

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

REVISION APPLICATION NO. 368 OF 2022

(Arising from an Award issued on 11/10/2022 by Hon. Mbeyale, R, Arbitrator in Labour dispute No. CMA/DSM/KIN/457/20/206 at Kinondoni)

MARIE STOPES TANZANIA (MST) APPLICANT

VERSUS

BERNARD PAUL MTUMBIKA RESPONDENT

JUDGMENT

Date of last Order: 07/02/2023
Date of Judgment: 28/02/2023

B. E. K. Mganga, J.

Facts of this application in brief are that, on 29th January 2020, applicant employed the respondent on fixed term contract as Fleet Coordinator. In March 2020 charged the respondent for misconducts namely gross dishonest for unfair and unlawfully ordering and receiving money from junior staff, assigning drivers assignments under condition that of receiving pay back, carrying out an authorized tasks not within his roles, and by giving assignments to drivers who would give payback hence discrimination. On 17th April 2020, after conducting the disciplinary hearing,

applicant terminated employment of the respondent. Respondent unsuccessful appealed against the decision of the disciplinary hearing. On 20th May 2020 applicant served the respondent with a final decision to terminate his employment.

Aggrieved with termination, on 8th June 2022 respondent filed Labour dispute No. CMA/DSM/KIN/457/20/206 before the Commission for Mediation and Arbitration (CMA) at Kinondoni claiming to be paid TZS 120,348,148.48. On 11th October 2022, Hon. Mbeyale, R, Arbitrator having heard evidence and submissions of the parties, awarded respondent to be paid a total of TZS 61,870,459.4 as compensation for breach of contract and one month salary in lieu of notice.

Aggrieved with the award, applicant filed this application for revision. In the affidavit sworn by Jacqueline Chambua, applicant's principal officer in support of the application, applicant raised eight legal issues for determination. In opposing the application, respondent filed both the Notice of Opposition and the counter affidavit.

By consent of the parties, the matter was disposed by way of written submissions. In complying with the court's order of filing written submission, applicant enjoyed the service of Philip Irungu, learned

Advocate while respondent enjoyed the service of George Lupindo, Personal Representative. I thank them for their timely filing submissions.

When I was composing my judgment, I perused the CMA record and find that respondent indicated in Part A of the Referral Form (CMA F1) that the nature of dispute was breach of contract. He also filled Part B that is only for termination of employment. In fact, in Part B, respondent indicated that applicant terminated his employment by a letter and that the reason for termination is misconduct. With those observations, I summoned the parties and asked them to address whether, CMA F1 was properly filled and filed at CMA F1 and the effect thereof. I decided to invite the parties because that issue was not covered in their respective written submissions.

Responding to the issue raised by the Court, Mr. Irungu, learned counsel for the applicant submitted that CMA F1 is an essential document that initiates proceedings at CMA and that CMA F1 was introduced by Rule 11 of GN No. 45 of 2017. Counsel for the applicant submitted further that for breach of contract, the party must fill only Part A of the said CMA F1. He went on that, if the dispute relates to termination of employment, the employee must also fill Part B of CMA F1 that is for unfair termination only. Mr. Irungu submitted further that, complaint by the respondent at CMA was breach of contract. He went on that, the parties had a fixed term

contract of two years from January 2020 expiring in January 2022 and that, respondent was terminated on 20th May 2020 due to misconducts having worked for five months' only. Counsel concluded that CMA F1 was defective hence the dispute was supposed to be struck out. Based on those submissions, counsel for the applicant prayed that CMA proceedings be nullified and the award arising therefrom be quashed.

Responding to the issue raised by the court, Mr. Lupindo, personal representative of the respondent submitted that unfair termination is one and the same to breach of contract. To support his submissions, he cited the case of ***Stella Lyimo v. CFAO Motors Ltd***, Civil Appeal No. 378 of 2019, CAT (unreported). Mr. Lupindo submitted further that, for breach of contract, the employee is supposed to file the dispute at CMA within sixty (60) days as provided for under Rule 10(2) of GN. No. 64 of 2007 but the dispute relating to unfair termination the dispute must be filed within thirty (30) days as provided for Rule 10(1) of GN. No. 64 of 2007. In his submissions, Mr. Lupindo conceded that respondent filled both Part A and Part B of CMA F1. He maintained that in so signing, the CMA F1 did not become defective and that the matter was properly heard at CMA. He therefore prayed that CMA award be upheld.

In rejoinder, counsel for the applicant submitted that ***CFAO's case*** (supra) is distinguishable because in that case, the main issue was whether, it was proper for CMA to determine the issue of breach of contract for the employee who was employed for less than six months. He went on that, the issue before this Court is validity of CMA F1. He added that, CMA F1 is self-explanatory as to how disputes should be filed.

I have examined evidence in the CMA record and considered both written submissions and oral submissions made on behalf of the parties in this application. In disposing this application, I will first address the issue raised by the court *suo moto* before going to the issues raised by the applicant.

It is undisputed by the parties that in CMA F1 respondent indicated that the nature of dispute is breach of contract but he also filled part B of CMA F1. It is worth to note that, part B of CMA F1 relates to termination of employment only. The said part B of CMA F1 reads:-

"PART B

ADDITIONAL FORM FOR TERMINATION OF EMPLOYMENT

DISPUTE ONLY"

In the said part B of CMA F1, respondent indicated that date of termination of his employment is 20th May 2020 the reason thereof being

misconduct and that he was informed his termination by a letter. It is my view that, by filling part B of CMA F1, the said CMA F1 became defective hence the dispute was incompetent and was not properly before the arbitrator. I am of that view because, respondent worked with the applicant for only five months, as such, in terms of section 35 of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] he could not file the dispute for unfair termination. My position is fortified by what was held the Court of Appeal in the case of [**Stella Lyimo vs CFA O Motors Tanzania Limited**](#) (Civil Appeal 378 of 2019) [2022] TZCA 742 and [**Serenity on the Lake Ltd vs Dorcas Martin Nyanda**](#) (Civil Appeal 33 of 2018) [2019] TZCA 64. In **CFAO's case** (supra) the Court of Appeal held:-

*"...We had occasion to pronounce ourselves on this aspect in **Serenity on the Lake Ltd v. Dorcus Martin Nyanda**, Civil Appeal No. 33 of 2018 (unreported) and held that a challenge on unfair termination is not available to an employee with less than six months' contract and we reiterate that stance here..."*

I should also point out that CMA F1 is pleading and that the parties are bound by that pleading. In filling that the dispute was for breach of contract and then fill part B that relates to unfair termination, the said pleadings became incompetent. This court held in the case of [**Bosco Stephen vs Ng'amba Secondary School**](#) (Revision 38 of 2017) [2020]

TZHC 390 and [Ngorongoro Conservation Area Authority vs Amiyo Tlaa Amiyo and Another](#) (Labour Revision Application 28 of 2019) [2022] TZHC 3078 that filling and filing a defective CMA F1 makes the said CMA F1 that is pleading to be defective. In the aforementioned two cases proceedings were nullified and the award arising therefrom quashed and set aside.

Guided by the aforementioned Court of Appeal decisions and High court decisions, I hereby nullify CMA proceedings, quash, and set aside the award arising therefrom.

Dated in Dar es Salaam on this 28th February 2023.



B. E. K. Mganga
JUDGE

Judgment delivered on this 28th February 2023 in chambers in the presence of Method Nestory, Advocate for the Applicant and George Lupindo, Personal Representative of the Respondent.



B. E. K. Mganga
JUDGE