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

REVISION APPLICATION NO. 310 OF 2022

DAR ES SALAAM INTERNATIONAL ACADEMY.....APPLICANT

VERSUS

MAKIADI NDOSIMAU..... ..... RESPONDENT

RULING

Date of Last Order: 02/03/2023
Date of Ruling: 10/03/2023

B.E.K. Mganga, J.

Makiadi Ndosimau, the herein respondent was employed by the applicant as a teacher teaching French subject. The said employment was for two years fixed term contract with effect from 15th August 2019 to 14th August 2021. Sometimes in 2020, the parties agreed to alter the terms of their contract and came out with another contract of employment which commenced on 15th August 2020 to 14th August 2021. But on 02nd March 2021, applicant issued a notice of non-renewal of their employment contract. After expiry of the contract, on 10th September 2021, respondent knocked the doors of the Commission for Mediation and Arbitration (CMA) where filed the Referral Form (CMA F1) indicating that the dispute was relating to application/ interpretation/implementation of any law or agreement. In the said CMA

F1, respondent also filled Part B that relates to termination of employment only.

On 17th August 2022, Hon. Lucia Chrisantus Chacha, Arbitrator, having heard evidence and submissions by the parties, awarded respondent to be paid (i) USD 1258 being salary arrears from July 2021 to August 2021, (ii) USD 25,820 being salaries for ten months' for breach of contract, and (iii) USD 1,935 being severance pay.

Aggrieved with the award, applicant filed this Revision application. I perused documents filed by the applicant in support of the notice of application and documents filed by the respondent opposing the application and noted that, in the copy of the Referral Form(CMA F1) that was attached to the application, respondent indicated that the nature of the dispute was application/ interpretation/implementation of any law or agreement. I noted further that, respondent indicated in the said CMA F1 that he was claiming to be paid TZS 42,943,200/= and that applicant terminated the contract after it has come to an end. I further noted that, in part B of the said CMA F1, respondent indicated that reason for termination was non-renewal of the contract.

When the matter was called on for hearing, on 1st December 2022, both Amos Paul learned counsel for the applicant and Kennedy Lyimo,

learned counsel for the respondent entered appearance. That was prior receiving the CMA record. I showed both counsel what was recorded by the respondent in the said CMA F1 as stated hereinabove. Counsel for the respondent did not say whether, that is not what respondent filled in CMA F1. I therefore asked the parties before they have conversed on the grounds advanced by the applicant, to address the court on two legal issues namely:

i. *Whether CMA had jurisdiction to determine issues of interpretation of collective bargaining agreement, and*
ii. *Whether the dispute was properly filled and heard at CMA.*

By consent of the parties, hearing of the two issues raised by the court was conducted by way of written submission. In arguing those issues, applicant enjoyed the service of Mr. Amos Paul, learned advocate while respondent enjoyed the service of Mr. Kennedy Lyimo, learned advocate.

It was submissions of Mr. Paul, learned counsel for the applicant on the 1st issue that, CMA had no jurisdiction to determine the dispute relating to application, interpretation, implementation of any law or collective agreement. He added that, the jurisdiction of the CMA ends on mediating a dispute concerning the application, interpretation, implementation of any law or collective agreement.

He added that, adjudication of a dispute relating to application, interpretation, implementation of any law or collective agreement is reserved to the Labour Court. To support his submissions, counsel for the applicant referred the court to Sections 74 and 94 both of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] and the case of ***James Kapyata vs Mcc Ltd*** (Revision 198 of 2019) [2020] TZHCLD 130.

Responding to the 2nd issue, counsel for the applicant submitted that, Section 86(1) of Cap. 366 R.E. 2019(supra) requires disputes referred to CMA be in a prescribed Form. He further submitted that, a person who refers the dispute to the CMA must tick the correct box to indicate the nature of the dispute. He submitted that in the CMA F1 on record, respondent ticked the box for application/interpretation /implementation of any law of agreement. He went on that; respondent did not tick the box for termination of employment to indicate that he was unfairly terminated and though he filled part B of the said CMA F1 which is supposed to be filled only if a party wants to refer a dispute of termination of employment. To bolster his submission, he referred the court to the case of and the case of ***Dew Drop Co. Ltd vs Ibrahim Simwanza*** (Civil Appeal 244 of 2020) [2021] TZCA

525 and ***Security Group Tanzania Ltd vs Samson Yakobo & Others*** (Civil Appeal 76 of 2016) [2020] TZCA 6. Counsel for the applicant further submitted that; the dispute relating to unfair termination was never instituted at CMA because respondent did not indicate the same in the CMA F1. He further insisted that, arbitrator had no jurisdiction to entertain the dispute of unfair termination. He further submitted that, in CMA F6, the dispute that was mediated was relating to collective bargaining, but in the award, the arbitrator held that there was unfair termination and ordered respondent to be compensated and be paid salary arrears. In winding up his submissions, counsel for the applicant prayed that CMA proceeding be nullified, the award arising therefrom be quashed and set aside.

On the other hand, Mr. Lyimo, learned counsel for the respondent, in his written submissions, submitted that CMA had jurisdiction to entertain the matter of unfair termination and that, respondent was fairly awarded. To support his submissions, counsel for the respondent cited the case of ***Barelia Karangirangi vs Asteria Nyalambwa*** (Civil Appeal 237 of 2015) [2019] TZCA 51. Counsel for the respondent did not submit on the issue whether CMA has jurisdiction over a dispute relating to the application, interpretation, implementation of any law or

collective agreement or whether, respondent did not indicate in the CMA F1 that the dispute was for the application, interpretation, implementation of any law or collective agreement. In short, in his submission, counsel for the respondent did not submit as to what exactly respondent filled in the CMA F1.

On whether the dispute was properly filled and heard at CMA, counsel for the respondent cited the case of ***Ngorongoro Conservation Area Authority vs Amiyo Tlaa Amiyo and Another*** (Labour Revision Application 28 of 2019) [2022] TZHC 3078 and prayed that CMA F1 should be expunged.

I have carefully examined the CMA record and considered submissions made by both counsel in support and opposing this application in relation to the abovementioned legal issues I have raised. In disposing this application, I will start with the 1st issue relating to jurisdiction of CMA to determine issues of application, interpretation, implementation of any law or collective agreement. I should point from the start that; the CMA record was received by this court in February 2023 after the parties have filed their respective written submissions. I have gone through it and find that respondent indicated in the CMA F1 that the nature of the dispute was breach of contract and that he was

claiming to be paid TZS 42,943,200/=. I have noted further that, respondent filled part B of CMA F1 relating to termination of employment only. In the said part B of CMA F1, respondent indicated that the reason for termination of his contract was non-renewal of contract of employment. I have noted further that, the certificate for non-settlement(CMA F6) that is in the CMA record, shows that the dispute that was mediated is application, interpretation, implementation of any law or agreement relating to employment.

From the foregoing, there are two possibilities namely, (i) applicant was served with a different CMA F1 showing that the dispute relates to application, interpretation, implementation of any law or agreement of employment and not the CMA F1 relating to breach of contract that is in the CMA record and (ii) the original CMA F1 that is in the CMA record was tempered with, after the court has raised the abovementioned issues but before the CMA record was forwarded to the court. Whatever the case, it is clear in the CMA record that the dispute that was mediated relates to application, interpretation, implementation of any law or agreement of employment as evidenced by CMA F6 that was signed by Makiadi Ndosimau, the respondent and Irene Urassa, Advocate of the applicant on 23rd September 2021 in the presence of

Fungo, E.J Mediator. For that reason, I am of the view that, the parties could have not signed the said CMA F1 if the nature of the dispute was breach of contract. Again, failure of counsel for the respondent to submit on that issue or state that respondent did not file the dispute relating to application, interpretation, implementation of any law or agreement of employment, in my view, is an implied admission that the dispute that was filed by the respondent related to that aspect. Therefore, as it was correctly submitted by counsel for the applicant, CMA had no such jurisdiction because that is the domain of this Court. My conclusion is fortified by the provisions of section 74 of Cap. 366 R.E. 2019 that provides:-

> *"74. Unless the parties to a collective agreement agree otherwise –*
>
> *(a) a dispute concerning the application, interpretation or implementation of a collective agreement shall be referred to the Commission for mediation; and*
>
> *(b)* ***if the mediation fails, any party may refer the dispute to the Labour Court for a decision****."*

It is clear from the above quoted provision of the law that, CMA is only vested with powers to mediate the dispute concerning collective agreement and that upon failure of mediation, the parties should file the dispute before this court.

In the matter at hand, the dispute that was mediated was application, interpretation/implementation of any law or collective agreement as evidenced by the Certificate of Non settlement (CMA F6). After failure of mediation, respondent did not refer the matter to this court, instead, the arbitrator continued to determine the matter and issued the award. Under such circumstance, the arbitrator proceeded to determine the dispute without jurisdiction.

Even if we accept that the nature of the dispute was breach of contract as indicated in the original CMA F1 in the CMA record, yet, the dispute was improperly heard and determined because the dispute relating to breach of contract was never referred to mediation and was never mediated. In other words, the dispute was heard and determined in contravention of the provisions of sections 86 and 87 both of Cap. 366 R.E. 2019(supra) and Part II of the Labour Institutions (Mediation and Arbitration Guideline) Rules, GN. 67 of 2007 that makes mediation in labour disputes compulsory.

On the 2nd issue namely, whether the dispute was properly filed and heard before the CMA, it was submitted by counsel for the applicant that the dispute was not properly filed and heard because CMA F1 was defective. It was submitted that CMA F1 was defective because

respondent indicated that the nature of the dispute was application, interpretation, implementation of any law or agreement of employment and also filled part B of CMA F1 that relates to termination of employment only. On his part, counsel for the respondent referred the court to ***Amiyo's case*** (supra) and prayed the CMA F1 be expunged. In other words, by referring to ***Amiyo's case*** (supra), counsel for the respondent conceded that CMA F1 was defective.

As pointed hereinabove, in both the CMA F1 that was served to the applicant and that is in CMA record shows that respondent also filled part B of the said CMA F1 relating to termination of employment only. While the nature of dispute in the copy of CMA F1 that was served to the applicant is application, interpretation, implementation of any law or agreement of employment, the nature of the dispute in the original CMA F1 in the CMA record is breach of contract. But in both, respondent filled part B of CMA relating to termination of employment only. By the respondent filling also part B of CMA F1, made the said CMA F1 to be defective. Since, CMA F1 is pleading, the matter was incompetent due defectiveness of the said CMA F1. See ***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 and ***Lancet Laboratories (T) Limited Versus Nelson Ng'ida*** (Revision Application 369 of 2022) [2022] TZHCLD 1092. The prayer by counsel for the respondent that CMA F1 be expunged complicates further the matter. It is my view that, if CMA F1 is expunged, there is no pleading and the matter was improperly heard and determined.

For the fore going, I hereby nullify CMA proceedings, quash, and set aside the award and orders arising therefrom.

Dated in Dar es Salaam on this 10th March 2023.

B. E. K. Mganga
JUDGE

Ruling delivered on this 10th March 2023 in chambers in the presence of Amos Paul, Advocate, for the Applicant and Kenedy Lyimo, Advocate, for the Respondent.

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

B. E. K. Mganga
JUDGE