IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 251 OF 2020

BETWEEN

ERNEST MTOKOMA..... APPLICANT

VERSUS

AZANIA BANK LIMITED..... RESPONDENT

JUDGMENT

Date of Last Order:28/06/2021

Date of Judgement: 19/8/2021

T.N Mwenegoha, J.

This Application emanates from the Commission of Mediation and Arbitration (CMA) Award issued against complaint no. CMA/DSM/ILA/795/17/by Hon. Msina on 22/05/2020.

The Applicant is applying for revision after being aggrieved by the said Award praying for the following reliefs:

i. That, the Honorable Court be pleased to call for the records of the proceedings and the Award from the Commission for Mediation and Arbitration for Dar es Salaam Zone at Dar es Salaam in Labour Dispute

No. CMA/DSM/ILA/R.795/17 dated 22nd May 2020 delivered by Hon. Msina H.H. Arbitrator and the Court to revise and set aside the same; and

ii. That, the Honorable Court be pleased to make an order that the Applicant was unfairly terminated and order for Applicant's reinstatement to employment by the Respondent without loss of remuneration from the date of termination or in the alternative, the court to order for payment of salaries for nineteen months period remaining in the fixed term contract signed between the Applicant and the Respondent.

iii. Any other relief the Court shall deem fit to grant to the parties

The Application was supported by the affidavit of Daniel Mwakajila and opposed by counter affidavit of Fatuma Kasimu Mtunyungu which all are adopted herein.

The applicant provided grounds for revision as follows:

i. That the Hon. Arbitrator having found that the applicant was terminated without being heard erred in law in deciding that the termination was substantively fair.

ii. That the commission erred in law in fact holding that the applicant's termination was substantially fair contrary to the evidence on record.

iii. That the commission erred in fact that the applicant was suspended on duty pending investigation of allegations was correct in holding that termination was procedurally unfair.

iv. Whether the compensation of 12 months' salary were appropriate to the circumstances of the case

In advancing their case, the Counsel for applicant, Advocate Moses Gumba submitted on the first ground that the arbitrator erred in law in determining that termination was fair. He referred this Court at page 54 and 55 of the Award where the arbitrator had in mind that the applicant was terminated without being heard. It was his further argument that the right to be heard is constitutional right as provided under Article 13 (6A) of the Constitution of Republic of Tanzania of 1977 as amended. Further that, Judge Rweyemamu in **Tanzania Telecommunication Limited vs Augustine Kibangu, Revision No. 122 of 2009** stated that in the employment termination, an employee has to be accorded full hearing before termination.

Mr. Gumba contended that having found that the respondent failed to accord the applicant fair hearing before terminating the applicant, the Arbitrator had a duty to nullify all the proceedings terminating the applicant. To back this position, he referred the case of **Abbas Shelaluu and another vs Abdul Sultan Haji Mohamed Fazal Boy referred in Hamis Jonathan John Mayage vs Board of External Trade.**

It was the submission of the counsel for applicant that the Revision before this Court emanated from a termination that was effected without hearing

and therefore it was legal duty of the Arbitrator having found the illegality to nullify the whole termination proceeding by the respondent. A duty that administrator failed to exercise.

In continuing with his submissions, counsel for applicant argued the second ground together with the 4th, 5th, 6th grounds as they were related.

It was his submission that, according to page 57th of the Award, the Arbitrator held that the applicants were not faithful and abused office for private gain. The Award shows substantive reasons for termination.
He proceeded to tell the Court that what amounts to substantive fairness in employment termination was underscored by Rweyemamu J., in **Martin Oyier Vs Geita Gold Mine Ltd, Labour Revision No. 226 of 2008** where the Judge underscored the policy objectives provided under S.3 of Employment & Labour Relations Act, 2004. The Judge in this case at page 4 felt that it is unfair to terminate an employee unless procedures have been followed.

The counsel for applicant proceeded to tell the Court that the applicant's contract with the employer was for fixed term of 3 years, as evidenced in Exhibit ABZ. In that regard the termination of his contract was subject to Rule 8 (2) (a) Employment & Labour Relations Code of Good Practice GN. 42/2007.
That the Rule requires termination of a fixed term contract only where an employee breaches a contract. He continued to state that it is from that rule that once the respondent established that the applicant breached his term

of contract, the respondent had an obligation under Rule 13(1) of GN 42/2007 which mandatorily require an employer to conduct an investigation to ascertain that there are grounds to be heard.

He said this is also the position of this court in the case of **Salkaiya Seif Khamis Vs JDM Travel Services (SATAURO), Labour Revision No. 658/2018**, where in the case at page 11 Hon. Aboud J., in deciding on what follows after employee has breached his contract, held that the respondent ought to have followed the requirement of Rule 13 of GN. 42/2007.

It was counsel for applicant contention that in this case there was no investigation conducted as per that rule. The Counsel further provided that it is a legal principle that where equation of fairness termination is in question it is employer who has to prove the fairness as per S.39 of the Employment and Labour Relations Act of 2009 reading together with Rule 8 (1) (d) of GN 42/2007. Rule 8(1) (d) requires termination to be on fair reasons and fair reasons are defined under S.37 (2) of the Employment & Labour Relations Act, 2004. This provision provides that a termination of an employment is unfair if the employer fails to prove that reason for termination is valid.
The Counsel further argued that the reason is fair reason if it is related to employee's conduct, capacity, and compatibility or based on operational requirement. He provided that in **Kulwa Solomon Kalile Vs Salama Pharmaceuticals, Labour No. 155/2019** at page 10, first paragraph centered on the requirement of S.32 that termination of an employee to be fair it should be based on valid reason. That reason for termination is

communicated through notice of termination, as para S.41 (3) of Employment & Labour Relations Act read together with R.13 (10) GN. 42/2007. All these provisions require a termination to be in writing stating the reason for termination.

Counsel Gumba further referred to the applicants termination notice Exhibit AB8. It was his contention that the exhibit in question communicated no reason of termination related either to conduct, capacity capability as required as per provisions. That reading through the notice of termination, exhibit AB8, includes that the respondent evoked close 8 of the applicants' employment and proceeded to terminate the applicant. That, the said clause 8 of Exhibit AB2, employment contract, states that after probation the contract will be subject to termination on notice of 3 months. That the respondent invoked clause 8 to end the applicant's employment as is evidenced by the respondent's counter affidavit. It was Counsel Gumba's contention that therefore, it was in error for the Arbitrator to hold that the applicants were terminated because of being unfaithful due to going contrary to the respondent's policy or that the applicant benefited themselves.

Mr. Gumba argued that the invocation of clause 8 of employment contract without obsolesce of fair labour practices was contrary to provisions of Employment and Labour Relations Act as was decided in the case of **Maxmillan Aidan Ltd Vs Blandina Lucas Mohamed, Rev. No. 292/2008** where at page 13, 2nd paragraph it was held that an insertion of the clause that termination shall be by notice does not absolve the employer from the duty to deserve fair practices in instances of premature termination.

He further provided that referring back to page 15 of Salkaiya Khamis termination of employer's will is not part of our laws. That the Arbitrator based his ruling on Audit report Ex. AB18, a 15/02/2017 report. While the applicant was suspended on 29/3/2017 in that regard that audit report cannot be on investigation report subjected to the applicant in March 2017. Testimony of DW1 page 20, DW2 at page 40, DW3 page 56, DW 4 at pages 64 & 65 together with testimony of the Applicants at page 112 & 113 in that regard it was in error for the Arbitrator to base her decision against the testimony and exhibit in court. Only to believe unsubstantiated oral testimony of the respondents witness. He referred the case of **MIC Tanzania Vs Sinai Mwakisilile Revision No.387/2019** at P. 13 to support position that unsubstantiated oral testimony of the witnessed can not be relied upon.

On the last ground or revision (8^{th}), it was Mr. Gumba's submission that holding of the Arbitrator at p.58 and 59 of compensation of 3 months salary was incorrect. He alleged that S.40 of Employment & Labour Relations Act provides for reinstatement, compensation and other reliefs. He argued that the Applicant prayed for reinstatement but when the Award was delivered the contract had already expired. That, being a fixed term contract it is an established principle of this court where a termination of a fixed term contract is adjudged unfair the foreseeable remedy is to grant the remaining time in the period of unexpired contact on the date of termination. For this he referred to the case of **Ultimate Security Vs Abubakari Abdallah**

Mkupasi. It submitted that Award of 3 months was illogical, unlawful and improper. Having found that the termination was unfair.
He prayed for the court to revise and set aside the impugned Award under the provisions of S.91(2) of Employment and Labour Relation Act.

The applicant's submissions were strongly opposed by the respondent's advocate where Mr. Francis Ramadhan clarified to this Court that the main issue the applicant's raising is on how the contract was terminated arguing that the procedure was unfair.

It was Mr. Ramadhan's contention that the termination was termination of contract under the terms of that contract. He cemented this argument by elaborating to the Court that under the labour laws there are 5 forms of termination as per R. 3 (1) a – c of the Code of Good Practice GN. 42/2007. That R. 3 (2) of the Code of Practice GN 42 of 2007 provides for lawful termination under common law where R 3 (2) c and d provides that. He further referred to Rule 4 (1) & (2) of GN 42/2007 and contended that the applicant was terminated in accordance with terms & conditions of a fixed contract of 22/10/2015 as expressed in the respondent's Counter Affidavit. Termination clause No. 8 talks about Probation, and during contract. Subject to termination notice of 3 months. That under the clause it does require reasons to be given. Referring to Court of Appeal case of J**oseph Mutashobya Vs M/S Kibo Match Group Ltd, Court of Appeal Arusha, Civil App. No. 53 of 2001** where the facts are similar to the case at hand, he referred to page 245 last paragraph where Clause No. 13 allowed the

employer to terminate without reason by giving 3 months' notice and clause 14 allowed employee to do the same.

It was his argument that the case and clauses are similar to this case and that employer can terminate a contract and if an employee had decided to terminate the contract without reason, then the employer could ask no questions about it because that is what parties agreed. Mr. Ramadhan argued that in the principle of sanctity of contract parties are required to honour obligations of a contract once they enter it. That the contract should be held sacred and enforced by courts if broken. He pointed out further that the applicant is not challenging the legality of contract but the form of termination. This therefore means the applicant accepts and continue to accept the terms of contract.

It was Mr. Ramadhan's contention that considering applicability and purpose of termination clause 8 clearly, the parties anticipated that in event of termination of their agreement no reasons will be given and that's why the applicant is not challenging the legality of the terms of the contract.

In replying to the consolidated grounds, Mr. Ramadhan notified the Court that procurement policy was tendered, as Exhibit AB 14. He also argued that there is evidence that was tendered and accepted at the commission that showed that the applicant exercised power that was not delegated to him as acting director. He highlighted that the applicant was responsible for signing a building contract under seal (exhibit AB 10) without the mandate to do so awarding a contract 539 Millions Tshs contrary to clause 5.0,5.1, & 5.2 of the Procurement Policy (AB 14) and contrary to the expenditure approval limits found in accounting and financial Management Policy (AB 15)

and offering advances without approval (AB18) and that such misuse of funds has never been able to be explained by Applicants.. He directed this Court to read further all that was testified by Director of Internal Auditor (DW6) which can be found at page 33 and 34 of CMA ruling.

It was Mr. Ramadhan's argument that the audit report was extensive and highlighted several policy breaches and financial losses by the applicant as by pages 4-18 of the report. He further noted that the report was routine internal audit and all department heads including the applicant were involved and they gave their input; and that since the applicant participated in the making of this report and failed to challenge the report at the time hence there is no reason at this point to avoid relying on this report

Mr. Ramadhan submitted that the respondent had many reasons and grounds to terminate the applicant's contract. However the respondent chose to rely on termination clause 8 as parties had agreed to rely on that clause. For this he referred to **Deloitte Consult Ltd Vs Dr. Menrad Rwezaura, High Court Labour Division Rev. 219 of 2015**, where in the case, Hon. Nyerere J., at page 11 expressed that in a fixed term contract one does not have to go to the length of it, it can be terminated at any time by either party. He further submitted that there is nothing under the current labour law that forces the employer to choose a particular type of termination. That the law provides for 5 different forms of termination and the respondent chose to rely on termination clause 8 requiring no reason to be given. He therefore argued that procedure of unfair termination cannot

be applicable to the current case due to the nature of the contract of employment and to termination clause 8.

It was Mr. Ramadhan's submission that in order for the applicant to rely on Rules 8 and 13 of Code of Good Practice GN 42 of 2007 to be applicable the applicant ought to have challenged the legality of contract and that the applicant has never challenged the validity of the terms of contract, of clause 8. Mr. Ramadhan prayed for this Court to dismiss the application.

In rejoinding the respondent's submission, Mr. Gumba argue that the Audit Report (AB 18) was an Internal audit report that was done while the applicant was still employed and there is no implication whatsoever in audit report that implicated the applicant. That, if at all there was implication to the applicant occasioning any loss as provided under R.27 of GN. 42 of 2007 read together with Rule 13 of GN. 42 of 2007, the respondent should have produced a report that would have been a result of suspension of the applicant of 27/3/2017. This was not the case. The applicant reiterated his prayer and asked for the application to be granted and allowed.

The Court has considered carefully the arguments advanced by both parties and records provided herein. The Court found itself with one issue to determine; that is whether the applicant's termination was substantively and procedurally fair.

In analyzing the arguments of the applicant, it is clear that he is arguing on unfair termination hence his prayer that he should be reinstated to the

employment by the respondent or in the alternative should be paid salaries for the remaining period of his the fixed term contract with the respondent.

In proving his case that termination was unfair, the applicant submitted to this Court that there was no investigation and that he was not given opportunity to be heard. It was the applicant's argument employee's right to be heard is crucial in employment termination and referred to the decision of Hon. Judge Rweyemamu in **Tanzania Telecommunication Limited vs Augustine Kibangu** (supra) which emphasized that in the employment termination, an employee has to be accorded full hearing. He also referred case of Abbas **Shelaluu and another vs Abdul Sultan Haji Mohamed Fazal Boy** referred in **Hamis Jonathan John Mayage vs Board of External Trade** (supra)

It was the submission of the counsel for applicant that Arbitrator having found that the applicant was not heard, he had a legal duty to nullify the whole termination proceeding by the respondent.

Mr. Gumba proceeded to tell the Court that the applicant's contract with the employer was for fixed term of 3 years, as evidenced in Exhibit ABZ. In that regard the termination of his contract was subject to Rule 8 (2) (a) Employment & Labour Relations Code of Good Practice GN. 42/2007. That the Rule requires termination of a fixed term contract only where an employee breaches a contract. He continued to state that it is from that rule that once the respondent established that the applicant breached his term of contract, the respondent had an obligation under Rule 13(1) of GN

42/2007 which mandatorily require an employer to conduct an investigation to ascertain that there are grounds to be heard.

Mr. Gumba further provided that Rule 8 (1) (d) requires termination to be on fair reasons and fair reasons are defined under S.37 (2) of the Employment & Labour Relations Act, 2004 which provides that a termination of an employment is unfair if the employer fails to prove that reason for termination is valid. The same was held in **Kulwa Solomon Kalile vs Salama Pharmaceuticals, Labour No. 155/2019.**

At this juncture, I would like to refer to the records of CMA which revealed that the applicant was employed for fixed term of contract for 3 years, as evidenced in Exhibit ABZ. That the applicant was employed in a position of Director of Shared Services.

The CMA records further evidence that the applicant exercised power that was not delegated to him as acting director, consequently occasioning loss to the respondents. Among conducts testified in the CMA records are the applicant's signing a building contract under seal without the mandate to do so and contrary to clause 8.2 of the Procurement Policy of the respondent (AB 14) as reflected at page 33 and 34 of CMA ruling.

Other conducts reflected in CMA records include applicant awarding a contract of 539 Million Shillings contrary to the Procurement Policy and expenditure approval limits found in Accounting and financial Management Policy of the respondent (submitted at CMA as Annexure AB 15). Moreover,

records further reveal that the applicant failed to explain advance payment of 215 Million that was done without approval.

Going through the CMA records and ruling, it is clear that the respondents had reasons to terminate the applicant as his conducts amounted to breach of contract.

I therefore in agreement with the Arbitrator's finding echoed at page 56 of the Ruling that the applicant's evidence reveals that the applicant was not faithful, misusing their positions and going against their contracts. Therefore, the respondent has proved fairness of termination in terms of Section 37 of Employment and Labour Relations Act, Act No. 6/2004 as the termination of the contract is on valid reason.

I hereby would like to emphasize the same case quoted by the Arbitrator at page 56 of the Ruling and referred to this Court by the respondents, that of **Deloitte Consult Ltd Vs Dr. Menrad Rwezaura, High Court Labour Division Rev. 219 of 2015**, where it was expressed that

> *"It should be known to the employers that a fixed time agreement does not mean that the employer or employee can always rely on an end date of the employment contract. Either party may terminate employment contract at any point in time in case of misconduct and capacity or poor performance or any other contact of an employee."*

It was also the applicant's contention that procedure for termination was not followed. It was his argument that as the applicant's contract was employment contract with fixed term of 3 years, then termination of his contract was subject to Rule 8 (2) (a) Employment & Labour Relations Code of Good Practice GN. 42/2007 which requires termination of a fixed term contract only where an employee breaches a contract, where under the rule, the action to follow would be for an employer to conduct an investigation to ascertain that there are grounds for termination as per under Rule 13(1) of GN 42/2007.

In respondent's submission, Counsel for the respondent, Mr. Ramadhan was of the view that the respondent had many reasons and grounds to terminate the applicant's contract. The facts above seems to support his contention.

Mr. Ramadhan submitted further that chose to rely on termination clause 8 of the contract because the parties had agreed on the clause. Mr. Ramadhan referred to the case of **Deloitte Consult Ltd Vs Dr. Menrad Rwezaura, High Court Labour Division Rev. 219 of 2015**, where Nyerere J, at page 11 expressed that "*in a fixed term contract one does not have to go to the length of it, it can be terminated at any time by either party.*" It was contention of Mr. Ramadhan that R (13) of GN.42/2007 is not applicable to the case at hand and therefore argued that the procedure of unfair termination cannot be applicable to the current case due to the nature of the contract of employment and to termination clause 8.

I agree with the submission of the respondent above, apart from the contract being a fixed term contract, the respondent had valid reasons to terminate the contract. I further agree that the respondent had a right to invoke clause 8 of the contract.

In the case of Jordan University College vs Flavia Joseph, High Court of Tanzania Labour Division at Morogoro, Revision No. 23 Of 2019, at page 10, Hon. Mruke J., having similar situation to consider, she held that:

> *"By terminating respondent, applicant just exercised express term of contract. Respondent cannot refute what they agree in their legal binding agreement exhibit MKJ-1 tendered by herself as witness of her own case. There is nothing wrong done by applicant having exercised contractual rights. Thus, there is nothing like unfair termination, in the presence of express term previous agreed upon by parties. Thus...arbitrator was not correct to treat the respondent to have been unfairly terminated. ... Clause 10 of exhibit MKJ-1 being express term that parties agreed, while signing employment contract, respondent cannot claim for breach of contract. To this court, applicant exercised her contractual rights which respondent agreed when she signed employment contract, on 7th January, 2016. Thus, it is odd to think of breach of contract while there is express term to that effect"*

At this point, I wish to note that the Arbitrator, had awarded the applicant 3 months salaries as compensation for termination of the contract. Again,

referring to the case of Jordan University College vs Flaviana Joseph (Supra), Hon. Mruke J., at page 8 expressed *"There is no unfair termination in a fixed term contract."* The remedies if any in such circumstances would be not remedies for unfair termination, but rather for breach of contract.

In the case at hand, the respondent had paid the applicant 3 months' salary as part of his notice during termination as per their contractual agreement. I therefore find no need for the additional payment. To this effect I vary the arbitrator's award of 3 months compensation.

Consequently, the Arbitrator's decision is varied to the extent shown and the application is dismissed accordingly. No order as to costs.

T. N. Mwenegoha

JUDGE

19/08/2021