IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 341 OF 2022

ADINANI ALLY SIPURU & OTHERS.....APPLICANT

VERSUS

RESORT WORLD t/a PALM BEACH CASINO.....RESPONDENT

(From the award of the Commission for Mediation & Arbitration of DSM at Ilala)
(Lucia, C.C: Arbitrator) Dated 11th March 2022 in
Labour Dispute No. CMA/DSM/ILA/200/21/120

JUDGEMENT

K. T. R. MTEULE, J.

14th February 2023 & 15th March 2023

This Revision application arises from the award delivered by Hon. Lucia, C.C, the Arbitrator, dated **11th March of 2023** in Labour Dispute No. CMA/DSM/ILA/200/21/120 originating from the Commission for Mediation and Arbitration of Dar es Salaam, Ilala (CMA). The Applicants herein are praying for the following orders of the Court: -

1. That this Honorable Court be pleased to call for the record of the proceedings of the Commission for Mediation and Arbitration in **Labour Dispute No. CMA/DSM/ILA/200/21/120**, revise and set aside the award

therein dated 11th March 2022 delivered by Hon. Lucia Chacha, arbitrator.

2. Any other reliefs that this Honourable Court may deem fit and just to grant.

The background of this application is traced from CMA record, affidavit and counter affidavit filed by the parties as follows:- The Applicants were employed by the Respondent as Gambling Player under several fixed term contracts. The latest contract commenced on **1st January 2021** fixed for one year term. Their relationship turned hostile on **27th February 2021** when the Applicants were terminated for an alleged misconduct and breach of Company's Rules and Procedures. Aggrieved by the termination, the Applicants filed the labour dispute in the CMA where it was decided in respondent's favor with the Applicants awarded nothing. Dissatisfied with the CMA award, the Applicants preferred the present application.

The applicant advanced four legal issues of revision as stated at paragraph 4 of the affidavit which can be paraphrased as: -

i) That the Honourable arbitrator erred in both law and facts by holding that the applicants' employment was terminated while they were under probation period.

ii) That the Honourable arbitrator erred in both law and facts by holding that, the applicants were below six months in their employment hence they cannot sue for unfair termination.

iii) That the Honourable arbitrator erred in both law and facts by holding that there was a meeting between the applicants and the respondent, where the applicants were told about their misconduct and that the parties agreed on their termination from employment.

iv) That the Honourable arbitrator erred in both law and facts for failure to evaluate the evidence which was adduced by the witnesses before Commission hence arriving at a wrong decision of dismissing the applicant's dispute without justifiable reasons.

Along with the Chamber summons, the applicant filed an affidavit sworn by Adinani Ally Sipuru, the applicants' representative, in which he explained the events leading to this application and alleged that, the Respondent terminated the Applicants unfairly.

The application was challenged by a counter affidavit sworn by Alex Masawe, the respondent's Human Resource Director. The deponent in the counter affidavit vehemently disputed the applicant's allegation

regarding unlawful termination. He deponed that they mutually agreed to terminate the contract.

The application was disposed of by a way of written Submissions. The Applicants were represented by Mr. Michael Nyambo, Advocate, whereas the Respondent was represented by Mr. Tesiel Augustino Kikoti, Advocate.

Arguing in support of the application, Mr. Nyambo submitted on the 1st and the 2nd grounds jointly. On whether the applicants were terminated while under probation period having served for less than six months in their employment and therefore unable to sue for unfair termination, Mr. Nyambo submitted that during termination, the applicants were actually not under probation period. According to him, their contracts were renewed several times and its renewal was subject to the performance and that this fact has been supported by the evidence of **DW1** and **Exhibit D1**. On such basis he is of the view that the applicants were not under probation period.

On the third issue as to whether the Applicants agreed with the respondent on their termination, Mr. Nyambo referred to page 10 paragraph 1 of the arbitrator's award and stated that the arbitrator erred in law by agreeing that there was agreement and at the same time holding that there was no evidence that parties agreed to

terminate their contract. Mr. Nyambo is of the view that the arbitrator's findings that there was agreement without supporting evidence is contrary to the cannon principle of law, that the one who alleged must prove.

Lastly on whether the evidence adduced at the CMA was properly evaluated, Mr. Nyambo submitted that, both parties testified that they had employment relationship for a period of not less than three years, but surprisingly the arbitrator held that the employment relation between the parties started on 01st January 2021 and ended on 27th February 2021. Referring to the Respondent's statement at page 4 paragraph 1 of the award that she issued to the applicants a letters of termination so that they could enjoy their pension contributions from NSSF, Mr. Nyambo questioned how applicants could enjoy pension while they were on probation and served for less than 6 months.

Mr. Nyambo further submitted that even though the applicants were under probation period, the respondent neither followed the procedures provided under **Rule 10 (1) and (8) of G.N No. 42 of 2007** nor conducted investigation to support the allegation stated under **Exhibit D-2** (suspension letter). They thus prayed for the application to be revised and set aside.

Opposing the application, Mr. Kikoti submitted that the Applicants were employed under yearly fixed term contract from 1st January 2021 to 28th February 2022 but their termination was on 27th February 2021, and it was by an agreement after showing dishonest to the respondent, and agree to be terminated by accepting an offer of terminal payments.

Mr. Kikoti referred to Clause 3 of the employment contract, which provides for a probation period of three months and stated that the Applicants served only one month of their employment period, that means their tenure of service fall under Clause 3 of the employment contract. He further added that since the applicants signed the contract and agreed to the terms, then the door of denying it is closed. Bolstering his position, he cited different cases including the case of **Christian Mwesiga v. Board of Bishops,** Revision No. 31 of 2020, High Court of Tanzania, at Morogoro, (unreported), citing with approval the case of **Hotel Sultan Palace Zanzibar vs. Daniel Laizer & Another**, Civil. Appeal No. 104 of 2004, Court of Appeal of Tanzania, (unreported). He quoted the holding of this Court that employer and employees must be guided by the terms of their contract.

On whether there was a voluntary agreement to terminate the contract, Mr. Kikoti submitted that, **Rule 3 (2) (a) of G.N No. 42 of 2007** recognizes a voluntary termination of an employment contract. He stated that the Applicants were informed about their misconduct by the respondent and gave them option for those who wish to terminate their contract voluntarily to do so, and the applicants agreed to the offer, and signed and received payment as per **Exhibit D-3** (offer of termination). He further added that since the Applicants signed the agreement without inducement, he is of the view that they are bound by the terms and conditions therein. Strengthening his position, he cited the case of **Francis Kidanga v. Kilimanjaro Fast Ferries LTD,** Revision No.668 of 2019, High Court of Tanzania, Labour Division, at Dar es Salaam, (unreported) with a holding that where parties freely enter into an agreement neither Court nor parties to such an agreement should interfere. According to him, the applicants' allegation that there was no meeting for the agreed termination and that they were not informed about their misconduct lacks merits.

Regarding evidence evaluation Mr. Kikoti submitted that the arbitrator properly evaluated the evidence before him basing on the nature of the dispute filed in the Commission as per CMA Form No.1, and that

the Applicants' contentions are baseless and unmerited. He thus, prayed for the application to be dismissed.

The applicant's counsel filed a rejoinder. The said rejoinder will be taken into account in determining this application.

Having gone through the parties' submissions and their sworn statements together with the record of the CMA, I am inclined to address the issue as to **whether the applicants have adduced sufficient grounds for this Court to interfere with the CMA award by a way of revision.**

To answer the raised issue, the four grounds of revision contained in the affidavit will be reflected. In the CMA, the arbitrator found that the applicants are entitled to nothing as they voluntarily terminated their employment contract and that they were under probation period, hence they were not entitled to claims on unfair termination. The Applicants are challenging this finding basing on the argument that they had several previous contracts, thus cannot be treated as probationers. They further claim that they worked for more than six months in those contracts.

The contention here is whether working for more than six months entitled the Applicants to a status of a confirmed employee and not a

probationer. I find worth to seek guidance from the provision of **Section 35 of Sub Part E of the Employment and Labour Relations Act, Cap 366 R.E 2019** which provides; -

> *35. The provisions of this Sub-Part shall not apply to an employee with less than 6 months' employment with the same employer, whether under one or more contracts.*

As articulated in the above provision, for someone to be covered by ***Sub Part E*** he or she must have more than six months employment with same the employer. More interpretation on the above **section 35 of ELRA** was given by the Court of Appeal in the case of **David Nzaligo versus National Microfinance Bank PLC, Civil Appeal No. 61 of 2016, CAT**. In this case the Court of Appeal discussed at lengthy the application of **Section 35 of ELRA** and at pages 21 and 23 the Court of Appeal stated:

> *"Whilst we are aware of the appellant's counsel submissions that the appellant probation exceeded the six months threshold by about 11 days prior to resigning, but since the probation period was yet to be declared to have ended, at the time the appellant was still on probation, we are of the view that a*

probationer in such a situation, cannot enjoy the rights and benefits enjoyed by a confirmed employee. Having regard to the circumstances of the present case, can it be said that the said provision covers the appellant's situation, since the record of appeal reveals that the appellant worked for more than 6 months with the same employer. We find that the import of section 35 of ELRA though it addresses the period of employment and not the status of employment, the fact that a probationer is under assessment and valuation can in no way lead to circumstances that can be termed unfair termination. It suffices that when assessing this provision, it is a provision that envisages an employee fully recognized by an employer and not a probationer"

From the above holding, it is apparent that unconfirmed probation period will remain with the same status regardless of duration of time it survives. ELRA sub part E of ELRA to apply only to envisages

employees who are fully recognised by the employer and not the probationer.

Coming to the instant application, the record shows that the last contract entered by the parties was yearly fixed term contract which commenced on 1st January 2021 as per **Exhibit D-1** (employment contract). Clause 3 of the said contract provides that, the applicants were employed under yearly fixed term contracts subject to probation period of three months. Further to that **Exhibit D-4** (notice of termination) admitted collectively, shows that the Applicants were terminated on 27th February 2021. That means their operational employment contract at the time they exited the employment existed for two month. The terms of contract need to be respected.

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; -

> *"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."***

From the above quotation, Court are precluded from interfering parties agreements entered freely.

In the matter at hand the parties freely agreed in their contracts to have a probation period and specific time for its lasting. By signing it without considering the previous contracts the Applicants' denial of probationary status lacks merits. Mr. Nyambo's assertion that the Arbitrator erred in holding that the applicants were under probation period and that the employees/Applicants had less than six months in their employment hence they cannot sue for unfair termination is unfounded. The Applicants are bound by the terms of their contract which provides for a probation period and with a duration of a fixed term. Every beginning of a contract operates on its own. Terms of an expired contract cannot apply in a new contract. Each contract works

on it own terms. The fact that there were 3 previous contracts do not affect the terms of the operational contract.

In the premises, I find that the applicants were under probation period and therefore not covered by the provision of unfair termination. This responds to the first and the second issues raised by the applicants.

The third issue covers the procedural compliance in ending the applicant's employment. The arbitrator held that there was a voluntary agreement to end the Applicants' employment. Advocate Nyambo challenged this arbitrator's holding according to Mr. Nyambo, there was no evidence to support the holding and therefore the arbitrator's finding is contrary to the cannon principle of law, that the one who alleged must prove.

Opposing the argument Mr. Kikoti maintained that since the applicants signed the contract of termination without inducement, then they are bound by the terms and conditions therein.

As to whether there was voluntary agreement to terminate the contract, I had to go to the said agreement which is Exhibit D-3, the applicants only signed a clause which declared that they understood the terms. The said terms did not state that by so signing the

applicants waived any other right and entitlement. I differ with the holding of the arbitrator that Exhibit D-3 constitute sufficient evidence of voluntary agreement by the applicant.

Termination of an employment of a probationary employee is guided by Rule 10 of the Employment and Labour Relations (Code of Good Practice) **Rules, G.N. 42 of 2007**. **Rule 10 (7) (8) and (9)** provides: -

> *"10- (7) Where at any stage during the probation period, the employer is concerned that the employee is not performing to standard or may not be suitable for the position the employer shall notify the employee of that concern and give the employee an opportunity to respond or an opportunity to improve.*
>
> *(8) Subject to sub-rule (1) the employment of a probationary employee shall be terminated if-*
>
> *(a) the employee has been informed of the employer's concerns:*

(b) the employee has been given an opportunity to respond to those concerns;

(c) the employee has been given a reasonable time to improve performance or correct behavior and has failed to do so.

(9) A probationary employee shall be entitled to be represented in the process referred to in sub-rule (7) by a fellow employee or union representative."

Having gone through the record the only information is the evidence of DW1 who explained that there was a meeting held between the Applicants and the Respondent to agree on the termination. It was on the basis of this evidence did the arbitrator got convinced that the procedure was followed on basis of voluntary agreement. Nevertheless, this evidence was countered by the Applicants' evidence given by PW1 who claimed the Applicants to have never been called in a meeting. It is on this point I differ with the arbitrator's analysis of evidence. Since the Respondent's evidence by DW1 was challenged, the employer had a duty to provide another evidence to give strength to what DW1 stated. Neither minutes nor agreement as an outcome of the meeting were produced to indicate

that there was a meeting which was conducted pursuant to the provision of **Rule 10 (7), (8) and (9) supra.**

The employer has a duty to observe the procedures stated under **Rule 10 (7) (8) and (9) supra**. The applicants were not afforded an opportunity of being heard. This amounts to unfair labour practices.

Having said so, **third** ground of revision confirms that there was no compliance with legal procedure required for termination of a probationary employee.

The answer to the third ground answers the first issue affirmatively that there is a reason established to warrant this court to exercise revisional power against the CMA proceedings.

The next question is what are the **reliefs entitled to parties?** The Applicants being probationary employee for a period of three months who just rendered service for only two month from 1st January 2021 to 27th February 2021, it means they remained with 1 month to complete their probationary period. I will apply the principle of the foreseeability of the remaining period to estimate what can be awarded to the Applicants. This principle of awarding remaining period was emphasized in the case of **Good Samaritan Vs. Joseph**

Robert Savari Munthu, Rev. No. 165/2011 HC Labour Division DSM (unreported) where the Court held: -

> *"When an employer terminates a fixed term contract, the loss of salary by employee of the remaining period of the unexpired term is a direct foreseeable and reasonable consequence of the employer's wrongful action...."*

Since the respondent breached employment contracts under probation period which was to expire in one month time, therefore I award the Applicants a compensation of one month to each.

Finally, the application is partly allowed. Each party to the suit to take care of its own cost.

It is so ordered.

Dated at Dar es salaam this 15th Day of March 2023

KATARINA REVOCATI MTEULE

JUDGE

15/3/2023