IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION NO. 373 OF 2022

BETWEEN

CITY SQUARE HOTEL ..... APPLICANT

VERSUS

KASSIM COPRIANCE ..... RESPONDENT

JUDGEMENT

Date of last order: *13/02/2023*
Date of Judgement: *17/02/2023*

MLYAMBINA, J.

This application is for revision of the decision of the Commission for Mediation and Arbitration (hereinafter referred as "CMA") in labour dispute No. CMA/DSM/ILA/480/21/207/21. The application has been filed under *Section 91 (a)(b) 91(2)(a)(b) 94(1)(b)(ii) of the Employment and Labour Relations Act [Cap 366 Revised Edition 2019] and Rule 24(1)(2) (a) (b)(c)(d)(e)(f) 3(a)(b)(c), 28(1)(a)(b)(c)(d)(e) 55(1) and (2) of the Labour Court Rules, GN. No. 106 of 2007.* The Applicant is seeking for the following orders:

1. To call for Original Records CMA/DSM/ILA/480/21/207/21, revise and nullify the decree issued by CMA before the Arbitrator Hon. Abdallah M, on 30/9/2022.

2. The Court to hear and determine on its jurisdiction as it deems fit.

3. The High Court to issue any necessary orders as it deems fit.

The Applicant invited the Court to determine the following grounds: *One*, the Arbitrator did not have factual and legal consideration that there was no permanent contract. This is as per *Section 14 of the Employment and Labour Relations Act* which sets out types of contract of employment. *Two,* the Arbitrator did not comply with the Rules and laws on filing the dispute. *Three,* the Arbitrator erred in facts & law for not analyzing the evidence and exhibits tendered. *Four,* the Arbitrator did not consider the facts and law on the type of the issue and the results thereof.

The application was argued orally on 13th day of February, 2023. Before the Court the Applicant was represented by Mr. Hemed Omary, Personal Representative, whereas the Respondent appeared in person.

At the hearing, Mr. Hemed adopted the affidavit of the Applicant sworn by Salum Abdi Abasi on 4th November, 2022 to form part of his submission. He submitted on the grounds for revision mentioned above.

Arguing for the first ground Mr. Hemed submitted that the complaint's form filled by the Respondent before CMA showed that the

complainant was illegally terminated. That complaint was on a contract for an unspecified period of time contract. He submitted that; since the complaint was based on an unspecified period of time, the complaint was improperly filed before CMA. That the complainant was supposed to file a complaint on breach of contract. He was of the view that; since the complaint was in breach of the contract filed before the CMA (a contract on specified period of time), then, the CMA ought not to have entertained the dispute. He maintained that the dispute was filed against the contract.

In response to this ground the Respondent briefly admitted that he had a one year contract with the Applicant. On this ground, the issue to be addressed are two. *First*, what was the nature of the Applicant's contract? *Second*, whether the complaint form was properly filed by the Respondent?

Starting with the first issue, the types of employment contracts in Tanzania are provided under *section 14 of the ELRA*. The provision recognizes employment contracts of the following types:

> Section 14: A contract with an employee shall be of the following types-
>
> (a) a contract for an unspecified period of time;

(b) a contract for a specified period of time for professionals and managerial cadre;

(c) a contract for a specific task.

(2) A contract with an employee shall be in writing if the contract provides that the employee is to work within or outside the United Republic of Tanzania.

The first type of contract is also known as the permanent contract which is terminated upon reaching the retirement age. The second type is a contract of a fixed term, terminated upon expiry of the agreed term; whereas, the last contract is a contract which is terminated upon completion of a certain task. In the application at hand, it is crystal clear that the parties entered into a fixed term contract as admitted by the Respondent. This is also proved by the employment contract, exhibit D1A and D1B which were tendered at the CMA. The first contract as per D1A commenced on 01/07/2017 and expired on 31/12/2017. Thereafter, the parties entered into another contract which commenced on 01/01/2019 and ended on 31/12/2019. On such analysis, it is proved that the parties entered into a fixed term contract.

Turning to the second issue as to whether the complaint form was properly filed by the Respondent; disputes referred to the CMA are initiated

by the Referral Form, CMA F1 as in accordance with *section 86 (1) of the ELRA as well as Regulation 34(1) of GN. 47 of 2007.* At the CMA the Respondent indicated the nature of the dispute being termination of employment. There are two school of thoughts on the issue of filling CMA F1 to an employee on a fixed term contract; the first being the employee under fixed term contract is only supposed to sue for breach of contract and the second thought is that the employee under fixed term contract can sue for both breach of contract and unfair termination. In the CMA F1 all employees whether on a fixed or permanent term contract are supposed to fill part A of the form while part B of the form is for employees who sue for termination of employment disputes only. However, the contradiction has been addressed by the Court of Appeal in the following cases. In the case of **Asanterabi Mkonyi v. Tanesco**, Civil Appeal No. 53 of 2019 the Court held that:

> In view of the foregoing, it is our view that the High Court was correct in its holding in this matter, premised on its earlier decision in **Mtambua Shamte** (supra), that the principles of unfair termination do not apply to a fixed-term contract (or even a special task contract) unless it is established that the employee reasonably expected a renewal of the contract. It is

instructive to note that in terms of *rule 3 (4) (a) and (b) of the Code,* a fixed-term contract exists where the agreement to work is for a fixed time or upon completion of a predetermined task while a contract is for a permanent term where the agreement to work is without reference to time or task - see also Mtambua Shamte (supra).

The above position was further expounded by the Court of Appeal in a recent decision of **St. Joseph Kolping Secondary School v. Alvera Kashushura** (Civil Appeal 377 of 2021) [2022] TZCA 445 (18 July 2022) where it was held that:

> We also do not agree with him that, under our laws a fixed term contract of service can be prematurely terminated without assigning reasons. This is because the conditions under *section 37 of the ELRA* are mandatory and therefore implicit in all employment contracts. It is only inapplicable to those contracts whose terms are shorter than 6 months. *(See section 35 of the ELRA).*

In the first case of the Court of Appeal, the principles of unfair termination were only limited to a circumstance where an employee's contract was terminated while he/she had reasonable expectation of renewal of the said contract. However, the second case, established the

general principle that the principles of unfair termination apply to all types of employment contract as they are provided under *section 14 of the ELRA.*

In the matter at hand, the Respondent only sued for unfair termination. Mr. Hemed was of the view that the Respondent was only supposed to sue for breach of contract since he was under fixed term contract. What was addressed by the Court of Appeal in the above cited cases is the application of principles of unfair termination of employment to a fixed term contract. The issue of how the form should be filled at the CMA remained unresolved and every judge has decided the issue of the form in his/her own way depending on the circumstance of the case. For instance, in the case of **Bilila Lodge Investment Ltd T/A v. Zakayo Agael Mollel**, Revision No.77 of 2021 the Court held that:

> The records reveal that, while the Respondent did not claim for unfair termination, he filled in Part B which an additional form for termination of employment disputes only. I do not agree with the Applicant's assertion that the Respondent raised two distinct disputes under CMA Form. I say so because, it is clear from the said form that, under Part A where the employee is supposed to fill the nature of dispute, only breach of contract was opted and termination of employment was not opted. The fact that Part B was filled could not help to serve the purpose of showing that

there was a claim for unfair termination. I say so because that part become relevant only where in Part A, the employee had opted to raise dispute on termination of employment.

In the above case the position would have been different if the Respondent did not indicate a claim of breach of contract as it is the position in the case at hand. In that case, the Respondent's cause of action was breach of contract but she also filled part B of the form which concerns about claims of unfair termination and the matter was found to have been properly filed.

In another case of **Marian Boys High School v. Rugaimukamu Rwekengo**, Revision Application No. 44 of 2022 the Court resolved the issue of filling CMA F1 as follows:

> It was submitted by counsel for the Applicant that CMA F1 that is a pleading, was defective because Respondent filled both breach of contract and part B that relates to unfair termination only hence the dispute was incompetent. During her submissions, counsel for the Respondent conceded that Respondent filed the dispute at CMA relating to both breach of contract and unfair termination. She defended that procedure relying on the provisions of Order II Rule of *the Civil Procedure Code [Cap 33 R.E.*

> *2019]* that allow joinder of cause of action on ground that labour statutes are silent. With due respect to counsel for the Respondent, it was not proper for the Respondent to indicate in the CMA F1 that the dispute was both for unfair termination and breach of contract. As correctly submitted by counsel for the Applicant, the CMA F1 was defective making the whole dispute to be incompetent. I therefore associate myself with the position taken by my learned sister (Mongela, J) in Bosco Stephen's case *(supra)* and hold that CMA 16 proceedings were nullity and that the award arising therefrom cannot stand.

In the above case, the matter was nullified because the employee under fixed term contract filled both part of the form. In the light of the above High Court decisions which are only persuasive to me and the Court of Appeal decisions which are binding to this Court, it is my view that it is not fatal for an employee under fixed term contract to fill both part A and B of the CMA F1. I say so because of the following reasons:

First, there is no specific part in the referral form to be filled with an employee who claims only for breach of contract. **Second**, the principles of unfair termination apply to both types of contracts and the only difference between the said contracts will be on the reliefs awarded to the affected employee. In a permanent contract, the remedies available are provided

under section 40 of ELRA while in fixed term contract an employee is awarded salaries for the remaining period of the contract, a remedy which was developed by case laws including the case of **Azama Rajabu Mbilanga v. Shield Security Services Limited**, Rev. No. 113/2019. **Third**, a party cannot be condemned while the form itself is not exhaustive. As stated above the form does not have a specific part to be filled by an employee who claims for breach of contract. **Fourth**, the CMA is encouraged to conduct arbitration with minimal legal formalities as it is provided under *section 88(4)(b) of the ELRA* which provides as follows:

> The arbitrator-
>
> (b) shall deal with the substantial merits of the dispute with the minimum of legal formalities.

On the second ground, that the Arbitrator did not comply with the Rules and laws on filing the dispute, Mr. Hemed submitted that; the complaint form was received by the CMA on 27/10/2021. He stated that; the form was served to the Applicant herein on 01/11/2021. According to him, the form was supposed to be served first to the employer before CMA received and opened the complaint. Mr. Hemed was of the view that; since the form was served to the Applicant herein on 1/11/2021, it therefore follows that the CMA was in error to entertain the dispute on 27/10/2021.

The complaint ought to have been filed to the employer before been entertained by the CMA. He added that; the form is made under *Regulation 34 of G.N. No. 47 of 2017*. On this ground, the Respondent simply replied that he started to serve the form to the employer but they refused to receive it. He therefore went to Serikali za Mtaa then to the CMA.

In rejoinder Mr. Hemed denied the submission that the employer rejected the form. He said they received it through Serikali za Mtaa Chairman on 1/11/2021 but it was received by CMA on 22/10/2012. On this ground, the Courts finds it prudent to analyse the manner for filling disputes before the CMA. The same are provided for under *section 86(1) of ELRA as well as Regulation 34 (1) of GN. 47 of 2017* which provides as follows:

> *Section 86 (1):* Disputes referred to the Commission shall be in the prescribed form.
>
> (2) The party who refers the dispute under subsection (1), shall satisfy the Commission that a copy of the referral has been served on the other parties to the dispute.
>
> *Regulation 34(1):* The forms set out in the Third Schedule to these Regulations shall be used in all matters to which they refer.

The above provisions insist in the referral form (CMA F.1) at the first page paragraph C which I hereunder quote for easy of reference:

C. WHERE DOES THE FORM GO?

To the other party or the dispute and a copy of the Commission in the area where the dispute has arisen, together with proof of the Form having been served on the other party or parties.

All the provisions quoted above clearly stipulates that the form must be served to the other party before the same is submitted at the CMA. The form is submitted at the CMA together with proof that the other party has been served. I believe the essence of such mandatory procedure is to encourage amicable dispute settlement among employers and employees which is the spirit of the labour laws.

The matter at hand shows that the referral form was submitted and received at the CMA on 27/10/2021 as stamped at page 1 of the relevant form. Before this Court, Mr. Hemed submitted that; the form in question was served to the Applicant herein on 01/11/2021 while the dispute has already been filed at the CMA. During cross examination at the CMA, the Respondent who was PW1 also testified that the CMA F1 was served to the

Applicant on 01/11/2021 while the dispute was referred to the CMA on 27/10/2021.

On the basis of the above analysis, it is apparent that the above stipulated procedure of serving referral form to the other party was violated. Thus, the above stipulated provisions were violated in this case. I therefore have no hesitation to say that the dispute was improperly filed and admitted at the CMA in violation of the mandatory provisions of the law.

The third ground was to the effect that; the Arbitrator erred in facts & law for not analysing the evidence and exhibits tendered. Mr. Hemed submitted that; the exhibits (D1A & D1B) tendered before CMA are contracts on specified period of time between City Square Restaurant and Kassim Bakari Copriace. He strongly submitted that; the complaint Form No. 1; City Square Hotel has never been in contract with Kassim Copriace. Mr. Hemed firmly argued that the Respondent sued a non-existent entity. He added that he sued a person whom he has never been in contract with. In support of his submission, he referred the Court to the case of **National Oil v. Aloyce Hobokela**, Misc. Labour Application No. 212 of 2013 p.7 where it was held that:

> In the circumstances, I find National Oil and National Oil Tanzania Limited are two distinctive entities. Hence the Applicant does not quality to be referred as a party to the Court proceeding that he wishes the Court to consider in his intended application, in other woods the Applicant does not fit in the definition of a Party Provided for under *Rule 2(2) of the Labour Court Rules.* Since the Applicant was not a Party at the CMA with no hesitation, I say he has no right to file this application against the Respondent.

In response to the third ground, the Respondent maintained that; it is not true that he entered contract with City Square Restaurant. He contended to have entered contract with City square Hotel. He added that; the Respondent did not raise this issue before CMA. Thus, the CMA's decision be sustained.

The contention of suing a wrong party falls within the doctrine of misnomer which have been addressed at large in the case of **Rev. John Mathias Chambi & 548 Others v. Registrar General (Registration Insolvency and Trusteeship) & 5 Others,** Miscellaneous Cause No. 21 of 2020, HC DSM, where the case of **Access Bank PLC v. Agege Local Government and Another**, 3 (CA/L/649/2014) [2016] NGCA 35 (17 MAY 2016) (CA/L/649/2014) [2016] NGCA 35 (16 MAY 2016) was quoted and it was held that:

> Simply put, a non juristic person cannot sue nor be sued. It is also agreed that the naming o f a non-juristic person as a claimant in a suit makes the suit out rightly incompetent.

In the matter at hand, the employment contract was entered between City Square Restaurant and Kasimu B. Corpriace as it is evidenced in the employment contracts (exhibit D1A and D1B). At the CMA, the Respondent instituted his proceedings against City Square Hotel as it is reflected in the CMA F1. On such basis, it is crystal clear that City Square Hotel has never been in employment relationship with the Respondent as he wishes this Court to believe. City Square Hotel and City Square Restaurants does not have the same legal status. The position which was also in the case **National Oil and Aloyce Hobokela** *(supra).*

In the case of **St. Mary's International Academy Ltd v. Hellen Ntinda**, Application for Revision No. 37 of 2022, it was held:

> ...it is established that for the order or award to be executed, one of the requirements is to have the proper party to whom the order is expected to be executed.

In line with the above positions, it is my view that the Respondent sued a non-existent part as properly contested by the Applicant. However, it is encouraged that grounds of this nature be raised at the Court of first

instance so as to avoid wastage of time to each party and wastage of resources spent in the relevant case.

Turning to the fourth ground, that the Arbitrator did not consider the facts and law on the type of the issue and the results thereof. Mr. Hemed submitted that; the agreed framed issues were four:

1. Whether there a contract on unspecified period of time
2. Whether there were reasons of terminating the contract
3. Whether the legal procedures of termination of terminating the contract were followed.
4. To what reliefs were the parties entitled.

He referred the Court to the case of **Jordan University College v. Flavian Joseph**, Revision Application No. 23 of 2019 where it was ruled that:

> There is no unfair termination in a fixed term contract as correctly submitted by Applicants Counsel Prof. Binamungu. This Court held so (Hon. Rweyemamu) in the case of **Mtambua Shamte & 64 Others v. Care sanitation & supplies**, Revision No. 164 of 2020.

Mr. Hemed strongly submitted that; the principles of unfair termination under the act do not apply to specific task or fixed term contract which came to an end the specified time or completion of specific

task. He therefore prayed for this Court to quash the whole proceedings and nullify the decision of CMA issued by Hon. Abdallah M. Arbitrator for being illegal. The Respondent did not submit anything on this ground.

On the part of the Court, I find this ground has been determined in the first ground. Therefore, there is no relevance for the repetition of the same.

In the result, I find the present application to have succeeded. Since it is found that the Respondent-initiated proceedings against a wrong party, then the CMA's proceedings and the subsequent award are hereby quashed and set aside. It is so ordered.

Y. J. MLYAMBINA

JUDGE

17/02/2023

Judgement delivered and dated 17th February, 2023 in the presence of Hemedi Omary Personal Representative of the Applicant and the Respondent in person.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) DIVISHENI YA MAHAKAMA YA KAZI (Labour Division)

Y. J. MLYAMBINA

JUDGE

17/02/2023