IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

APPLICATION FOR REVISION NO. 114 OF 2022

(From the award of Commission for Mediation & Arbitration at Kinondoni in Labour Dispute No. CMA/DSM/ILA/837/19/392

MSPH TANZANIA LLC.....APPLICANT

VERSUS

ALLY A. NASSORO.....RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J.

10th November 2022 & 21st November 2022

The applicant filed the present application for revision challenging the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Ilala (CMA) (Hon. Massawe Y, Arbitrator) which was decided in favour of the respondent. The applicant is praying for this court to call for the records of the CMA, inspect, examine such records and its proceedings so as to satisfy itself as to the correctness, legality and the award to be revised, quashed and set aside. She further prays for other reliefs as the Court deems appropriate in the circumstances.

This revision application developed out of the following context. The respondent was employed by the applicant from 1st October 2013 on yearly fixed term contracts until on 23rd July 2019 when his employment was terminated due to contract non-renewal. (See notice of intention

not to renew in the CMA record). Being not satisfied with the way the employment ended, the respondent filed a complaint in the CMA, vide **Labour Dispute No. CMA/DSM/ILA/837/2019/392** complaining against the non-renewal of the employment contract and claiming for 12 months remuneration as compensation, general damages, 13th Months Cheque and annual leave payment. In the CMA, the arbitrator found that there was employees reasonable expectation of renewal of the contract, hence awarded TSZ 65,087,805.24= as a compensation for unfair termination.

Being aggrieved by the CMA's award the applicant filed the present application. In her affidavit, the applicant is challenging the CMA award basing on three grounds of revision contained in Paragraphs 7.1 to 7.3 namely exercise of jurisdiction illegally and with material irregularities, errors material to the subject matter involving injustice and award being unlawful, illogical, irrational and ambiguous. The following issues are contained in Paragraph 7.4 of such affidavit: -

a) Whether or not it was proper for the parties' dispute to be treated and tried as a dispute of unfair termination while the respondent had a fixed employment contract which ended upon expiration and on operation of contractual time.

b) Whether or not the notion of expectation to renewal does not require a separate trial within trial pursuant to **Rule 23(6), 23(7), and 23(8)** before proceedings with the framing of issues and other process of arbitration.

c) Whether it was proper for trial arbitrator to shift the burden of proof to the applicant while the dispute involved a fixed employment contract which ended/expired by operation of time.

d) Whether or not the dispute was filed within time, and in the instance the dispute is found not to be filed within time, whether or not the dispute was properly condoned.

e) Whether the applicant as an employer is obligated by the law to give reason for his decision not to renew a fixed employment contract. In alternatives whether the parties in an employment contract are obligated to give reasons for deciding not to continue with renewal of a fixed employment contract which ends by expiration of time.

f) Whether the parties' employment contract in question was expected to be renewed by the respondent.

g) Whether or not the CMA proceedings where properly recorded.

h) Whether in the circumstances of the present case to wit the

notice of non- renewal and the meeting held to discuss the applicant's intention of not renewing the employment contract did not operate to nullify or negate the notion of reasonable expectation of renewal.

i) Whether it was proper for the CMA to hold that parties' employment contract was terminated ignoring the respondent's evidence that the contract "ended" on September 2019; in alternative whether the or not the word termination has the same meaning with the end of contract.

j) Whether or not the CMA consider Clause 12.3 (ii) of the parties' employment contract to be severally to other clauses of the employment contract.

k) Whether or not renewal of employment contract has to be done unilaterally by the applicant as an employer.

l) Whether the trial arbitrator was right to hold that, there was expectation of renewal of employment contract basing on applicant's financial status and the performance of the respondent in the absence of hearing the parties on respondent's performance and applicant's financial status or any evidence in that regard, alternative whether CMA had jurisdiction to find and hold that the alleged conditions for

invoking expectation of contract renewal under the contract did exist.

m) Whether the trial arbitrator was correct to determine the dispute by an issue not framed, not in dispute and parties have not been head on the same.

n) Whether the contract renewals in the present dispute signify expectation of renewal of employment contract and whether the arbitrator considered the respondent's change of contract with a completely different position and scope of work in holding the respondent's contract was renewed for six instances.

o) Whether the trial arbitrator correctly invoked, interpreted and considered the doctrine of *"contra preferentem rule"* on the parties' employment contract was a standard contract and Clauses 1 and 12.3 (ii) therein where unilaterally drafted by the applicant for invoking the *contra preferentem* doctrine.

In this application, the applicant was represented by Mr. George Shayo, Advocate from the HR Expert Limited whereas Mr. Godfrey Tesha, Advocate from Law Front Advocates represented the respondent. Parties argued the application by a way of oral submissions.

In his submissions Mr. George Shayo consolidated grounds enumerated in items 7.1 to 7.3 and argued them all together. He submitted that the award of the CMA is misconceived and not legally valid, on the reason that the parties' facts and evidence were not considered as narrated in the affidavit, that the respondent was a yearly fixed term contract employee. He stated that the employment contract commenced on 1st October 2018 till 30th September 2019 when it came to an end. According to Mr. Shayo two months before expiration of the contract, vide a letter dated 15th July 2019, the respondent was informed officially about employer's intention of not to renew the contract.

Mr. Shayo challenged the arbitrator's understanding at page 1 of the award that the respondent was employed from 2013 until 2019. He submitted that the correct fact is that the respondent was employed under yearly fixed term contract which started in 2013 with several renewals. He submitted that the arbitrator had a wrong analysis of facts which led to a wrong conclusion.

He further challenged the holding of the arbitrator that the respondent was terminated while the employment terminated automatically by operation of time. He is of the view that the arbitrator's findings are tainted with illegalities and irregularities for that improper recording of

facts.

Referring to page 2 of the award, Mr. Shayo faulted the Hon Arbitrator accusing him of having wrongly recorded that the applicant did not comply with the termination procedure. In his view, at the CMA, only two issues were framed including; whether there was expectation of renewal and to what reliefs parties are entitled. According to Mr. Shayo, the recording of the arbitrator diverted outside the issues framed as indicated on page 2 paragraph 3 of the award which wrongly recorded what the applicant stated in the opening statement. He added that all this led the arbitrator into a wrong findings and conclusion.

Another complaint by Mr. Shayo accused the arbitrator of failure to consider DW1 evidence one Faiza Salum who tendered exhibits where the arbitrator concluded that there was expectation of renewal while the contract lapsed automatically. He submitted that it was stipulated in the said contract that parties should not expect renewal.

Mr. Shayo complained against the arbitrator's findings that the contract may be renewed upon satisfactory performance and availability of donor funds as per Clause 1 of the employment contract without interpreting and referring to clause 12.3 (ii) of the contract which states that the contract shall terminate automatically and neither party shall have

legitimate expectation of renewal. According to Mr. Shayo, the first clause considered by the arbitrator did not qualify any standard which indicate expectation of renewal as the respondent was called and attended a meeting in discussing employer's intention of not to renew the contract.

Mr. Shayo submitted that apart from the failure to consider clause 12.3 (ii) and the meeting, the arbitrator yet said that clause 1 of contract should be interpreted through *contra preferentem* Rule. He disagreed with the arbitrator on the reason that the words of Clause 1 of the contract are plain with no ambiguity, thus they wonder how the arbitrator satisfied himself that there was availability of fund and satisfactory performance.

Mr. Shayo further stated that existence of contingent contract before the conditions are met, render the contract void. He referred to the case of **Rock City Tours Ltd vs. Andy Nurray, Revision No. 96 of 2013** where this Court considered to be void a contingent contract formed before the conditions met.

He added that the principle of contra preferentem was wrongly invoked because its interpretation was not properly done as there was no any ambiguity for the same to be applied.

Mr. Shayo submitted that several renewals do not amount to expectation to renewal. Supporting his stand, he cited the case **IOT (Travelling Bags) vs. Thomas Soko,** Revision Application No. 131 of 2015, High Court of Tanzania, Labour Division, at Dar es salaam, (unreported).

Mr. Shayo alleged the arbitrator of having invited extraneous matter which was not an issue in the CMA. Referring to page 15 at paragraph 3 of the typed award, he stated that the arbitrator said that the applicant did not prove that there was no evidence of lack of fund or that there was a change of scope in the department while this was not an issue from the beginning as parties were not required to adduce evidence to prove it for it being not an issue. He is of the view that the applicant was condemned unheard. He cited the case of **Gaia Eco Solution vs. Fadhiri Ulaya,** Revision Application No. 443 of 2018, High Court of Tanzania, at Dar es salaam, (unreported) in explaining the effects of denial of a right to be heard.

Regarding to timeliness of the matter, Mr. Shayo submitted that the application in the CMA was wrongly condoned as it was filed out of time. He stated that the notice of intention not to renew was issued on 23rd July 2019, and the contract expired on 30th September 2019. According

to him, since the count must begin on the date when the Respondent was informed about non-renewal which was on 23rd July 2019, therefore lodging the dispute in October 2019 means he was out of time. Bolstering his position, he cited the case of **Tanzania One Mining Ltd vs. Andre Venter, Labour Revision No. 276 of 2009**, where the Court held that counting of termination begins on the date the employer made final decision to terminate. He thus prayed for the application to be allowed.

In Reply Mr. Godfrey Tesha, Advocate for the respondent refuted any error on the part of the arbitrator. He submitted that it was not disputed that the dates of employment are the ones mentioned, the applicant was employed on 8th September 2013 until 23rd July 2019 when he was terminated.

Mr. Tesha refuted the assertion that the arbitrator was wrong to address unfair termination. He prayed for the Court to refer to **Rule 27(3) of G.N No. 67 of 2007** which states how an award should be and see how the arbitrator complied with the procedure.

On allegation that the arbitrator failed to consider the evidence and exhibits tendered by their witnesses, Mr. Tesha argued that in the 1st clause of the employment contract which was admitted in the CMA as

exhibit D1 & P2, the contract period imposed a possibility of renewal upon satisfactory performance and availability of donor fund. In his views these were preset of expectations to renewal. He stated that Clause 12(3)(ii) relied by the applicant provides for termination by agreement and not expectation to renew. He further added that termination means ending an existing contract and not a lapsed contract. For that reason, he is of the view that, it is not proper to say that this clause removes expectation to renew, the arbitrator did not need to use *contra preferentem* Rule because there was no conflict between the two disputed clauses.

Mr. Tesha submitted that expectations to renewal was created from the beginning when the contract was being made. According to him, the two months' notice issued by the applicant to the respondent does not remove legitimate expectation. He further added that there was no evidence which showed that the applicant lacked donor fund or respondent's underperformance. He is therefore of the view that the meeting could not remove the renewal expectation as it was already prescribed in the contract.

Mr. Tesha submitted that all the cases cited by the applicant provided circumstances where failure to renew a fixed term contract amounted to

unfair termination. He stated that **Section 36(a)(iii) of the Employment and Labour Relations Act** explains clearly that termination of contract includes a failure to renew a fixed term contract if there was a reasonable expectation of renewal. He further referred to **Rule 4(3) of G.N 42 of 2007** which explains that failure to renew a contract may be considered to be unfair termination.

Responding on the allegation of inclusion of extraneous matters, Mr. Tesha referred to page 15 of the award and submitted that the arbitrator was right to say that there was no proof that the applicant had no money and there was no proof of change of scope. According to Mr. Tesha these were not extraneous matters because they were the centre of dispute, and it was on that reason the respondent wrote a letter to inquire why the contract was not renewed.

According to Mr. Tesha, the law has never defined what amounts to reasonable expectation for renewal of contract. He submitted that the Court or arbitrator must look at various circumstances of the case. He supported this argument by the case of **Ibrahim s/o Mgunga & 3 others vs. African Muslim Agents,** Civil Appeal No. 476 of 2022 page 11 paragraph 2 and the case of **Asanterabi Mkonyi vs. Tanesco**, Civil Appeal No. 53 of 2019.

Regarding condonation Mr. Tesha submitted that the CMA ruling on preliminary objection against timeliness of the dispute was correct to condone the dispute. He disputed the applicant's assertion that the 30 days provided by **Rule 10(1) of G.N No. 64 of 2007**, counts from the date the respondent was issued with nonrenewal expectation. According to him, the count should start when the contract lapsed which is on 1st October 2019. He submitted that the respondent was right in lodging the dispute on 29th October 2019. In his view, filing the dispute before this date, would have amounted to premature dispute, as the respondent was still working.

The applicant's counsel Mr. Shayo made an rejoinder in which he reiterated his submission in chief but emphasized on two issues; one being availability of fund and performance satisfaction. He stated that for the proper addressing of those issues parties ought to be afforded with an opportunity of being heard for the same to be proved, therefore contesting it at this revision stage would amount to new issue. All the contents of the rejoinder will be taken into account in determining this revision application.

Having considered parties submissions, pleadings, and the CMA record, I noted two issues for determination. The first issue is **whether the**

applicant adduced good grounds for this Court to exercise its revisional power to set aside the CMA award, and the second issue is **what reliefs are parties entitled to.**

In resolving the **first** issue, all the issues and grounds of revision listed in the affidavit will be considered all together. Basing on parties' submissions on these issues and grounds, I see three main centers of controversy. The **first** is whether the matter before CMA was time barred, if the answer is not in affirmative, the **second** center of debate is whether the arbitrator was correct to hold that there was a reasonable expectation of renewal of the parties' contract and **lastly** what reliefs are the parties entitled to.

Starting with the **first** as to **whether the matter was time barred before CMA**, it is on record that this matter was addressed in a preliminary objection raised by the applicant in the CMA. The arbitrator found that preliminary objection regarding the time limit of filing respondent's labour dispute before CMA lacked merit on the reason that the matter was filed within thirty days counted from the time when the employee exited the office.

Time limit in filing labour disputes is guided by **Rule 10 (1) and (2) of G.N No. 64 of 2007** which provides: -

"Rule 10(1) "dispute about fairness of employee's termination must be referred to the Commission within thirty days from the date of termination or the date employer made final decision to terminate or uphold the decision to terminate."

From the above provision, for the dispute to be filed within time the one who wish to initiate a labour dispute must account for days from the date of termination or the date employer made final decision to terminate or the date the employer upheld the decision to terminate to the date the dispute is lodged. Parties' contention in this application is based on when should the counting of days begins. The applicant is claiming that counting must start from the date when the applicant was issued with a letter of intention of nonrenewal while the respondent is of the view that counting should begin when the employee left the office on the date of the expiry of the contract. Basing on the nature of this dispute the contents of the notice of non-renewal expectation was not a decision that ended the employment. It was just an expression of intention to have it automatically end upon its expiry. In this regard, the actual decision was in the contract that the termination of the applicant's employment was automatic at the end of the contractual fixed term which is the date when the respondent exited the office. I agree with the respondent's Counsel that filing of the matter at CMA before 29th

October 2019 or on 23rd July 2019 when the notice of intention not to renew was issued, would have amounted to premature application as the respondent was still in employment. The first scenario provided in **Rule 10(1) of G.N No. 64 of 2007** applies in this matter which is the date of termination of contract that expired automatically.

On such findings I am of the view that the dispute was timely filed within thirty days from 30th September 2019 when the employment automatically terminated on the expiry of the contract. Therefore, applicant's allegation that the matter was time barred in the CMA lacks merits.

On **second** point as to **whether there was a reasonable expectation of renewal,** the applicant alluded that the respondent's employment automatically came to an end after the expiry of its fixed term contract and that the arbitrator erred in law by holding that there was a reasonable expectation by relying on clause 1 of employment contract and disregarding Clause 12.3 (ii) of the said employment contract. For ease of reference, I find it crucial to reproduce the contents of the contentious provisions of the contract (Exhibit D1) which are Clause 1 and clause 12.3.(ii). The said contract is dated between October 1st 2016 until 31st March 2017 but the same terms were

renewed two times until 30th September 2019 when the last renewal ended.

Clause 1 of the said contract provides:-

> *"1. Contract period –The Employee's employment shall commence on the October 1st 2016 until 31st March 2017, and may be renewed upon satisfactory performance achievement and availability of donor fund."*

Clause 12.3.(ii) provides;-

> *"The contract shall automatically terminate upon the expiry of the term of service stipulated in clause 3 above. Neither party shall have legitimate expectation of renewal or continuation of this agreement after its expiry as aforesaid."*

Basing on the above clause 1, the respondent maintained that the arbitrator was right in his findings that there was a reasonable expectation as there was no prove of applicant's shortage of fund and the respondent's poor performance relating to his termination. For that reason, he is of the view that Clause 1 of the employment contract was well interpretated by the arbitrator in his findings.

It is a common understanding that employment relationship is guided by the contents of their contract. **Rule 4(2) of G.N No. 42 of 2007 and Section 36(a) (iii) of the Employment and Labour Relation Act,** Cap 366 R.E 2002 provides: -

> *"Rule 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."*

From the above cited provision, it is an established principle that in a fixed term contract, the employment contract comes into an end when the agreed period expires unless the contract provides otherwise. Does the parties' contract provide otherwise? Is there reasonable renewal expectation? These are debated questions to be resolved.

Legitimate expectation of renewal, is guided by **Section 36 (a) (iii) of the ELRA No. 6/2004 and Rule 4(4) of G.N No. 42 of 2007** which provides: -

> *"Section 36 (a) Termination of employment includes:-*
>
> *iii) a failure to renew a fixed term contract on the same or similar terms, if there was* ***reasonable expectation of renewal"***

Rule 4(4) of G.N No. 42 of 2007 provides that: -

> *"Rule 4 an employer and employee shall agree to terminate the contract in accordance to agreement.*
>
> *(4) Subject to sub-rule (3), the failure to renew a fixed-term contract in circumstance where the employee reasonably expects a renewal of the contract may be considered to be an unfair termination".*

To understand whether there was a legitimate expectation of renewal the contention in Clause 1 and clause 12.3.(ii) of the contract need to be resolved. By a simple interpretation, clause 1 gives a possibility of having the contract renewed upon some conditions met. The use of the word "may" in the words "*may be renewed upon satisfactory performance achievement and availability of donor fund",* means, it is open to two possibilities that is renewal or nonrenewal. By simple interpretation, the existence of fund and good performance is only a trigger to enable the possibility of renewal but not a condition precedence to renewal. I get a different interpretation in clause 12.3 (ii). It seems to give a stricter command on renew expectation. The words "*the contract shall automatically terminate upon the expiry of the term*

of service" in my interpretation allows no compromise. This means, there expectation to renewal is extinguished. The clause unambiguously, prohibited renewal expectation by the words "*Neither party shall have legitimate expectation of renewal or continuation....*"In both statements, the word "shall" is used. This means, the provisions must strictly be followed without any other option.

In the case of **Hotel Sultan Palace Zanzibar vs. Daniel Laizer & Another**, Civil. Appl. No. 104 of 2004, Court of Appeal of Tanzania, (unreported) it was held: -

> *"It is elementary that the employer and employee have to be guided by agreed term governing employment. Otherwise, it would be a chaotic state of affairs if employees or employers were left to freely do as they like regarding the employment in issue."*

It is on record that the respondent issued notice of intention not to renew the contract on 23rd July 2019. This notice was challenged by the respondent in the CMA basing on Clause 1 of the Employment contract which allowed possibility of renewal subject to availability of fund and performance. It was on this argument the arbitrator got convinced that clause 1 of the contract rendered the contract renewable automatically

with only condition of having donor fund and good performance. I differ with the arbitrator on this point since the general rule was stipulated in cluse 12.3(ii) of the contract that the fixed term was unrenewable, and that the employment automatically terminates upon the expiry of the term.

The respondent's contract expired on 30th September 2019. That means the notice of intention not to renew was issued early before the expiration date. This in my view, automatically terminated the employment. In is my finding that the arbitrator erred.

Thus, basing on above cited authority, since the respondent greed to be employed under yearly fixed term of contract expected to end on 30th September 2019, and that the notice of intention not to renew was issued by the applicant early before termination, then the respondent's assertion that there was a reason to expect renewal lacks merits. Fixed term contract by itself is a notice as it states when the contract would end. I could not see sufficient evidence in the CMA to indicate applicant's conduct which could justify reasonable expectations of renewal.

In the upshot, it is my finding that the major issue as to **whether the applicant has adduced sufficient grounds for this Court to**

exercise its revisional power in Labour Dispute No. CMA/DSM/ILA/837/2019/392 is answered affirmatively.

On reliefs to be paid I find nothing to award as the applicant's contract come to an end after the expiry of the term of service. It is for this reason I hereby quash and set aside the CMA award. The application is allowed. I give no order as to the cost of the suit.

It is so ordered.

Dated at Dar es salaam this 21st Day of November 2022

KATARINA REVOCATI MTEULE

JUDGE

21/11/2022