IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 506 OF 2020

BETWEEN

WALLACE NGEREZA TOGOLAI ..... APPLICANT

VERSUS

JOHN THE BAPTIST GIRLS SECONDARY SCHOOL ..... RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J:

The applicant herein is challenging the decision of the Commission for Mediation and Arbitration for Ilala ("CMA") dated 10th May, 2019 in Labour Dispute No. CMA/DSM/ILALA/R.1034/17/2010 ("the Dispute") delivered by Hon. Alfred Massay. The application was initiated by notice of application and a Chamber Summons supported by an affidavit of the applicant himself dated 07th December, 2020. On the other hand, the respondent challenged the application by filing notice of opposition and counter affidavit sworn by Jalia Abbakari Mayanja, respondent's Managing Director.

Briefly; the applicant was employed by the respondent as a Teacher on a fixed term contract of three years which commenced on 17th

January, 2017 and agreed to end on 16th January, 2020. On 31st August, 2017, the applicant was terminated from employment on the ground of unsatisfactory performance and failure to comply with lawful instructions. Aggrieved by the termination, the applicant referred the dispute to the CMA and after hearing the evidence of both parties, the CMA dismissed the complaint on the ground that the employment contract between the parties was void ab initio. Dissatisfied by the CMA's decision, the applicant filed the present application on the following grounds:-

i. That the Arbitrator erred in facts and law when he failed to co-ordinate the evidence and exhibits produced by the parties.
ii. That the Arbitrator erred in facts and law when he clearly indicated that he was wearing the shoes of the employer by deciding on the issues that no evidence was produced.
iii. That the Arbitrator erred in facts and law to borrow another law of Contract Act when actually the Employment and Labour Relations Act [CAP 366 RE 2019] (ELRA) has prevailing provisions for the employment contract.

iv. That the Arbitrator erred in facts and law by relating this dispute with a dispute not similar in nature (Rev. 69/2013: **Rock City Tours Ltd v. Andy Nurray**, High Court, Labour Division).

The application was argued by way of written submissions. Both parties were represented, Mr. Sammy Katerega, Personal Representative was for the applicant whereas Mr. Josiah N. Samwel, Learned Counsel appeared for the respondent.

Arguing in support of the application Mr. Katerega submitted that the applicant is challenging the award because it was improperly procured. He stated that the Arbitrator failed to analyse and consider the evidence tendered by the applicant. Further that the Arbitrator stepped in the employer's shoes and determined the dispute relying on untendered evidence and that he also misdirected himself to resort into other laws apart from ELRA which would have determined the matter. Mr. Katerega submitted further that the decision of Hon. Judge Rweyemamu in the case of **Rock City Tours Ltd. v. Andy Nurray** (supra) was wrongly applied by the Arbitrator.

Mr. Katerega submitted further the respondent terminated the applicant without following required procedures. That the notice of termination was not served on time to the applicant, that the applicant

was served on 04/09/2017 which was four days to the end of the employment contract. He further submitted that the respondent failed to prove the alleged poor performance contrary to Rule 17 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. 42 of 2007 ("the Code"). Mr. Katerega went on submitting that before termination, the applicant was not informed about his poor performance so as to avail him with time to improve.

It was further submitted that the applicant was employed for specific task of teaching book keeping subject and he tendered documents to prove that. Mr. Katerega submitted that the respondent confirmed the applicant on 01/07/2017 after his probation period expired. That the applicant was not consulted before his termination. He added that in this case, the respondent did not comply with section 37 of the ELRA which requires the employer to have valid reason of termination and follow required procedures. To cement his argument, he sought support from the case of **Mantra Tanzania Limited v. Daniel Kisoka**, **Rev. No. 267 of 2019,** High Court Labour Division, Dar es Salaam.

Mr. Katerega continued to submit that there were no pre-level set of attainment agreed by the parties and that the requirement of a

teaching certificate was raised suo motto by the Arbitrator which led to improper procurement of the award. Mr. Katerega thus asked the court to revise and set aside the CMA's decision and award the applicant the remaining period of the contract.

Responding to the submissions, Mr. Samwel submitted that Mr. Katerega has not submitted on each ground of revision as they are deponed in the affidavit. That he generally submitted on the issue of improper procurement of the impugned award and has raised matters that were not transacted at the CMA, to wit that the applicant was employed for specific task and served the respondent on part time basis.

Despite the blame, Mr. Samwel submitted on the grounds as to their order. As to the first ground, he submitted that the respondent employed the applicant on the condition that he would produce his professional certificates but he failed to do so thus the respondent rightly terminated him. He argued that the applicant had the duty at the CMA to prove that he is a licenced and registered teacher by producing his credentials, however none of his professional certificates were tendered. The Learned counsel joined hands with the Arbitrator's decision that the applicant being unqualified teacher he is prohibited to practice as per section 44 (1) of the Education Act.

Mr. Samwel submitted further that the applicant's contract was a contingent contract subject to the submission of certificates. He hence argued that failure to submit the certificates rendered the employment contract void which cannot be enforced by the law. To strengthen his position, Mr. Samwel cited the cases of **Rock City Tours Ltd** (supra) and **Serengeti Breweries Ltd vs Hector Sequeiraa (Civil Application 373 of 2018) [2019] TZCA 145 (16 May 2019).**

Mr. Samwel continued to submit that the burden of proof as far as professional qualification is concerned is vested on the applicant in this case. To cement his position, he cited the cases of **Abdallah Kidunda & another v. CM Co. Ltd [2014] LCCD II**, **Revision No. 277 of 2013** and the case of **Konrad Kambona v. Tanga Cement Co. Ltd [2013] LCCD Revision No. 09 of 2013**. He added that the applicant failed to adduce evidence to prove contravention of any of his right under the labour law emanating from the alleged breach of employment contract. To sum up on the ground, Mr. Samwel submitted that the Arbitrator correctly coordinated and analysed evidence adduced by the parties and decided the case in favour of the respondent.

Regarding the second ground, Mr. Samwel submitted that the employment contract entered by the parties was tainted by fraud and

misrepresentation on the part of the applicant. He stated that it was agreed by both parties to decide on the validity of the employment contract. That being the position, he said the burden of proof lied to the applicant to prove that he is a licenced teacher. He stated that the Arbitrator was right to decide in favour of the respondent basing on the evidence on record.

As to the third ground, Mr. Samwel submitted that the ELRA does not prohibit the applicability of other laws like the Law of Contract, when there are compliance or pre-qualification matters or when there are issues that constitute a contract/an agreement under the context of the law. He stated that validity of contracts in Tanzania is governed by LCA thus the Arbitrator properly relied on the same.

Turning to the last ground, Mr. Samwel argued that the Arbitrator was correct in referring and relying on the case of **Rocky City Tours** (supra) because the cited case laid general principles regarding contingent contracts of employment entered by disqualified persons. He submitted further that the applicant was not an employee for the purpose of the ELRA as well analysed in the cited case. Mr. Samwel went on to submit that in the case of **Serengeti Breweries Limited** (supra) the Court of Appeal stated that the CMA had no jurisdiction to

entertain a dispute that arose from a void contract. He cemented that the CMA had no jurisdiction to entertain this dispute because the employment contract entered between the parties was unlawful. In the upshot the Learned counsel asked the court to dismiss the application with costs. In rejoinder Mr. Katerega reiterated his submission in chief.

After considering the parties submissions for and against the application and analysing the grounds of revision, I find the issue for my determination is on the misapprehension of the evidence that was adduced and the nature of contract that existed between the parties. Owing to that, I will determine the relevant grounds jointly.

Starting with Mr. Keterega's allegation that the Arbitrator failed to analyse the evidence properly, I have thorough perused the CMA records, in his CMA Form No. 1, the applicant filed the dispute of breach of contract challenging the reason for his termination and the procedures followed thereto. In determining the dispute, the Arbitrator examined the validity of the contract between the parties and arrived to the conclusion that the employment contract between the parties was void ab initio. The court is now invited to examine the validity of the challenged decision.

It is undisputed that the parties herein entered into employment relationship, which according to the employment contract the same commenced on 17th January, 2017 and agreed to end on 16th January, 2020 as reflected in the employment contract (exhibit D1). The record shows that the applicant was terminated from employment due to unsatisfactory performance and failure to comply with the lawful instruction as stated in the termination letter (exhibit D5). That being the position, pursuant to Section 39 of the ELRA, it was the duty of the respondent/employer to prove the poor performance hence the Arbitrator was duty bound to determine if the relevant misconducts were proved.

As per the records one of the reasons that were advanced by the arbitrator according to the framed issues is whether there was a valid contract between the parties. In my view, the contention against the legality of the employment contract between the parties would have merit if the applicant was terminated for such reason. To the contrary the applicant was terminated for misconducts as stated above thus, therefore the issue of legality of the contract is an afterthought. Even if the court wants to believe the respondent that the employment contract between the parties was induced by fraud and misrepresentation, there

is no evidence on record to prove the alleged claim. The respondent did not tender any document to prove that he demanded a teaching certificate from the applicant or an agreement showing enforceability of the disputed contract depended on the submission of the teaching certificate. The respondent did not tender even a letter reminding the applicant to bring the alleged certificates. In absence of such evidence, and the fact that the respondent's evidence (DW1) was to the effect that they hired him because they were impressed that he is a good teacher based and presumed that he had qualifications based on his previous employment, the respondent could not challenge the validity of the contract at that stage of arbitration.

The arbitrator ought to have also taken into consideration the factor of time that the parties had the contract in existence before termination based on performance should the respondent have any issues with the validity of the contract, then she should have taken action earlier on. So in so far as the applicant continued to work for the respondent who paid him salaries for a period of time, the respondent cannot now challenge the validity of the contract simply because he was sued by the applicant. The arbitrator fell into error in invalidating the contract simply because the respondent alleged that there was misrepresentation while it was

not the respondent who brought an action against the applicant on the validity of the contract. That said, it is my finding that the parties are governed by the agreed terms of their signed contracts.

Having made the above finding, the next issue to be determined is whether the respondent proved the misconduct levelled against the applicant. According to the termination letter (exhibit D5) the applicant was terminated for two grounds of misconducts namely unsatisfactory performance and failure to comply with lawful instructions. Starting with the first misconduct of unsatisfactory performance, the Form three annual examination report (EXD1) indicates that students who sat for bookkeeping subject which was taught by the applicant did not perform well. In his testimony at the CMA, the applicant impliedly admitted that the student underperformed but he alleged that the underperformance was the result of frequent dismissals of teachers. I find the applicant's defence to have no merit because the applicant was specifically assigned to teach bookkeeping subject therefore it was his duty to make sure that the performance of his students was excellent.

As stated above the applicant was employed based on his experience, thus, being an experienced teacher, the school had higher expectation from him. Therefore his failure to improve the performance

of the directed students leaves the respondent with no other option than to terminate him from employment, this is therefore a valid reason for terminating the contract.

The second misconduct which led to termination of the applicant was failure to comply with lawful instructions. The applicant was instructed to mark examination papers for form III and submit the same to the Academic Officer by 30th August, 2017. On his evidence the applicant alleges that he attended at work on 30th August, 2017 but he left at 11 hours due to emergence and upon getting permission. To the contrary there is no evidence on record proving that the applicant sought and obtained the alleged permission. The applicant knew that the school was scheduled to close on 02nd September, 2017 but he failed to mark the exams as instructed. Under such circumstance I find the respondent managed to prove the misconducts levelled against the applicant. Having been satisfied that both grounds are valid, it is my conclusive finding that the termination of the applicant was substantively fair and the respondent did not breach contract by such a termination on the substantive part.

As to termination procedures, the termination procedures on the ground of poor performance are provided under Rule 18 and 19 of GN.

42/2007. Looking at the matter at hand, the laid down procedures were not followed by the employer. Therefore, it is crystal clear that the respondent did not follow the required procedures.

The second reason which resulted to the termination of the applicant is failure to comply with lawful instruction which directly falls on the misconduct of insubordination. Again, the procedures for termination on the ground of misconduct are provided under Rule 13 of GN. 42/2007. The said procedures were also not followed by the respondent. Thus, on the basis of the foregoing analysis, it is my finding that in this case the applicant's employment contract was unfairly terminated procedurally. As correctly contested by the applicant at the CMA, the respondent breached the procedures for termination of the employment contract entered between the parties.

On the basis of the above finding the court is left with the determination of the reliefs entitled to the parties. In the CMA F1 the applicant prayed for remaining period of the contract, 20% gratuity for 36 months and a certificate of service. As to the first claim of the remaining period of the contract, it is my view that following the finding that the respondent had valid reason to terminate the applicant but he failed to follow the laid down procedures, it is my view that the applicant

is not entitled to be compensated for the whole remaining period of the contract as it is normally awarded in fixed term contract where there is no valid reason for termination. In the case of **Felician Rutwaza vs World Vision Tanzania (Civil Appeal 213 of 2019) [2021] TZCA 2 (02 February 2021)** the Court of Appeal held:

"Be it as it may, we share similar views with the High Court that a person in breach of the employment manual could not benefit from his wrong doing."

In the circumstances of this case, since the substance/reason was valid and only the procedure breached, the award of six (6) months' salary compensation is appropriate and would suffice justice.

Regarding the award of gratuity, the same is pursuant to clause 5.10 of the employment contract which provides as follows: -

'5. 10 GRATUITY/SURVELANCE PAYMENT

An employee will be paid gratuity at the rate or 20% of employed basic salary at the end of the contract.

That the employee ***will not be given*** *gratuity only if*

(a) *His employment* ***will be terminated as a result of indiscipline***

(b) *Such employment is terminated as a result of high running costs of rejection by employee to take up*

substitute employment if so requested by employer.'
(Emphasis is mine)

In light of the above cited clause, it is my view that the applicant at hand is not entitled to such relief because he did not perform the contract to its finality and the contract was terminated on grounds of misconduct. Regarding the award of certificate of service, the applicant is entitled to the same as in accordance with section 44 (2) of the ELRA.

In the result, as it is found that the applicant was unfairly terminated procedurally, I find the application at hand has merits. Consequently, the CMA's award is hereby quashed and set aside. The respondent is ordered to pay the applicant a total of Tshs. 4,500,000/= being the compensation of 6 months' salary basing on the salary of Tshs. 750,000/= indicated in the employment contract. The respondent is also ordered to issue a certificate of service to the applicant. It is so ordered.

Dated at Dar es Salaam this 11th day of March, 2022.

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S.M. MAGHIMBI
JUDGE