature of the offence charged, it is common knowledge that there is no trust between the parties. Mr. Mrindoko stated that in the circumstances of this case reinstatement was not the appropriate remedy. He submitted further that each case should be decided on its own peculiar circumstances as required under section 40 (1) of the Employment and Labour Relations Act [CAP 366 RE 2019] (ELRA).

Mr. Mrindoko went on to submit that the Arbitrator considered the applicants prayer of reinstatement but in exercising the discretion provided under the provision cited above, the Arbitrator decided to compensate the applicants.

As to the second issue, his reply was that the applicants claim of underpayment is an afterthought presented using the backdoor of termination because the same should have been claimed immediately from when they arose. That the applicants claim to have presented such claim to the respondent but no evidence was tendered to prove such allegation. Mr. Mrindoko contended that the applicants cannot hide under the umbrella of Section 7 of Cap. 89 R.E 2019 because there is no proof of continuous breach of contract in this case. He hence argued that the alleged claims are time barred as found by the Arbitrator.

Regarding the last issue, Mr. Mrindoko submitted that the applicants were employed as Terminal Tractor Drivers and not Terminal Operators. He contended that the grades claimed by the applicants as grade TCIIB belongs to the Accounting Assistant as apparently indicated in Exhibit T2. He added that the applicants testified that they were entitled to the salary of Tshs. 889,000/= however the records show that salary is entitled to the person employed in the position of equipment operator and not terminal tractor drivers.

Mr. Mrindoko further contended that the applicants were employed in the grade of TC1-D which started effectively from August 2016 and not TCII-B as submitted by the applicants' counsel. The Learned Counsel

insisted that the applicants are bound by the terms of their agreed employment contracts.

Mr. Mrindoko went on to submit that the alleged CBA of 2013 does neither provide for the salary grades for employees as that is exclusively provided in the salary structure and not even in the personal handbook as claimed by the second applicant. As to the allegation that exhibit D34 (1st applicant's salary slip) reflects the first applicants' salary Mr. Mrindoko breakdown the payment indicated in such document where it indicates other allowances which were paid annually. He insisted that the applicant's salary is indicated in their employment contracts and prayed that the court dismiss the application.

After going through the rival submissions of the parties, court records and relevant laws, I find the court is called upon to determine only one issue, whether the Arbitrator properly awarded the applicant.

The applicants in this application are disputing the award of compensation for unfair termination instead of an order of reinstatement as prayed in CMA F1. The remedies for unfair termination are provided under section 40 of ELRA which includes reinstatement, re-engagement and payment of compensation of not less than 12 months remuneration. It is also worth noting that upon making findings of unfair termination

the arbitrator/court has mandate to award either of the mentioned remedies depending on the nature and circumstances of the case.

In this application as stated above, the applicants prayed for reinstatement, however the Arbitrator awarded them 12 months salaries compensation. Indeed the arbitrator considered the circumstances and that is why having noted that there was unfair termination, he referred himself to Section 40(1) of the ELRA and ordered compensation to be paid to the applicants herein. I find the payment of compensation as awarded by the Arbitrator is appropriate and will suffice justice in this matter.

I am not in in disregard of the case of **Mantra Tanzania Limited** (supra) cited by the applicants and which is binding to this court. As rightly submitted by Mr. Mrindoko, each case has to be decided in its own peculiar circumstances and since the arbitrator noted that the options under Section 40 were appropriate, then he was not bound by only the order of reinstatement of the applicants to their positions.

I have also noted the applicants claims on award of salary increment according to the CBA. This issue was properly addressed by the Arbitrator. Since the applicants are claiming for underpayment because the respondent did not pay them pursuant to the CBA, then the

relevant claim accrues from the date of employment on 01/08/2016 to the date the applicants were terminated from employment on 19/02/2018.

As correctly held by the Arbitrator, the applicants claim fell under other claims not on unfair termination thus, such claims were supposed to be filed at the CMA within 60 days from the date when the dispute arose pursuant to Rule 10 (2) of the Labour Institutions (Mediation and Arbitration) Rules, GN 64 of 2007. The alleged claim was time barred and the applicants did not bother to seek for extension of time before filing the same hence the allegation of continuous breach of contract cannot stand in this application. Therefore, I see no need to interfere with the findings of the Arbitrator.

In the result, I find the present application to be lacking merits and it is hereby dismissed.

Dated at Dar es Salaam this 15th day of December, 2021.

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S.M. MAGHIMBI
JUDGE