IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 313 OF 2022

(Arising from the decision of the Commission for Mediation and Arbitration at Temeke in REF: CMA/DSM/TEM/605/2021/23/2021)

BETWEEN

SINOHYDRO CORPORATION LTD ..... APPLICANT

VERSUS

ABDUL MOHAMED JIMAI ..... 1ST RESPONDENT

SHAMTE SADALA MILYANGO ..... 2ND RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J:

The applicant herein filed the present application challenging the decision of the Commission for Mediation and Arbitration ("CMA") in Labour Dispute No. CMA/DSM/TEM/605/2021/23/2021 ("the dispute") which was in favour of the respondents herein. The dispute arose out of the following context, the respondents were employed by the applicant in a one-year fixed term contract. The respondents alleged to have been terminated from their employment on 16/12/2020 and aggrieved by the alleged termination, they lodged the dispute at CMA claiming of unfair termination. After considering the evidence of the parties the CMA found that the respondents were unfairly terminated from their employment

hence awarded them salaries for the remaining period of the contract and one month salary in lieu of notice of termination. Dissatisfied by the CMA's award, the applicant filed the present application urging the court to determine the following legal issues:-

1. Whether the arbitrator erred in law and facts for awarding remedies which were not pleaded for in complaint Form No 1.
2. Whether remedies of termination of employment contract as pleaded in CMA Form No. 1 can extend to specific terms contract of the respondents.

The application was disposed by way of written submissions. Before this court the applicant was represented by Tesiel Augustino Kikoto Learned Counsel whereas Mr. Elay Edward Nyamoga, Learned counsel appeared for the respondents. In his submissions to support the two issues, Mr. Kikoti submitted them jointly.

He submitted that the arbitrator awarded remedies which were not pleaded for in complaint Form No.1. That the nature of this dispute as presented before the CMA was for termination of employment as per complaint Forms No. 1 and the issues for determination framed before the commission were also for termination of employment. However, he

submitted, the remedies awarded were for breach of contract. He therefore argued that the finding of the Arbitrator was an afterthought as there is no dispute of breach of contract referred to the CMA through referral form CMA No. 1.

Mr. Kikoti then referred to Rule 16 (2) of the Labour Institutions (Mediation and Arbitration) Rules, G.N No. 64 of 2007 ("G.N 64 of 2007") and argued that it empowers the arbitrator to identify the nature of dispute guided by complaint form CMA No. 1. He argued that the rule does not allow the mediator or arbitrator to alter or amend what is pleaded for in the referral form. The counsel disputed that in the present application, the respondents identified their nature of the dispute as termination of employment and not breach of contract which was acted upon by the arbitrator.

Mr. Kikoti went on submitting that Section 86(1) of the ELRA requires all labour disputes referred to the CMA to be in prescribed form, CMA form No. 1 and this form is the one which is used by the Arbitrator or mediator to determine dispute before the CMA. Mr. Kikoti submitted that it was wrong for the arbitrator to skip determining the termination of employment as pleaded in referral form and form her own nature of dispute of breach of contract and issue remedies thereto in favour of the

respondents. He added that in our jurisprudence, there are series of decisions of the High Court which impose duties to arbitrators to stick on four corners of what is referred to in referral form CMA No. 1. To support his submission, he referred the court to the case of **Uranex (T) Ltd V. Godwin M. Nyelo (Rev. 159 of 2020) [2021] TZHCLD 2067,** whereby this court held at page 8 para 2, while commenting on Rule 16 (3) of GN No. 64 of 2007 and held that;

> *"In my strong view, the provisions above do not empower the mediator to amend or add what is pleaded in the referral form No. 1. The mediator is* ***only empowered to determine the nature of the dispute and not to change the pleadings to include prayers which were not pleaded in the CMA Form No. 1*** *....."*
>
> *(Emphasis is mine).*

Mr. Kikoti insisted that the dispute before the CMA as pleaded in CMA Form No. 1 was for termination of employment but the arbitrator amended the nature of dispute and issued remedies of breach of contract which were not the nature of the dispute before the CMA. In that regard, he argued that the arbitrator amended the referral form and

entertained her own dispute not mediated and pleaded by the respondents in the complaint forms which is wrong and which is against the principle of law of pleading that parties are bound by their own pleading. To support his submission, the counsel cited the case of **Omary Hamis Chago And 2 Others Vs Gashparts Ltd Rev NO. 670 OF 2018**, responding to this legal principle of pleading, Hon. **B.E.K. MGANGA, J.** at Page 5 para 3 had this to say;

> *"As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings. For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or a fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to*

pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation"

He further submitted that to emerge with new nature of dispute of breach of contract before the CMA by the arbitrator without due amendment was to take the applicant by surprise which is contrary to the principle of pleadings as aforementioned. He therefore submitted that the arbitrator erred in law and fact when he awarded remedies of the dispute neither mediated nor pleaded in CMA referral form No. 1. The counsel further cited the case of **Mtambua Shamte And 64 Others Vs Care Sanitary and Suppliers Rev No. 154 Of 2010.** He therefore urged the court to revise and set aside the CMA's award.

In reply, Mr. Nyamoga conceded that the nature of dispute pleaded in CMA F1 was termination of employment. He disputed the fact that the Arbitrator awarded what was not pleaded in the CMA F1. He stated that the decision was not on breach of contract as alleged by the applicant's counsel. He strongly submitted that the award was in line with the remedies of unfair termination provided under section 40(1) of the ELRA. He further submitted that the cases cited by the applicant's counsel are inapplicable to the circumstances at hand. He insisted that

the Arbitrator properly awarded the respondents hence the application be dismissed.

After considering the parties rival submissions and the records before me, I find that the court is called upon to determine only one issue; whether the decision of the CMA was contrary to law. It is the applicant's argument that since the dispute instituted at the CMA concerned unfair termination, then the remedies awarded should have been in accordance with the provision of section 40(1) of the ELRA. As rightly submitted by Mr. Nyamoga, the dispute instituted at the CMA was of unfair termination of employment and the issues framed were of that nature too. I have also considered the applicant's counsel submissions that parties are bound by their pleading and the cases cited thereto, indeed that is the correct position. However, the contradiction as to whether a fixed term contract employee can sue under the principles of unfair termination or not have been cured by numerous court of appeal decisions including the case of **St. Joseph Kolping Secondary School vs 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)".

Therefore in the light of the above decision which is binding to this court, it is crystal clear that the principles of unfair termination also applies to a fixed term contract thus the dispute was properly filed and arbitrated at the CMA.

Coming to the reliefs that awarded by the CMA, the applicant's contention is that the remedies awarded were for a fixed term employee while dispute was for unfair termination. It has been developed by case laws that where a fixed term contract has been unfairly terminated, the employee is entitled tohis/her salaries for the remaining period of the contract. This is what was awarded by the CMA after finding that the contract was unfairly terminated and the available remedy was salaries for the remaining period of the contract. Hence the respondents were properly awarded.

In the result, on the basis of the above findings, I find the present application has no merit and it is hereby dismissed.

Dated at Dar es Salaam this 10th day of February, 2023.

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S.M. MAGHIMBI

JUDGE