IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

REVISION NO. 88 OF 2020

BETWEEN

YARA TANZANIA LIMITED ..... APPLICANT

VERSUS

CATHERINE ASSENGA ..... RESPONDENT

JUDGEMENT

Date of last order: 20/04/2021
Date of Judgement: 16/07/2021

Aboud, J.

The applicant, filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (herein CMA) delivered on 20/07/2018 by Hon. Masaua, Arbitrator in labour dispute No. CMA/DSM/KIN/R.60/16. The application is made under section 91 (1) (a) (b), 91 (2) (a) (b) (c) and section 94 (1) (b) (i) of the Employment and Labour Relations Act [CAP 366 RE 2019] (herein referred as the Act) Rule 24(1) 24 (2) (a) (b) (c) (d) (e) (f) 24 (3) (a) (b) (c) (d) and Rule 28 (1) (c) (d) (e) of the Labour Court Rules GN. No. 106 of 2007 (herein referred as the Labour Court Rules).

The application emanates from the following background; the respondent was employed by the applicant as a Sales Officer on 01/10/2009 for two years renewable contract. The applicant alleged that, on 18/11/2015 the parties entered into a mutual agreement to end their employment relationship. It is contended that, in the relevant separation agreement the respondent was to be paid by the applicant sum of Tshs. 19,662,099/= as consideration of ending employer-employee relationship between the parties. That contrary to the agreement on 14/12/2015 the respondent filed a complaint at the CMA claiming for unfair termination where she sought to be paid her terminal benefit and compensation for the alleged unfair termination. After hearing the parties, the Arbitrator delivered an award in favour of the respondent where the applicant was ordered to pay her 12 months remuneration as compensation for unfair termination. Aggrieved by the CMA's award the applicant filed the present application on the grounds provided under paragraph 12 of the affidavit in support of the application.

The matter was argued orally where both parties were represented by Learned Counsels. Mr. Godfrey Paul was for the applicant whereas Mr. Migire Migire appeared for the respondent.

Arguing in support of the application Mr. Godfrey Paul adopted the applicant's affidavit to form part of his submission. He submitted that, the gist of the application is based on the separation agreement entered between the parties to end their employment relationship. He stated that, after the respondent received consideration to the tune of Tshs. 19,000,000/= she went to the CMA and alleged that she was unfairly terminated from the employment, where the CMA awarded her in her favour. Hence the applicant filed the present application.

On the first ground it was submitted that, the CMA did not adhere to the principle of sanctity of contract which is binding in our jurisdiction. To cement his submission, he referred the court to the case of **Albualyalibhai Azizi V. Bhatia Brothers Ltd**, Misc. Civ. Appeal No. 01 of 1999 at page 303.

It was argued that, the CMA award interfered the parties' agreement which was binding to them. It was stated that, the separation agreement at clause five bars the parties to bring any claim in respect of the agreement. He therefore prayed for the Arbitrator's award to be revised as was decided in ignorance of the principle of sanctity.

On the second ground it was submitted that, the CMA erred by failure to appreciate that agreement is one of the ways to end employment relationship as it is provided under Rule 3 (1) (a) of the Employment and Labour Relations (Code of Good Practice) Rules, GN 42 of 2007 (herein referred as GN 42 of 2007). It was strongly submitted that, the CMA award was issued in ignorance of the fact that termination by agreement is allowed by our law. To support his submission, he referred the Court to the cases of **Yara Tanzania Ltd Vs. Athumani Mtangi & others**, Rev. No. 49 of 2019 HC Lab. Div. DSM (unreported) and the case of **Yara (T) Limited Vs. Alphonce Damian**, Rev. No. 39 of 2018 HC Lab. Div. DSM (unreported).

As to the third ground it was submitted that, the respondent was not forced to sign the termination agreement as she has no proof which was tendered. He added that, the respondent took the money paid to her without returning it back which signifies that, she agreed about the termination. It was also submitted that, the respondent admitted to take the money as deponed under paragraph 7 of her affidavit and she never reported the issue of being threatened in the CMA F1. It was argued that, in absence of any evidence to prove threat, this application has

merit. The Learned Counsel prayed for the Arbitrator's award to be set aside.

In ground four it was submitted that, the CMA awarded the respondent without taking into consideration the amount previously received. He prayed for the same to be revised as it is excessive and contrary to the law.

The Learned Counsel went on to submit that, the Arbitrator was bias in the award because she intentionally failed to consider one of the respondent's witness evidence (PW2) at the CMA, because his evidence never featured in the award. He added that, another clear bias can be found at page 3 in last paragraph of the award as well as at page 5 where the CMA discredited the evidence of DW3. It was stated that, the Arbitrator described DW3 as not credible witness but at pages 15-19 of the CMA proceeding the witness clearly demonstrated what transpired on the date the agreement in dispute was signed. He therefore prayed for the application to be allowed.

Responding to the application Mr. Migire Migire adopted the respondent's counter affidavit to form part of his submission. In his submission he consolidated all grounds of the revision. He submitted

that, the applicant's grounds for revision lacks legal basis to be considered by this court. He argued that, revisionary powers of the Court are limited by law, it was submitted that, this is not an appeal where an applicant raises points of dissatisfaction.

It was further argued that, the High Court only considers revision of an award if the reasons fall within section 91(2) (a)(b)(c) of the Act and Rule 28(1)(a)(b)(c)(d) of the Labour Court Rules. He submitted that, in this application the applicant ought to have argued on whether there was misconduct on the part of the Arbitrator, if the award was not properly procured, if the award is unlawful, illogical or irrational. The Learned Counsel argued that, going through the affidavit supporting the application under para 13 (i)-(viii) the statement of legal issues or ground for revision provided under para 12 of the same affidavit do not fall under the revisionary powers of this Honourable Court.

It was further submitted that, the Arbitrator at page 5 and 6 of the impugned award considered the so called separation agreement and finally made a decision that the respondent in this case was influenced to sign such agreement thus, the termination was termed unfair. It was further submitted that, the applicant in this case failed to plead in his affidavit any misconduct on the part of the Arbitrator to show whether

the award was improperly procured or any other ground of the revision of the award.

The Learned Counsel went on to submit that, the applicant failed to make connection on how his grounds of revision falls or relates to the enabling provision for the Court to exercise its revisionary powers. In the upshot the Learned Counsel prayed for the award to be sustained.

In rejoinder Mr. Godfrey Paul submitted that, the Counsel for the respondent failed to reply to all issues raised by the applicant. He argued that, this application complies squarely with all the enabling provisions cited by the applicant. He therefore urged the court to allow the application.

After considering the submissions by the parties, Court records and relevant labour laws I find the Court is called upon to determine the following issues; whether the respondent was forced to sign the separation agreement and what reliefs are the parties entitled.

On the first issue of whether the respondent was forced to sign the separation agreement. It is undisputed fact that in this matter the contractual relationship of the parties ended after signing the separation

agreement (Exhibit A1) thus, the parties terminated the contract by agreement. Termination by agreement is one of the lawful ways of ending employment contracts in Tanzania which is provided under Rule 3 (2) (a) of GN 42 of 2007 and not Rule 3 (1) (a) cited by applicant's Counsel. For easy of reference, I hereunder quote the relevant provision:-

> *'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 the employment by the employee, or*
>
> (d) *Determination of employment by the employer.'*

Termination by agreement is also recognized under Rule 4(1) of GN 42 of 2007. Termination by agreement may refer to expiration of a contractual relationship by the mutual consent of the parties. Generally, it is an established principle of law of contract that, just as parties are free to enter into contract, they are equally free to bring their contracts to an end by mutual agreement. The relevant principle is also applicable in employment contracts. The most important factor to be considered in

termination of employment by agreement is genuine mutual consent of the parties.

In the circumstances of this case there is no doubt that an agreement to terminate the employment contract was initiated by the employer. In the case of **McAlwane V. Boughton Estates Limited** [1973] 2 All ER 299 cited in the book titled **Employment Law Guide for Employers by George Ogembo** courts are warned to be cautious with the agreement initiated by the employer where it was held that:-

> *'An agreement to terminate an employment contract, if the initiatives arises from the employer, must be interrogated to confirm whether the employee freely consented to the termination. Hence, the court would not approve an agreement to terminate employment unless it is proved that the employee really did agree with full knowledge of the implications it had for him.'*

Therefore, employers should ensure that the agreement to terminate the employment is made without duress and preferably after proper and sufficient advice to an employee. In the application at hand for easy of refence I hereunder reproduce the disputed termination agreement:-

YARA TANZANIA LIMITED

YP - 1

CHAPA MELI® FERTILIZERS

AGREEMENT

BETWEEN

CATHERINE R. ASSENGA

AND

YARA TANZANIA LTD

Prepared by

NexLaw Advocates
PPP Tower, 4th Floor
P.O. Box 75578
DAR ES SALAAM

Tel. +255 22 2135677

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Email. info@nexlawadvocates.com

SEPARATION AGREEMENT

This Agreement is made this..18..day of...November.....2015

Between

CATHERINE R. ASSENGA of P.O. Box 40230, Dar es Salaam (hereinafter referred to as "**the employee**") on the one part

And

YARA TANZANIA LTD of P.O. Box 40230, Dar es Salaam (Hereinafter referred to as "**the employer**") of the other part.

WHEREAS the employee was employed by the employer since 1st October, 2009

WHEREAS the parties herein have been engaged in a series of consultation regarding the termination of employment of the employee.

AND WHEREAS the Parties have agreed to mark the employment of the employee as terminated with effect from 18th November, 2015

NOW THIS AGREEMENT WITNESSETH AS FOLLOWS:-

1. That in consideration of the employee working with the employer since 6th September 2004, the employee shall be paid the following:-
   a. Arrears of salary, and leave - 12 DAYS. 773,944.3
   b. Three month salary in lieu of notice TZS 5,804,583
   c. Severance Pay (seven days salaries per year times 7 being years of service) TZS 2,708,805
   d. Certificate of service TZS 3,409,268
2. That in addition to the foregoing payments, the employee shall be paid .....~~Months salaries~~ as consideration for termination of the employment contract between the parties.

3. THAT in addition to the foregoing clauses Parties herein agree as follows:

    a. Having been paid the foregoing amount, the employee on his own motion shall claim all other dues from the National Social Security Fund (NSSF) in accordance with the law.

    b. The employee undertakes and agrees to return immediately upon signing of this agreement all information, records, correspondence and or files of the employer be it in soft or hard copies which he made, created or obtained in the course of employment and pursuant to his duties with the employer.

    c. The employee also undertakes to return all the assets of the employer which the employee obtained while under the employment with the employer.

    d. By this agreement, the employee makes an unequivocal representation that he is aware that any information obtained in the course of employment with employer is confidential and shall not be disclosed at any material time in future to any natural or legal person whomsoever.

4. By this agreement, parties herein states clearly that this Agreement constitutes the entire agreement of the parties with respect to the subjects covered herein and supersedes any and all prior agreements or understandings whether oral or written.
5. Ms **ASSENGA** undertakes not to raise ANY claim against the employer and hereby releases the employer from any claim that he has or may claim to have whether arising from contract or tort or related to his employment with employer which is being terminated by this agreement.
6. This agreement binds parties herein together with the employee's heirs, successors and administrators of his estate.

IN WITNESS WHEREOF the parties have set their respective hands hereinto

For the Employee:

Name ..... CATHERINE ASSENGA

Signature.....

Date 18/11/2015

For the Employer:

Name Alexandre Marcolo

Title... MD Yara Tanzania Ltd.

Signature.....

Date 18/11/2015

Witness to all signatures

Name WILLY A. MWANTEMBE

Signature.....

Date ..... 18th NOV - 2015

In this application the respondent strongly alleged that she was forced to sign the above agreement. Her evidence was also collaborated with the testimony of PW2. Now the duty of this court is to assess if there were any inducement in signing the disputed agreement.

In my view by signing the separation agreement with a clause stipulating that there was prior consultation, the respondent accepted that there was consultation made and agreed upon. It is my observation that, if the respondent was not agreeing to separation agreement, she should have not signed the disputed agreement as some of the employees did.

It is my view that, the fact that some of the employees refused to sign the separation agreement proves that there was no inducement on the party of the employer. Thus, the respondent could have opted to be one of the employees who refused to sign the contested agreement. Hence, it is my view that filing of this case is an afterthought.

Generally, parties are bound by the agreed terms of the contract, courts have no powers to interfere with the same unless it was made under duress or inducement as stated above. This was the position of

the Court of appeal in the case of **Miriam Maro v. Bank of Tanzania**, Civil Appeal No.22/2017 (unreported) where it was stated that:-

> *'It is the law that parties are bound by the terms of the agreement they they freely enter into. We find solace on this stance in the position we took in* ***Univeler Tanzania Ltd v. Benedict Mkasa t/a Bema Enterprises****, Civil Appeal No. 41 of 2009 (unreported) in which we relied on a persuasive decision of the Supreme Court of Nigeria in* ***Osun State Government v. Daiami Nigeria Limited****, Sc. 277/2002 to articulate:*
>
> *'Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed between themselves. It was up to the parties concerned to renegotiate and to freely rectify clauses which parties find to be onerous. It is not the role of the courts to redraft clauses in agreements but to enforce those clauses where parties are in dispute.'*

The respondent signed in every page of the separation agreement signifying that she accepted the terms agreed thereon. As it is shown in the clauses of the agreement above, it is stated that before signing such particular agreement the parties had series of consultation meetings.

Therefore, the respondent was aware of the disputed agreement before signing the same.

Thus, on the basis of the foregoing discussion I am satisfied that the applicant proved with sufficient evidence that the disputed separation agreement was signed by the respondent's free will. The respondent did not tender sufficient evidence to prove that she was forced to sign the disputed separation agreement as found by the Arbitrator. The only evidence available on the part of the respondent and of which the Arbitrator considered was that of PW2 who in my view gave contradictory evidence, especially on the environment allegedly to be tense during the signing of the separation agreement in question. According to PW1 testimony she clearly testified that, PW2 was not around when the whole alleged saga of forceful signing of separation agreement was going on. This is because PW1 mentioned only three co-workers who were involved in the alleged process and PW2 was not among them as it is reflected in pages 23 and 24 of the CMA proceedings. During cross examination PW1 had this to say I quote:-

> *'Swali: Je, kuna watu gani wengine walioitwa na kina nani?*
>
> *Jibu: Denis-Warehouse manager, Hamisi Godown Msimamizi, Nuhu, sijui cheo, muweka mafuta katika generator.'*

In translation PW1 was asked if other employees were called to sign the separation agreement and, she replied yes; Denis-Warehouse manager, Hamisi Godown Supervisor, Nuhu, his position was not known and someone who was filling fuel in a generator.

The respondent filed complaint at the CMA on 14/12/2015 and despite that fact she agreed to receive payment of her terminal benefit. Part of such terminal benefits was paid on February, 2016 which was long after she instituted her complaint at the CMA. The circumstance of the case in my view clearly indicates that the respondent was not forced to sign the separation agreement at all. Thus, the termination of employment contract of the parties concerned was fair on the basis of the evidence available in record.

On the last issue as to parties' reliefs, the Arbitrator awarded the respondent 12 months remuneration as compensation for the alleged unfair termination. Having found that the respondent was fairly terminated it is my view that he is not entitled to the remedies awarded by the Arbitrator hence, the same is hereby quashed and set aside.

In the result, the court found that the parties concerned freely entered into separation agreement, so the termination of employment in

this matter was fair. Thus, the application has merit and consequently the Arbitrators award is quashed and set aside.

It is so ordered.

I.D. Aboud, J.
JUDGE
16/07/2021