

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

REVISION APPLICATION NO. 30 OF 2023

*(Arising from an Award issued on 20/1/2023 by Hon. MAKANYAGA, A.A, Arbitrator, in Labour dispute No.
CMA/DSM/ILA/386/21/211/21 at Ilala)*

NATIONAL INSURANCE CORPORATION OF TANZANIA LIMITED ... APPLICANT

VERSUS

MONICA G. MAFIKIRI RESPONDENT

JUDGMENT

*Date last Order: 14/03/2023
Date of Judgment: 31/3/2023*

B. E. K. Mganga, J.

It is undisputed facts that, respondent was an employee of the applicant and that, on 4th September 2020, applicant served respondent with twenty-four hours termination letter with effect from 30th September 2020. It is also undisputed fact that, respondent was employed as insurance officer. Aggrieved with termination, on 13th September 2021, respondent filed Labour dispute No. CMA/DSM/ILA/386/21/211/21 before the Commission for Mediation and Arbitration henceforth CMA at Ilala for breach of contract. In the Referral Form(CMA F1) respondent indicated that

she was claiming to be paid (i) TZS 20,171,250/= being gratuity, (ii) TZS 3,997,407/= being terminal benefits, (iii) per diem allowance at the rate of TZS 150,000/= from the date of breach of the contract to the date of the award, (iv) pension, (v) the employer to repay respondent's loan at Mkombozi Bank and (vi) Compensation for termination of the contract that was expiring in 2024.

On 20th January 2023, Hon. Makanyaga, Arbitrator, having heard evidence and submissions of the parties, issued an award that, there was no free consent between the parties in entering a contract of employment (exhibit GM3) that was operational from 1st April 2019 to 30th September 2019 and that, it was signed on behalf of the applicant by the person who, at that time, was not the Managing Director. Based on that, the Arbitrator held that there was no contract that was breached because exhibit GM3 was not a contract of employment. The arbitrator, therefore, ordered applicant to (i) reinstate the respondent from 1st September 2020 and pay TZS 36,685,000/= being salaries from that day to 31st January 2023, (ii) applicant to pay TZS 9,171,250/= being house allowance from 1st September 2020 to 31st January 2023, and (iii) applicant to pay TZS

130,500,000/= being subsistence allowances from 1st September 2020 to 31st January 2023 all amounting to TZS 176,356, 250/=.

Aggrieved with the award, applicant filed this application seeking the court to revise it. In the affidavit of Paul Geoffrey Shaidi in support of the Notice of Application raised seven grounds namely:-

- 1. That the award was unlawfully procured because the Commission had no jurisdiction.*
- 2. That the arbitrator erred in law and facts to issue an order reinstatement that was not prayed for by the respondent in Form No. 1*
- 3. That the arbitrator erred in law and fact in holding that respondent was employed for unspecified period contract.*
- 4. That the arbitrator erred in law and facts by ordering applicant to pay substance allowance for the period of 39 months' the fact that was not table to the applicant during hearing.*
- 5. That the arbitrator erred in law and facts in holding that there was no breach of contract and still deliver an award that is inconsistent and contrary to the issues drafted.*
- 6. That the arbitrator erred in law and facts by declaring employment contract of void the matter that was not an issue between the parties.*
- 7. That the arbitrator erred in law by entertaining claims of bank loan repayment which does not fall under the Commission's jurisdiction.*

Monica G. Mafikiri, respondent filed her counter affidavit together with the Notice of Opposition resisting the application.

When the application was called on for hearing, applicant was represented by Mr. Abeid Buzohela and Ms. Melania Lazaro, State Attorneys while the respondent was represented by Idd Mrema, Advocate.

Submitting on the 1st ground, Ms. Lazaro argued that CMA had no jurisdiction because the dispute involved a Public Servant. She submitted that, Section 32A of the Public Service Act[Cap. 298 R.E. 2019] provides that a public servant must exhaust remedies provided for, in the Act prior filing the dispute at CMA. Ms. Lazaro submitted that, respondent was employed for fixed term contracts and that her employment was terminated 28 days prior its expiry. She went on that, the said contract(exhibit NIC3) was governed by Public Service Act. Learned State Attorney submitted that, no reason for termination was provided in the termination letter. She submitted further that, respondent filed the dispute complaining that applicant breached the contract. When probed by the court, State Attorney submitted that, Section 3 of the Public Service Act specifically 3(a)(iii) of Cap. 298(supra) cannot apply in the application at hand though respondent was employed for a fixed contract. In support of her submissions that CMA had no jurisdiction to determine the dispute, she cited the case of ***Tanzania Posts Corporation v. Dominic Kalangi***, Civil

Appeal No. 12 of 2022, CAT(unreported). In her submissions, learned State Attorney conceded that, in ***Kalangi's case*** (supra), the Court of Appeal did not discuss employees with a fixed term contract. She was, however, quick to submit that, all employees in the Public Service are governed by Public Service Act.

Submitting on the jurisdiction of CMA, Mr. Mrema, counsel for the respondent submitted that CMA had jurisdiction because respondent is not a Public Servant and further that, applicant is not a Public Office. He argued that ***Kalangi's case*** (supra) is not relevant to the application at hand because, respondent was employed for a fixed term contract. He further cited the case of ***Tanzania Agricultural Development Bank Ltd (TADB) V. Thomas M.F. Samkyi***, Revision No. 114 of 2020, HC (unreported) to support his submissions that, an employee with a fixed term contract is not a Public Servant. He further submitted that; no preliminary objection was raised at CMA that CMA has no jurisdiction. He concluded his submissions praying that the application be dismissed.

I have carefully examined CMA proceedings and considered submissions of the parties in this application and find that, it is undisputed that parties had a fixed term contract of employment. It was submitted on

behalf of the applicant that CMA had no jurisdiction because respondent was a public servant. I entirely agree with the applicant. Submissions by counsel for the respondent that respondent was not a public servant because the parties had a fixed term contract cannot be valid in the circumstances of this application. I have read the fixed term contract between the parties (exhibit MG3) and find that the parties agreed that the contract will be governed by the Public Service Act and its Regulations. Clause 14 of the said contract loudly provides the governing law as hereunder:-

" 14. GOVERNING LAW

The application, interpretation, and implementation of this Agreement shall be governed and construed in accordance with the Public Service Act and its regulations i.e. Public Service Regulations."(Emphasis is mine)

It is my view that, having signed the contract with a clause that parties will be governed by the provisions of the Public Service Act[Cap. 298 R.E. 2019], respondent is estopped to claim that she was not governed by the said Act. See the case of [Denis s/o Magabe vs Republic](#), Criminal Appeal No. 7 of 2010 [2011] TZCA 45, [Bytrade Tanzania Limited vs Assenga Agrovat Company Limited & Another](#), Civil

Appeal No. 64 of 2018 [2022] TZCA 619, [Trade Union Congress of Tanzania \(TUCTA\) vs Engineering Systems Consultants Ltd & Others](#), Civil Appeal No. 51 of 2016 [2020] TZCA 251, [Muhimbili National Hospital vs Linus Leonce](#), Civil Appeal No. 190 of 2018 [2022] TZCA 223. In [TUCTA's case](#) (supra) the Court of Appeal quoted an Article by Shreya Dave titled The Doctrine of Promissory Estoppel where the author wrote:-

"The true principle of promissory estoppel is where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact acted upon by the other party the promise would be binding on the party making it and he would not be entitled to go back upon it"

Having quoted the said Article, the Court of Appeal went on that :-

"Under the Evidence Act, Cap 6, R.E. 2019, there is a provision relevant to the above doctrine, and that is section 123 which provides;

'123. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing'.

The Court of Appeal endorsed the decision of the High Court of Kenya in the case of ***Nairobi County Government v. Kenya Power and Lighting Company Limited*** [2018] eKLR wherein it was held that:-

"Upon applying the law to the facts of this case, I find that in the circumstances of this case, the doctrine of estoppel applies against the Petitioner. The Petitioner is estopped by the said doctrine from turning around and reneging on what it had agreed and committed itself into and even performed its part of the agreement. The Respondent in reliance to the agreement and commitment not only agreed to the arrangement and acted in reliance of the same".

The Court of Appeal concluded by holding that:-

"We are similarly of the view that the overt conduct and expressions of the appellant's predecessors during the signing of the contract and during the respondent's claims for payment, are binding on it."

It is my further view that, there is no reason that was advanced by the respondent as to why the above quoted clause of the contract between the parties should be ignored. I have no reason, and there is no evidence justifying, as to why, the court should allow parties to depart from what they agreed. It is now settled law that, parties are bound by the terms of the contract as it was held by the Court of Appeal in the case of [Simon](#)

Kichele Chacha vs Aveline M. Kilawe (Civil Appeal 160 of 2018) [2021]

TZCA 43. In **Kichele's case** (supra) it was held:-

*"It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be a sanctity of the contract as lucidly stated in **Abualy Alibhai Azizi v. Bhatia Brothers Ltd** [2000] T.L.R 288 at page 289 thus:-*

'The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement."

Since the parties were governed by the Public Service Act, then, prior filing the dispute at CMA, respondent was supposed to exhaust remedies provided for under the Public Service Act[Cap. 298 R.E. 2019]. It is my view that, respondent was a public servant, hence, CMA had no jurisdiction to hear and determine the dispute between the parties as it was held by the Court of Appeal in the case of **Tanzania Posts Corporations vs Dominc A. Kalangi** (Civil Appeal 12 of 2022) [2022] TZCA 154. Since CMA had no jurisdiction, all proceedings were a nullity.

It was held by the arbitrator that the contract was signed by the person who, at the time of signing, was not the managing director of the

applicant. With due respect to the arbitrator, the said contract was signed by the parties at the time the person who signed on behalf of the applicant was the Managing Director. What is clear on the said contract is that parties signed the said contract with retrospective operation. Having signed the said contract, respondent cannot be heard complaining now about validity of that contract.

It was submitted on behalf of the respondent that at CMA, applicant did not raise objection that CMA had no jurisdiction. With due respect to counsel for the respondent, whether it was raised or not, jurisdictional issue can be raised at any time or stage. See [Athuman Mtundunya vs the District Crime Officer Ruangwa & Others](#) (Civil Reference 15 of 2018) [2019] TZCA 364, [National Insurance Corporation Consolidated Holding Corporation vs Johanes Jeremiah & Others](#) (Civil Appeal 61 of 2008) [2016] TZCA 844 and [Amina Karim Jetha vs Wakf & Trust Property Commission](#) (Civil Appeal 86 of 2019) [2019] TZCA 511 to mention but a few.

The foregoing has disposed the whole application. I will therefore not consider other grounds and submissions made thereto. I therefore, allow

the application and nullify CMA proceedings, quash, and set aside the award arising therefrom.

Dated at Dar es Salaam on this 31st March 2023.



B. E. K. Mganga
JUDGE

Judgment delivered on this 31st March 2023 in chambers in the presence of Abeid Buzohela, State Attorney for the Applicant and Idd Mrema, Advocate for the respondent.



B. E. K. Mganga
JUDGE