**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO. 228 OF 2022**

**FALCON ANIMAL FEEDS LTD ..... APPLICANT**

**VERSUS**

**HUMPHREY PHILLIP PAGALLO ..... RESPONDENT**

*(From the decision of the Commission for Mediation and Arbitration DSM at Kinondoni)*

(Nyagaya: Arbitrator)

Dated 20th June, 2022

in

**REF: CMA/DSM/KIN/652/20/266**

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**JUDGEMENT**

28th October & 14th December, 2022

**Rwizile, J**

This application is for revision. The applicant has asked this Court to call for records and examine the proceedings of the Commission for Mediation and Arbitration (CMA) in labour dispute No. CMA/DSM/KIN/652/20/266and ultimately, set aside the award dated 20th June 2022.

Facts that gave rise to this application can be stated as hereunder; The respondent was employed on 1st April, 2020 on a fixed term contract of one year by the respondent. By reason of operational requirements, the

respondent's contract was terminated on 13th July, 2020. He was paid one month salary in lieu of notice and given a certificate of service.

Not happy with the acts of the applicant, the respondent instituted a labour dispute at CMA alleging breach of contract due to unfair termination substantively and procedurally. The CMA, upon hearing both parties, held, the procedure was not followed when termination of the respondent's employment occurred. The applicant was ordered to pay the respondent TZS. 3,000,000.00, being compensation of salaries for three months. Dissatisfied, the applicant filed this application, asking this court to revision the CMA award.

The application was supported by the affidavit sworn by Adelaide Ezekiel Sissya, the applicant's principal officer. The affidavit supporting this application raised the following grounds:

1. *Whether the respondent's claim before CMA was breach of contract or unfair termination,*
2. *Whether breach of contract was proved by the respondent,*
3. *Whether the arbitrator was correct to hold that the applicant did not adhere to the procedure for termination of contract of employment and,*

4. *Whether the arbitrator properly formulated the issues to address the dispute between parties.*

The hearing was conducted orally. Both parties were represented by learned Advocates. Miss Gladys Edes Tesha was for the applicant and Mr. Jeston Justin Mzihwi for the respondent.

At the hearing, Miss Gladys abandoned other grounds; she argued two of them namely:

i. *Whether breach of contract was proved by the respondent* and
ii. *Whether the arbitrator was correct to hold that the applicant did not adhere to the procedure for termination of the contract of employment*

She submitted on the first ground, that the reasons for termination was due to covid 19. This, it was argued, caused the contract to be frustrated. There was no termination, the learned counsel maintained. In her view, parties are bound by their pleadings always stated in CMAF1. She said, CMAF1 did not justify the claims. In her view, it was not proper to hold that there was termination of the respondent's contract.

Arguing the second ground, the learned counsel was vehement that, the procedure to terminate the respondent's contract was followed as per exhibit D1. She stated that article 11 of the contract provides how termination should be. She further said, article 11.1 provides for payment of salary or 28 days as a notice. It was her view that the terms of the contract on termination were fully complied with. To support her assertion, she referred me to the case of **Jordan University Collage v Flavia Joseph**, Revision No. 23 of 2019, (HC). She submitted that the procedure for termination was fair and as per the contract.

In reply Mr. Jeston submitted that rule 8(1) and (2) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 provides, there must be prior consultation, before termination.

He stated that the applicant terminated the employment when the respondent was on duty, submitting a report to the employer. In his view, such termination was not a good practice. He asked this court to dismiss this application.

In a rejoinder Miss Gladys submitted that the applicant complied with the law as in the case of **Cleophace Nkunda v St. Anne Marie Academy**, Revision No. 48 of 2021 (HC). He then prayed for the award to be revised.

After hearing both parties, I have now to determine grounds as raised;

In determination of the first ground, exhibit D1 (Mkataba wa Ajira) states clearly under clause 11 that any part can terminate the contract by a 28 days notice or payment of one month salary instead of a notice. It further provides that, the employer may exercise that right for the reason stated in the contract. Clause 11.2 of exhibit D1 is shown below: -

> *"kwamba usitishwaji wa ajira utaambatana na sababu zinazo husiana na makosa ya utovu wa nidhamu, uwezo na utendaji wa kazi; mahusiano na uendeshaji wa kampuni"*

In the circumstances, the applicant has an obligation to prove termination of the contract was of due to the reasons as listed in the contract. In exhibit D3, *kusitishwa kwa Mkataba wako wa Ajira*, the reason stated by the applicant was due to loss of business. It was stated as hereunder;

> *"Kampuni imelazimika kusitisha mkataba wako kutokana na kushuka kwa biashara kulikosababishwa na changamoto za Korona (Covid 19) ambapo idara yako ni miongoni mwa zilizoathirika zaidi."*

That being the reason for termination, the applicant was to lead evidence to prove there was a difficulty in doing business.

No evidence was tendered to prove so. The only evidence tendered was the letter from the applicant to the departments stating the challenges the applicant was facing; the letter stated: -

*"STOP PRODUCTION*

> *"...this is to inform you that due to the challenges we are facing in the market. The management has decided to stop production and sales of few products effectively from 14th May, 2020..."*

In my view this letter does not prove anything material in terms of procedure. This is because it does not show how was the business affected by Covid and the extent the business was hit.

Failure of the applicant to prove reasons for termination of the respondent's contract resulted to breach of it. There is therefore no room for the court to know to what the extent, the business was affected.

On the second ground, exhibit D1, provided that, for either party to terminate the contract, a notice of one month has to be given or payment of one month salary in lieu of notice. Rule 9(1) of the Code of Good Practice, provides that for termination to merit, both reasons and the procedure must be followed. It is the applicant, who terminated the employment contract of the respondent on the reason of business failure.

Rule 8(1)(a), (c) and (2)(b) provides the procedures in such circumstances: -

*An employer may terminate the employment of an employee if he-*

*(a) Complies with the provisions of the contract relating to termination;*

*(b) ...*

*(c) Follows a fair procedure before terminating the contract: and has a fair reason to do so as defined in section 37(2) of the Act*

*(d) ...*

*(2) (a) where an employer has employed an employee on a fixed term contract, the employer may only terminate the contract before expiry of the contract period if the employee materially breaches the contract.*

*(b) where there is no breach to terminate the contract lawfully is by getting the employee to agree to early termination."*

The law therefore directs, the employer to follow terms of the contract as well as the law, before terminating a contract for whatever reasons. More so, termination is allowed where the employee breaches terms of the

contract. The rules are categorical and are coached in mandatory terms. The applicant as an employer has no room to terminate the fixed term contract without following the law. Otherwise, there ought to be an agreement for early termination.

There is no evidence showing that there was an agreement of the respondent to an early termination. This, in the eyes of the law is unprocedural and amounts to unfair termination.

As a such, I think the CMA was right in holding that termination of employment contract of the respondent was not merited. There was breach of contract.

Having ruled out as above, I have to hold that the CMA was not justified to treat termination of a fixed term contract as if it was a contract of indefinite period. In as much as I agree that termination did not merit, but still, there was evidence to prove that the applicant did not have any reason for termination of the employment. If he had one, it ought to be communicated to the employee as the law requires. The reasons as intimated by the applicant was based on operational requirement. Termination by operational requirement is governed by section 38 of the Employment and Labour Relations Act. This was to be perhaps a corner stone in the whole termination process, if it is pegged as it was, on

operational reasons. For the fore going reasons, I hold that the application has no merit.

In terms of reliefs, the respondent applied before the commission for payment of compensation of TZS 9,000,000.00. I think, the same had in mind, the amount of compensation for 9 months that were remaining in his contract. The salary according to him was 1,000,000. 00 per month. The CMA awarded him, compensation of three months equal to 3,000,000.00. I think this was not right.

In fixed term contracts, any compensation must be pegged in the remaining period of the contract. There is no way, the CMA can reduce the same. That room is reserved in instances where termination is based on contract of the permanent nature. For the foregoing reasons, I quash the amount of three months given, I substitute for it, compensation for 9 months which is the amount of TZS 9,000,000.00

The application is dismissed for having no merit. This being a labour matter, each part has to bear its own costs.


**A.K. Rwizile**

**JUDGE**

**14.12.2022**