IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 273 OF 2022

(From the Ruling of the Commission for Mediation and Arbitration of Dar es salaam at Ilala dated 29th day of July 2022 in Labour Dispute No. CMA/DSM/IL/353/21/165/2021)
(By Abdallah: Arbitrator)

HAWA SIWA ABUHUSSEIN.....APPLICANT

VERSUS

MF1 DOCUMENT SOLUTIONS LTD.....RESPONDENT

JUDGMENT

K. T. R. Mteule, J.

09th February 2023 & 17th February 2023

This is an application for revision. The Applicant is seeking for this court to call for the record and revise the proceedings in **Labour Dispute No. CMA/DSM/ILA/353/21/165/2021** from the Commission for Mediation and Arbitration of Dar es Salaam, Ilala (CMA). The application further seeks for any other order as this court may deem just and fit to grant.

From the record of CMA, the affidavit of the Applicant and parties submissions, it appears that the Respondent employed the Applicant as a Secretary in Telecom Department, working under unspecified term contract. In July 2021 their relationship ended due what the applicant

claimed to be informed to be Covid 19 pandemic and changes in technology.

Being not satisfied with the fairness of the termination both substantively and procedurally and the payment of her terminal benefits, the applicant referred her complaint to the CMA. The arbitration in the CMA was conducted and the award was issued in Respondent's favour. The arbitrator having confirmed that the applicant was employed by the respondent on unspecified term contract, assessed and got satisfied with the fairness of the reasons and procedure used to end the applicant's employment and dismissed the complaint.

The Applicant was dissatisfied with the dismissal of his complaint in the CMA hence the present application. In the affidavit in support of this application the applicant advanced 3 grounds of revision which are:-

1. That the arbitrator misconceived the law and evidence in holding that the procedure of termination was complied with while there was no evidence to prove it
2. That the arbitrator wrongly evaluated the evidence
3. That the arbitrator erred in law and fact in holding that the procedure of termination was fairly followed while not.

The application is disputed by the Respondent's counter affidavit in which he denied all the material facts. According to the counter affidavit the procedure of termination was complied with, and the arbitrator was right in finding so.

The application was heard orally, where the applicant was represented by Mr. Sospeter Lufasinza Ng'wandu, Personal Representative while the respondent was represented, by Mr. Omega Juaeli, Advocate. Their submissions approached 4 legal issues which were framed by the Applicant. The issues are: -

i) What kind of contract did the applicant had?

ii) Whether the respondent had reason to terminate the applicant?

iii) Whether the procedure was followed?

iv) Reliefs of the parties?

Arguing to support the application on first ground asserting misconception in law and evidence in holding the procedure to be fair, Mr Ng'wandu submitted that the applicant served the respondent for 10 years and on such basis, there should have been no reason for terminating her employment.

On second ground on alleged improper evaluation of evidence, Mr. Ng'wandu submitted that the only reason adduced by the respondent in

terminating the applicant's employment was Covid 19 pandemic. According to him there was no evidence brought in the CMA to show how the respondent undergone financial constraints before and after Covid 19 to prove the alleged financial constraints. He is of the view that Since CMA failed to consider the exhibits, therefore there was no fair decision.

On the 3rd issue where the arbitrator is faulted by the applicant for holding the procedure of termination to be fair, Mr. Ng'wandu submitted that there was not any meeting between the applicant and the respondent prior to termination. For that reason, he is of the view that termination procedure was not adhered to.

Mr. Ng'wandu finally cited article **Article 107A (1) & (2) of the Constitution of United Republic of Tanzania** which confers the court a mandate to award what the applicant is claiming and asked for all the reliefs to be awarded to the applicant and the CMA award to be set aside.

In reply to the application Mr. Omega argued that the applicant has failed to defend her arguments by explaining what ought to be explained in the CMA. He stated that at the CMA the applicant raised four issues

including the type of contract, reasons for termination, procedural compliance and reliefs.

Starting with the first issue Mr. Omega admitted that the applicant was employed under permanent contract, but in his view, this does not mean that, the said contract cannot be terminated. According to him, the law allows termination when there are reasons to do so.

On the issue of fairness in the reasons for termination, Mr. Omega submitted that at page 1 of the award, the Commission was satisfied that in August 2020 the Respondent did restructuring of the company and removed the telephone section where the applicant was working. According to him, the applicant was placed under store section, and this substantiated restructuring process. He added that the respondent's business was affected by Covid 19 and the respondent had to reduce the number of employees as stated at page 2 of paragraph 2 of the CMA award. He stated that the reason for the process of reducing staff was explained and the meeting to discuss the reduction of staffs was initiated, but the applicant did not attend the meeting after being informed two times. According to him, the applicant opted to terminate her employment contract by an agreement as per **Exhibit D-1A** (notice of terminating contract) and **Exhibit D-1B** (Final Payment). He added

further that, after missing the second meeting, the applicant asked for the contract to be terminated by agreement.

On third ground concerning procedure, Mr. Omega submitted that the procedure was followed. He referred to **Exhibit D-1 A** which was one month notice prior to termination which CMA relied upon to decide and that the applicant was called in a meeting before the notice. He submitted further that the applicant was paid all statutory benefits, as reflected at page 8 and 9 of the award.

According to Mr. Omega, since the applicant conceded to the agreement to terminate the employment, then the procedure in terminating the applicant's employment was followed.

Lastly Mr. Omega argued that the applicant failed to adduce sufficient reasons for this Court to interfere with the CMA award, and therefore, the last issue regarding reliefs could not stand. He thus prayed for the application to be dismissed.

After considering the parties rival submissions, the CMA record, and the relevant laws, I feel obliged to determine the three grounds for revision listed above, one after another.

Regarding the **first** ground on the asserted arbitrator's misconception of law and evidence, I would put it clear that parties are in one that the

applicant was employed under permanent contract term or unspecified term contract. Although parties took their time to submit on this ground, I did not see what they were contesting. I will go right away to what is debated.

The first point of contention is **whether the applicant's termination was substantively and procedurally fair**. On the fairness of the reason for termination, Mr. Lufasinza denied existence of any proof of valid reason caused by Covid 19. On the other side the respondent is blaming the applicant for her failure to attend restructuring meeting to discuss the reduction of staffs, even after being informed about the two meetings in both times they were held. According to exhibit D1A, the applicant was informed that the termination was due to restructuring of the company and financial constraints as reasons for the retrenchment of the applicant. The arbitrator was guided **by Rule 23 of the Employment and Labour Relations (Code of Good Practices) G.N. No. 42 of 2007** which provides:-

> *"23 .-(I) A termination for operational requirements (commonly known as retrenchment) means a termination of employment arising from the operational requirements of the business. An operational requirement is defined in the Act as requirement based*

on the economic, technological, structural or similar needs of the employer.

(2) As a general rule the circumstances that might legitimately form the basis of a termination.

(a) economic needs that relate to the financial management of the enterprise:

(b) technological needs that refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace:

(c) structural needs that arise from restructuring of the business as a result of a number of business related causes such as the merger of business, a change in the nature of the business, more effective ways of working, a transfer of the business or part of the business.

(3) The courts shall scrutinise a termination based on operational requirements carefully in order to ensure that the employer has considered all possible alternatives to termination before the termination is effected.

From the above provision, it is apparent that retrenchment is one of the valid reasons for termination if the above ingredients are met. It was not

in dispute that the applicant was initially employed as a secretary in telephone section, but the section was removed, and the applicant was placed in store section. This is an indication of restructuring process as rightly noted by the arbitrator. The respondent's efforts to find alternatives of continuing to work with the applicant by placing her in store section is another step to comply with Rule 23 supra. DW1 testified on the financial difficulties the respondent encountered after Covid 19. Although the reasons were clearly stipulated in the termination letter (Exhibit D1A) the applicant did not give any statement to indicate that there was no retrenchment exercise. She was not disputing its existence. This is equivalent to admission in this fact. In my view, the respondent managed to establish in the CMA that there was a retrenchment exercise which was the reason for the termination of the Applicant's contract of employment.

Regarding procedure, Mr. Lufasinza maintained that since there was no meeting prior to termination, then the procedure for termination was not adhered to. At the same time, the respondent claimed that the applicant was afforded with a notice prior to termination and she was called to a meeting before that notice but she did not attend the consultative meetings.

In resolving the above controversy, I have gone through the CMA record. It reveals that on 20th July 2021 a notice to terminate the applicant's employment contract (Exhibit D1A) was issued to the applicant containing expression of financial constraints and questioning non-attendance of the applicant to the meeting called to discuss the said retrenchment. It appears that the said notice was received by the applicant who signed it and, in the CMA, the applicant did not challenge the said notice. Although no minutes were tendered by the applicant to show that the respondent held the consultation meetings, the circumstances prior and after the termination indicates signs of existence of the said consultation meeting. The said circumstances include the mentioning of the said meetings in the termination letter **(Exhibit D1A)**. Further to that, on 28th July 2021 the applicant agreed to have received final payment relating to her termination subject to the condition that no further claims shall be entertained regarding her termination. In such circumstances of having eight days from 20th July 2021 when the notice of termination was issued to 28th July 2021 when the final payment was made, I am of the view that the applicant had ample time to contemplate on what was taking place regarding her employment and decline to sign the documents with such a commitment

contained in **Exhibit D1B** which was declared to accept calculation for full and final settlement payable to her.

In what I gather from what transpired in the CMA, I feel obliged to be guided by the provision of **Rule 4 (1) of the Employment and Labour Relations (Code of Good Practices), G.N No. 42 of 2007** which addresses termination by agreement.

Further to the above provision, I refer to the cases of **Benda Kasanda Ndassi Vs. Makafuli Motors Ltd**, Rev. No. 25/2011 HC Labour Division DSM (unreported), also in the case of **Hotel Sultan Palace Zanzibar vs. Daniel Laizer & Another**, Civil. Appl. No. 104 of 2004. In the latter case, it was held that:-

> *"It is elementary that the employer and employee have to be guided by agreed terms governing employment. Otherwise, it would be a chaotic state of affairs if employees or employers were left to freely do as they like regarding the employment in issue."*

It is not disputed that the applicant made a declaration to exit the employment by signing a document to that effect. There is no evidence

that she was forced to sign that the said declaration contained in the final settlement deed.

In the case of **Miriam E. Maro vs. Bank of Tanzania,** (Civil Appeal 22 of 2017) [2020] TZCA 1789 (30 September 2020), it was held thus:-

> *"It is the law that parties are bound by the terms of the agreement they freely enter into. We find solace on this stance in the position we took in* ***Unilever Tanzania Ltd v. Benedict Mkasa t/a Bema Enterprises****, Civil Appeal No. 41 of 2009 (unreported) in which we relied on a persuasive decision of the supreme court of Nigeria in* ***Osun State Government v. Dalami Nigeria Limited,*** *Sc. 277/2002 to articulate:*
>
> *Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed between themselves, it was up to the parties concerned to negotiate and to freely rectify clauses which find to be onerous. It is not role of the courts to re-*

draft clauses in agreements but to enforce those clauses where parties are in dispute."

In the matter at hand the applicant freely agreed to have her employment contract to be ended thus the same should be honoured as agreed. There could be no better procedure to end the applicant's employment as far as the respondent's retrenchment exercise is concerned other than what happened, where the applicant consented to terminate her employment contract even after being issued with the notice of termination eight days before she accepted separation by signing the final settlement. It is on this analysis I subscribe to the position of the arbitrator that there was no procedural unfairness in the termination of the Applicant's employment.

Regarding to sufficiency of what the applicant was paid, the arbitrator confirmed that all the applicants entitlements were duly paid to wit:- the salary dues, leave balance, payment in lieu of notice and severance allowance. It was apparent in the CMA that this amount was paid in Final settlement document which contained the Separation Agreement declaration. On this basis, I agree with the arbitrator's findings and find nothing to award to the applicant.

The above analysis answers the first issue negatively that there are no sufficient reasons established to warrant this court to interfere with the award of the CMA.

Regarding to relief, since the applicant has not managed to justify the setting aside of the decision of the CMA, the only remedy for this application is dismissal. Consequently, this application is dismissed. I hereby uphold the CMA award. I give no order as to costs. It is so ordered.

Dated at Dar es Salaam this 17th day of February 2023

KATARINA REVOCATI MTEULE

JUDGE

17/02/2023