IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 497 OF 2021

BETWEEN

ABDALLAH SEIF MAKWINYA ..... APPLICANT

VERSUS

TOL GASES LTD ..... RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J

The applicant filed the present application under the provisions of section 91(1)(a), 91(2)(b) and 94(1)(b)(i) of the Employment and Labour Relations Act (Cap 366 RE 2019) ('ELRA'), 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 ('LCR') seeking revision of the decision of the Commission for Mediation and Arbitration ('CMA') issued on 05/11/2021 by Hon. Batenga, Arbitrator in labour dispute No. CMA/DSM/TEM/51/19/51/19. He is moving the court for the following:

1. That this honorable court be pleased to call for the records of the proceedings and award of the Commission for Mediation and Arbitration with reference CMA/DSM/TEM/51/19/51/19 delivery by Hon. Batenga, M- Arbitrator and inspect the records with view to satisfy with the legality, propriety and the correctness thereof.

2. That the honorable court be pleased to call for the records and revise the award of the Commission for Mediation and Arbitration delivered by Batenga Arbitrator on 05/11/2021 and served to parties on 03/12/2021 and make order of setting aside.
3. Any other relief this honorable court deems fit and just to grant.

The application is supported by the applicant's affidavit dated 15th December, 2021. The respondent vehemently challenged the application by filing counter affidavit sworn by Ms. Doreen Machange, the respondent's Principal Officer. The application proceeded by way of written submissions. Before this court the applicant was represented by Mr. Jimmy Mnkeni, Trade Union Representative whereas Ms. Doreen Machange, respondent's Principal Officer appeared for the respondent.

The application emanates from the following background; the applicant was employed by the respondent as Cylinder handler since 23/02/2010 in a fixed term contract of one year. The contract has been renewed upon its expiry. The last contract which is the subject matter of this application was entered by the parties on 02/01/2018 and agreed to end on 01/01/2019. On 24/12/2018 the applicant was issued with a notice of non-renewal of the said contract into another term.

Aggrieved by such termination, the applicant referred the matter to the CMA claiming for unfair termination both substantively and

procedurally. The applicant sought for the following reliefs, notice payment one month, compensation of 12 months remuneration for the alleged unfair termination, salary of December 2018, annual leave, transport allowance, daily subsistence allowance up to the date of repatriation, repatriation cost and compensation for tort of discrimination and harassment. After considering the evidence of both parties the CMA dismissed the applicant's claims.

Again, being dissatisfied by the CMA's award, the applicant filed the present application on the following issues:-

i. Whether there are sufficient reasons for this honourable court to revise the proceedings in dispute No. CMA/DSM/TEM/51/19/51/2019, quash and set aside the Arbitrator award given.

ii. Whether the trial Arbitrator properly evaluated the evidence before her before reaching the verdict of fairness of termination.

Arguing in support of the first issue, Mr. Mnkemi submitted that it is apparent on the record the Arbitrator wrongly interpreted the provision of ELRA and relied on irrelevant documents. That the applicant was employed at Nachingwea and then transferred to Dar es salaam

therefore he ought to have been transferred back to the place of employment. He added that the applicant's terminal benefits were prepared but they were not paid to him as testified by DW1. He insisted that the respondent had to comply with section 43 of ELRA.

Mr. Mnkemi submitted further that the word "shall" is used in Section 43 of ELRA therefore in terms of section 53 (2) of The Interpretation of Laws Act, Cap 1 R.E 2019, it was mandatory for the respondent to comply with the same. He stated the respondent wrongly terminated the applicant without paying him his repatriation costs. To support his submission, he cited the case of **Kenya Kazi Security vs Kirobotoni Ramadhan and Others (Labour Revision 132 of 2019) [2020] TZHCLD 3755 (30 November 2020).**

As to the second ground Mr. Mnkemi submitted that the Arbitrator failed to analyse the evidence properly. He pointed out that the Arbitrator failed to make proper calculations of the applicants' outstanding debts. He urged the court to consider the annextures attached to this application to make proper calculations arguing that the respondent failed to comply with section 37 of ELRA. That the respondent had no valid reason to terminate the applicant and he did

not follow the stipulated procedures. In the conclusion he pleaded the court to revise and set aside the CMA's award.

Responding to the first ground, Ms. Machange submitted that the Arbitrator observed the testimony of DW1 who was the Director of Human Resources and that during applicant's employment he secured various Saccos loans and salary advance which were deducted in his monthly salary. She stated that the applicant had no prior complains about the said deductions during his employment, alluding that at the time of termination, the applicant had an outstanding loan of Tshs. 4,833,250.46 for Saccos Loan and Tshs. 1,029,000.00 as salary advance.

Ms. Machange submitted further that after termination the applicant was paid his terminal benefits which include one month salary in lieu of notice, severance pay and repatriation cost amounting to Tshs. 3,926,900.00. That since the applicant had an outstanding loan, his terminal benefits were used to set off his debts. She strongly submitted that the Arbitrator properly considered the evidence on record and made the right decision.

In response to the second ground Ms. Machange submitted that the applicant had a fixed term contract of one year and the same was

terminated automatically when the agreed period expired. She insisted that the obvious reason that led to the applicant's termination was expiry of fixed term contract. To support her submission, she cited the case of **Ahobwile Yesaya Mwalugaja v. M/s Shield Security (T) Ltd**, **Revision No. 333B of 2013** (unreported) and the case of **Mtambua Shamte & 64 Others v. Care Sanitation & Supplies**, **Revision No. 154 of 2010** (unreported).

Ms. Machange submitted further that the respondent followed the stipulated procedures in terminating the applicant as they are provided under Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007 ('The Code'). She cited the case of **NBC Ltd Mwanza v. Justa B. Kyaruzi**, **Labour Revision No. 42 of 2009** (unreported) to support her submissions.

Regarding the payment of repatriation cost, Ms. Machange submitted that the respondent complied with the provision of Rule 8(1)(b), (c), (d) of the Code. The counsel firmly submitted that the respondent had valid reason to terminate the applicant and followed all the required procedures. She stated that the applicant's allegation that he is not aware of the payment of terminal benefits lacks merit because he knows that the same was used to set off his outstanding debts. As to

the allegation of expectation of renewal, Ms. Machange submitted that it is a new issue which was not tabled at the CMA hence, it cannot be raised at this stage. In the upshot the counsel urged the court to dismiss the application for lack of merit.

I have carefully considered the rival submissions of the parties, for the convenient determination of the application, I will to begin with the second issue. The applicant is strongly alleging that the respondent had no valid reason to terminate him and he did not follow the required procedures. As stated above, the applicant had a fixed term contract of one year which commenced on 02/01/2018 and agreed to end on 01/01/2019 as indicated in employment contract (exhibit A2). On 24/12/2018 the applicant was served with a notice of non-renewal of the said contract (exhibit A3). It is a settled law that, a fixed term contract shall terminate automatically upon expiry of the agreed term. This is a position in law, to wit under Rule 4 (2) of the Code which provides that:-

> *"4 (2)-Where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise".*

In line with the with the above provision, it is settled law that when the agreed fixed period of contract expires, the stipulated procedures for termination of the contract to be followed are the ones provided for in the terms of the contract. This is because the contract of employment in a fixed term contract comes to an end upon expiration of the time that was fixed. The contract should however stipulate the period of notice of non-renewal or renewal of the contract. In a case where the employer or employee does not intend to renew the contract, then a notice of non-renewal for a period stipulated in the contract should be issued, the alternative being payment in lieu of notice. Therefore since the evidence on record is that the applicant was issued with a notice of non-renewal (EXA3) then the employer followed the procedures.

The termination procedures in a contract for unspefied period need not be followed in a fixed term contract which comes to an end since its expiry is known to both parties unless the said contract is terminated before the agreed period. In the case at hand the agreed contract was to end on 02/01/2019 and on 24/12/2018 the applicant was issued with a notice of non-renewal of the said contract. Under such

circumstances, it is my view there was no unfair termination of employment contract in this case.

I have noted the applicant's submission that he was supposed to be notified with the non-renewal of the said contract one month before the said contract. Unfortunately, the contract entered by the parties herein had no such clause and as stated above, at the commencement of the contract, both parties were aware of its expiry therefore the cases cited thereto are distinguishable to the present one. The respondent in this case had no obligation to inform the applicant why the contract will not be renewed because he ended the contract on the agreed period.

Again, the applicant has raised the issue of expectation of renewal; I join hands with Ms. Machang that the said allegation ought to have been raised at the CMA and not at this stage. Going through the record it is crystal clear that reasonable expectation to renew the contract was not the basis of the applicant's complaint at the CMA. At the CMA the applicant specifically disputed the reasons for termination and the procedures thereto. Thus, such issue cannot be entertained at this stage. On the basis of the foregoing, it is my findings that the respondent properly terminated the applicant's employment as rightly found by the Arbitrator.

Turning to the first issue as to whether the applicant has adduced sufficient reasons to revise the CMA's award the answer to that issue is no. As it is found above, the respondent properly terminated the applicant's employment.

There is also a claim that the terminal benefits were not paid to the applicant. The evidence available in record proves the applicant was paid his terminal benefits accordingly as indicated in exhibit (A4). The applicant contends that he had no any outstanding debt and the respondent wrongly used his terminal benefits to set off his debt. Surprisingly, the applicant's allegation is contrary to the evidence on record. The memorandum of inquiry of the applicant's debt (Exhibit A5 and A6) proves that the applicant had an outstanding debt. Furthermore, the applicant when cross examined at the CMA, he admitted that he had an outstanding debt. Therefore, the annextures attached to this court are of no value because the same were not tendered at the CMA thus, submissions are not evidence hence those documents cannot be admitted at this stage.

In the result, I find the present application to be devoid of merits as the applicant failed to adduce sufficient reason for this court to fault

the Arbitrator's award. Consequently, this application is hereby dismissed.

Dated at Dar es Salaam this 23rd day of May, 2022.

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S.M. MAGHIMBI
JUDGE