

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 439 OF 2020

(Arising from an award of the Commission for Mediation and Arbitration at Temeke in Labour dispute No. CMA/DSM/TEM/273/19/133/19 by Hon. Batenga, Arbitrator, dated 18th September 2020)

BETWEEN

LAKE CEMENT LIMITED..... APPLICANT

AND

PATRICK MAVIKA AND ANOTHER RESPONDENTS

JUDGMENT

Date of last order: 4/4/2022
Date of Judgment: 22/4/2022

B. E. K. Mganga, J.

Facts of this application briefly are that, on 13th May 2017 Lake Cement Limited (the applicant) entered into two years fixed term contract with Patrick Mavika (the 1st respondent) ending on 12th May 2019. In the said fixed term contract, the 1st applicant was employed as lift operator and his monthly salary was TZS 313,400/-. On the other hand, on 14th May 2017 applicant entered into two years fixed term contract with David G. William (the 2nd respondent) ending on 13th May

2019. On 11th May 2019, that is, a day before expiry of the contract of the 1st respondent, applicant served him with a non-renewal notice. On the other hand, on 13th May 2019, the date the said two years fixed term contract between applicant and the 2nd respondent was coming to an end, the applicant served him with a non-renewal of contract notice. Both respondents signed terminal benefit payment to acknowledge that they were paid their terminal benefits. On 10th June 2019, respondents filed Labour dispute No. CMA/DSM/TEM/273/19/133/19 before the Commission for Mediation and Arbitration (CMA) claiming to be paid TZS 10,410,000/= on ground that the applicant/employer breached the two years fixed term contract while there was expectation of renewal.

Only two witnesses testified at CMA namely, Amina Siwa (DW1) who testified for the applicant and Patrick Mwigiligio Mavika (PW1), the 1st respondent and closed their cases. Based on the evidence of the said two witnesses, on 18th September 2020, Hon. M. Batenga, arbitrator, issued an award in favour of the respondents that applicant unfairly terminated employment of the respondents for failure to renew their contracts and that the notice of termination did not comply with the provisions of section 41 of the Employment and Labour Relations [Cap. 366 R. E. 2019]. The arbitrator awarded each respondent to be paid 12

months' salary compensation. The arbitrator therefore awarded the 1st respondent to be paid TZS 4,488,000/= and 2nd respondent to be paid TZS 6,552,000/=.

Applicant was aggrieved with the said award hence this application for revision. In the affidavit affirmed by Amia Hamadi Siwa, the Human Resources and legal officer of the applicant in support of the notice of application raised one issue namely, whether in a fixed term contract of employment the employer has a duty to issue 28 days' notice.

In his written submission on behalf of the applicant, Mr. George Vedasto, learned counsel for the applicant cited Rule 4(2) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 and submitted that, the contracts of the respondents expired automatically hence 28 days' notice was not required. Counsel for the applicant submitted that, the 28 days' notice under section 41 of Cap. 366 R. E. 2019(supra) does not apply to the fixed term contracts. Counsel cited the case of ***Dotto Shaban Kuingwa v. CSI Engineering Company Ltd, Revision No. 5 of 2020***, HC (unreported) and ***National Oil (T) Limited v. Jaffery Dotto Msensemi & 3 others, Revision No. 558 of 2016*** and prayed the application be allowed.

Mr. Denis Mwamkwala, the personal representative of the respondents, resisted the application by submitting that respondents worked with the respondents since 2014 and that there was undertaking by the applicant to renew contracts. He argued further that, due to continued working on similar condition and terms, the respondents developed a reasonable expectation of renewal of their contracts. He cited the case of ***Shedrack Haruna & 16 others v. Interchick Company Ltd, Revision No. 198 of 2013*** (unreported) to bolster his argument. Mr. Mwamkwala submitted further that, failure to renew the contract on the same or similar terms while there is legitimize expectation is part of termination of contract and cited section 36 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019]. He further cited the case of ***Feza Primary School V. Wahida Kibarabara, Revision No. 117 of 2013*** (unreported) and submitted that the contracts between the parties required a one month notice to be issued prior termination and that the notices issued to the respondents were not proper.

I have read submissions made on behalf of the parties and examined the CMA record and find that it is undisputed that the fixed term contract of the 1st respondent was expiring on 12th May 2019 as

shown in the fixed term contract (exhibit L1) and was issued with a notice of non-renewal of the contract on 11th May 2019 as shown in the notice (exhibit L2). It is also undisputed that the contract of the 2nd respondent was expiring on 13th May 2019 as shown in the fixed term contract (Exhibit L1) and was issued with a notice of non-renewal of the contract as shown in the said notice (exhibit L2). It is undisputed further that, both respondents signed the document titled "terminal benefit payment" (exhibit L3) as acknowledgment that they received their terminal benefits. I have examined the referral of a dispute to the Commission for Mediation and Arbitration Form hereinafter referred to as CMA F.1 and find that the parties did not fill part B that relates to fairness of termination of employment. The respondents indicated that there was breach of contract of 2 years while there was legitimate expectation for renewal. As pointed hereinabove, the arbitrator relied on section 36(a)(iii) of Cap. 366 R.E. 2019 (supra) to that there was termination due to failure to renew while there was legitimate expectation and awarded the respondents. A similar view was taken by Mr. Mwamkwala, the personal representative of the respondents. With due respect to Mr. Mwamkwala and the arbitrator, that position is not correct in the circumstance of the application at hand. In the first place

there was no dispute relating to termination of employment of the respondents because they did not fill part B of the CM F1 that relates to fairness of termination of employment. Since they did not so indicate, they cannot thereafter change and argue that they were terminated. In other words, pleadings of the respondents were not based on unfair termination. Section 36 of Cap. 366 R.E. 2019(supra) relied upon by both the arbitrator and the personal representative of the respondents falls under Sub-Part E of Part III of the Act. The said Sub-Part E relates to unfair termination of the contract. It is a cardinal principle of law that parties are bound by their pleadings and they are not allowed to depart as it was held by the Court of Appeal in the case of ***The Registered Trustees of Islamic Propagation Centre (Ipc) v. The Registered Trustees of Thaaqib Islamic Centre (Tic), Civil Appeal No. 2 of 2020*** ,CAT (unreported). and in ***Astepro Investment Co. Ltd v. Jawinga Company Limited, Civil Appeal No. 8 of 2015***, CAT (unreported). In the ***IPC's case***, supra, the Court of Appeal held that:-

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot

be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation."

Respondents were claiming that they had legitimate expectation for renewal of their contracts. Legitimate expectation of renewal of the contract is provided for under section 36(a)(iii) of Cap. 366 R. E 2019 (supra) that is under Sub-Part E of the Act falling under fairness of termination of employment. As pointed out, in the CMA F1, respondents did not show that their dispute relates to fairness of termination of their employment. Therefore, it was an error on part of the arbitrator to award the respondents based on what were not pleaded.

It was submitted by the personal representative of the respondents that respondents were not issued with 28 days' notice as provided for under section 41 of Cap. 366 R. E. 2019 (supra) as it was held by the arbitrator. With due respect, that section cannot apply when the contract is terminated upon automatic expiration of the agreed period

between the parties. Since contracts between the parties expired automatically, the issuance of the notice (exhibit L2) was unnecessary.

For the foregoing, I hereby allow the application, quash, and set aside the CMA award.

Dated at Dar es Salaam this 22nd April 2022.



B.E.K. Mganga
JUDGE

Judgment delivered on this 22nd April 2022 in the presence of Denis Mwamkwala, the personal representative of the respondent but in absence of the applicant.



B.E.K. Mganga
JUDGE