IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 155 OF 2023

(Arising from An Award issued on 02/06/2023 by Hon. Ng'washi, Y, Arbitrator, in Labour dispute No. CMA/DSM/ILA/907/19/408 at Ilala)

MADONNA HOSPITAL LIMITED ..... APPLICANT

VERSUS

TAMALI STEPHANO MTENGWA ..... RESPONDENT

JUDGMENT

Date of last Order: 09/08/2023
Date of Judgment: 16/08/2023

B. E. K. Mganga, J.

Facts of this application in brief are that, on 1st April 2019, the applicant and the respondent entered a three years fixed term contract of employment. In the said three years fixed term contract, applicant employed the respondent as Nursing Assistant at monthly salary of TZS 350,000/=. It happened that on 28th October 2019, applicant terminated employment of the respondent allegedly, due to economic constraint. Respondent was aggrieved with the said termination as a result, on 21st

November 2019, she filed Labour dispute No. CMA/DSM/ILA/907/19/408 before the Commission for Mediation and Arbitration henceforth CMA at Ilala. In the Referral Form (CMA F1), respondent indicated that she was unfairly terminated and that she was claiming to be paid TZS 21,000,000/= due to the alleged unfair termination.

On 13th December 2019, the parties signed certificate of non settlement (CMA F6) before Hon. Mahindi, P.P, Mediator, showing that mediation has failed. Due to failure of mediation, respondent filed the notice to refer a dispute to arbitration (CMA F8). When the parties were called on for arbitration, on 4th February 2020, respondent filed a notice of preliminary objection that "the complainant's complaint is hopelessly incompetent to be entertained by the commission." At the time of arguing the said preliminary objection, applicant submitted that respondent filed the dispute relating to unfair termination but the dispute that was mediated is breach of contract. Responding to the submissions by the applicant in relation to the said preliminary objection, respondent submitted that the contract between the parties was fixed term contract and formed an opinion that the nature of the dispute is breach of contract, which is why, the certificate of non settlement shows that it was breach of contract.

On 23rd June 2020, Hon. Ng'washi, Y, Arbitrator, issued a ruling dismissing the preliminary objection raised by the applicant. In the said ruling, the arbitrator relied on the provisions of Rule 13(5) of the Labour Institutions (Mediation and Arbitrations Guidelines) Rules, GN. No. 67 of 2007 and Rules 16(2) and (3) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 that the mediator has powers to determine the nature of the dispute irrespective of what is stated in the CMA F1. Having delivered the said ruling, the arbitrator proceeded to record evidence of the parties.

Having heard evidence and submissions of the parties, on 2nd May 2023, Hon. Ng'washi, Y, Arbitrator, issued an award that applicant breached the contract because she had no valid reason to terminate employment of the respondent due to economic hardship and further that, procedures were not adhered to. With those findings, the arbitrator awarded respondent to be paid (i) TZS 10,150,000/= being salary for 29 months remaining period of the contract, (ii) TZS 350,000/= being one month leave pay and TZS 350,000/= being one month salary in lieu of notice all amounting to TZS 10,850,000/=.

Applicant was aggrieved with the said award hence this application for revision. In support of the Notice of Application, applicant filed the

affidavit sworn by Grace Sangawe, her principal officer. In the said affidavit, applicant raised three issues namely: -

1. *Whether the Commission for Mediation and Arbitration was right to arbitrate a claim which was not pleaded in CMA F1 and without amendment thereof.*
2. *Whether the notice of intention by the employer to retrench some of her employees on operation requirements placed on the notice board does not amount to service to the employees.'*
3. *Whether the Commission for Mediation and Arbitration failed to analyze and evaluate documentary evidence before it prior to holding that there were no valid reasons for retrenchment and that procedures were not followed*.

In resisting the application, respondent filed both the Notice of Opposition and the counter affidavit.

When the application was called on for hearing, Mr. Adam Mwambene, Advocate, appeared and argued for and on behalf of the applicant while Mr. Michael Mgombozi from TUPSE, a Trade Union, appeared and argued for and on behalf of the respondent.

Arguing the 1st issue, Mr. Mwambene, learned counsel for the applicant submitted that, respondent filed CMA F1 showing that the nature of the dispute was termination, application and interpretation of any law or agreement relating to employment. He submitted further that, the dispute that was mediated is breach of contract and not unfair termination. He went on that, the Commission departed from pleadings

of the parties in CMA F1 and mediated the dispute on breach of contract. He submitted further that, parties and the Commission were bound by their pleadings and cited the case of ***Salim Said Mtomekela V. Mohamed Abdallah Mohamed***, Civil Appeal No. 149 of 2019, CAT (unreported) to support his submissions. Based on those submissions, counsel for the applicant prayed CMA award be revised and order trial *de novo*.

In arguing the 2nd issue, learned counsel for the applicant submitted that, placing on the employer's notice board the notice of intention to retrench was a sufficient service of the said notice to the employees. He referred the Court to the case of ***NAS Dar Airco Co. Ltd V. Emmanuel Igonda & Another***, Revision No. 38 of 2021, HC (unreported) and conclude that, the conclusion by the arbitrator that respondent was not served with the notice of intention of retrenchment is not correct.

Arguing the 3rd issue, learned counsel for the applicant submitted that, in terms of Section 39 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019], onus of proof of fairness of termination is to the employer and that applicant discharged that duty. He submitted further that, applicant tendered exhibits without objection to prove that termination was fair. He cited the case of ***Nitak Limited v. Onesmo***

Claud Njuka, Civil Appeal No. 239 of 2018, HC (unreported) and submit that, since there was no objection, exhibits that were tendered by the applicant, proved that termination was fair. Counsel for the applicant concluded his submission praying that the application be allowed.

Arguing the application on behalf of the respondent, Mr. Mgombozi, from TUPSE, submitted on that, in CMA F1, respondent filed the dispute of unfair termination and that the dispute that was mediated is breach of contract. He went on that, that is proper in terms of Rule 16(2) and (3) of GN. No. 64 of 2007(supra) and referred the Court to the case of ***Morogoro Canvas Mills (1998) Ltd v. Jacob Mwansumbi,*** Revision No. 42 of 2009, HC (unreported). He added that, breach of contract and termination of employment are the same and cited the case of ***St. Joseph Kolping Secondary School v. Alvera Kashushura,*** Civil Appeal No. 377 of 2021, CAT (unreported) to support his submissions. Mr. Mgombozi submitted further that, termination of employment and breach of contract both are governed by the same limitation of time namely, 30 days under Rule 10(1) of GN. No. 64 of 2007(supra). He strongly submitted that ***Mtomekela's case*** (supra), cannot apply in the application at hand because, the said case relates to land dispute while labour cases are unique. Mr. Mgombozi

submitted further that, CMA F6 was signed by the parties showing that the dispute that was mediated is breach of contract and that the mediator or arbitrator did not depart from pleadings of the parties. Upon being probed by the court, he conceded that the dispute relating to unfair termination was not mediated.

Responding to submissions made on the 2nd issue, Mr. Mgombozi submitted that, applicant did not adhere to the procedures for retrenchment and did not prove presence of valid reason for termination. He submitted further that, employers are not required to retrench employees under fixed term, rather, the contract can be terminated by agreement. He cited the case of ***Morogoro International School v. Hongo Manyanya***, Civil Appeal No. 278 of 2021, CAT (unreported) to support his submissions. He also cited the case of ***Mustafa M. Mrope & Another v. Ultimate Security (T) Ltd***, Revision No. 875 of 2019, HC (unreported) to support his submissions that employers must submit audited financial report to prove economic difficult but the same was not done by the applicant.

Mr. Mgombozi further cited the cases of ***Bakari Athuman Mtandika v. Superdoll Trailer Ltd***, Revision No. 171 of 2013, HC (unreported), ***Mtambua Shamte & 64 Others v. Care Sanitation and Suppliers***, Revision No. 154 of 2010, HC (unreported), ***Mohamed***

R. Mwenda & 5 Others v. Ultimate Security, Revision No. 440 of 2013, HC (unreported) and ***Macmillan Aidan Ltd v. Blandina Lucas Mohamed***, Revision No. 292 of 2008, HC (unreported) on procedures to be followed by the employer who desire to retrench her employees and concluded that, procedures were not adhered to. Mr. Mgombozi, without specifically submitting on the 3rd issue, concluded his submission praying the application be dismissed for want of merit.

On rejoinder, Mr. Mwambene, learned counsel for the applicant submitted that, Rule 16 of GN. No. 64 of 2007(supra) does not give power to the mediator to depart from pleadings of the parties. He added that, there was no order of amendment of the pleadings and that, if the mediator thought that the proper dispute was breach of contract, he was supposed to order amendment of pleadings. Learned counsel submitted further that, Rule 10(1) of GN. No. 64 of 2007(supra) relates only to fairness of termination and that the dispute must be filed within 30 days while Rule 10(2) of the said GN provides that other disputes must be filed within 60 days. Learned counsel for the applicant reiterated his submissions in chief in relation to the holding in ***Mtomekela's case*** (supra) and added that the principle in the said case is general. He further submitted that, ***Morogoro Canvas's case*** (supra) is distinguishable and cannot apply in the application at hand.

I have considered submissions of the parties in this application and carefully examined the CMA record and find that, in CMA F1, in paragraph 3 relating to the nature of the dispute, respondent ticked the area showing that the dispute is on application/interpretation/ implementation of any law or agreement relating to employment. She further ticked the area showing that the dispute relates to unfair termination. It is my view that, CMA F1, that is a pleading, was defective. This court held in the case of ***Bosco Stephen vs Ng'amba Secondary School*** (Revision 38 of 2017) [2020] TZHC 390, ***Ngorongoro Conservation Area Authority vs Amiyo Tlaa Amiyo and Another*** (Labour Revision Application 28 of 2019) [2022] TZHC 3078 and ***Marie Stopes Tanzania (mst) vs Bernard Paul Mtumbuka*** (Revs Appl No. 368 of 2022) [2023] TZHCLD 1136 that, filling a defective CMA F1 that is pleading, makes the dispute to be defective and incompetent. I therefore hold that CMA F1 was defective and that the arbitrator was not supposed to proceed with hearing evidence of the parties based on the said defective CMA F1.

It was submitted by counsel for the applicant that respondent filed the dispute of unfair termination but the dispute that was mediated is breach of contract. In his submissions, Mr. Mgombozi from TUPSE, a trade union on behalf of the respondent conceded that the dispute

relating to unfair termination was not mediated. I have examined the certificate of non settlement (CMA F6) and find that the dispute that was mediated is breach of contract and not unfair termination. Therefore, the mediator proceeded to hear evidence of the parties and issued an award based on unmediated dispute. That was wrong because, in terms Rule 4(2) of GN. No. 67 of 2007(supra), mediation is compulsory. The said Rule provides: -

> *"4(2) whether agreed parties have settled or not, the **mediation (sic) under the employment (sic) and Labour Relations Act is compulsory** and parties shall attend the mediation and attempt to resolve the dispute without strikes and lockouts." (*Emphasis is mine).

In fact, the Court of Appeal in its opening sentences in the case of ***Barclays Bank T. Limited vs Ayyam Matessa*** (Civil Appeal 481 of 2020) [2022] TZCA 189 shows that mediation in labour disputes is compulsory. The opening statement in the said case reads: -

> *"…The complaint, it would appear, was disposed of at the level of compulsory mediation before the same had been referred to arbitration…"*

This court, had, on several occasions, held that mediation in labour disputes is compulsory. See the case of ***Lucas Abel Bumela and Another vs CRC Groupe Ltd K.N.Y Desert Eagle Hotel*** (Revision Application No. 41 of 2023) [2023] TZHCLD 1294 and ***Nelson Mwaikaja vs Gemshad Ismail & Usangu General Traders*** (Revs

Appl No. 382 of 2022) [2023] TZHCLD 1. In ***Mwaikaja's case*** (supra) this court held: -

> *"In labour disputes, mediation is compulsory as provided for under Rule 4(2) of GN. No. 67 of 2007(supra). Therefore, all disputes filed at CMA must be mediated prior going to the arbitration stage."*

It is my considered opinion that, the arbitrator erred to hear and determine the dispute relating to unfair termination while the said dispute did not pass through compulsory mediation process.

It is my further view that, the provisions of Rule 16(2) and (3) of GN. No. 67 of 2007(supra) and Rule 13(5) GN. No. 67 of 2007(supra) relied on by the arbitrator to dismiss the preliminary objection that was raised by the herein applicant, does not give power to the mediator to choose and mediate a dispute different from the one filed by the parties. I am of that view because, section 86(2) of Cap. 366 R.E. 2007(supra) clearly shows that it is the party who refers the dispute and not the mediator or the arbitrator. In fact, the dispute must be referred to the Commission in a prescribed form as provided for under section 86(1) of Cap. 366 R.E. 2019(supra). The said prescribed form is CMA F1. If it happens that the Mediator changes the nature of the dispute and proceed to mediate the parties without amending the Referral Form (CMA F1) as it happened in the application at hand, then, technically, the dispute that will be mediated, is not the one referred at CMA by the

parties in terms of section 86(1) of Cap. 366 R.E. 2019, rather, by the mediator. It is my view that, it is not the duty of the mediator to change the nature of the dispute, rather, his duty is to mediate the parties. The least the Mediator can do, is to advise the parties on the nature of the dispute, of course, that can be done during a separate session with any of the parties, and not to change the nature of the dispute completely and proceed to purportedly mediate the parties on the new dispute expecting to have positive mediation. More so, section 86(3) of Cap. 366 R.E. 2007(supra), is loud and clear that, once the dispute is filed, then, the Commission appoints the Mediator to mediate the parties. It is therefore my considered opinion, as it was correctly submitted by counsel for the applicant that, the mediator was bound by pleadings of the parties and was not supposed to depart therefrom. In the case of ***Salim Said Mtomekela vs Mohamed Abdallah Mohamed*** (Civil Appeal No. 149 of 2019) [2023] TZCA 15 cited by learned counsel for the applicant, the Court of Appeal quoted with approval a passage in an article by Sir Jack I.H. Jacob bearing the title, "The Present Importance of Pleadings," first published in Current Legal Problems (1960) at p. 174 thus:-

> *"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 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 no 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."

In ***Mtomekela's case*** (supra), the Court of Appeal having quoted the above passage, went on that:-

> *"In the bolded expression, it is glaring that since parties are bound by their pleadings, neither the parties nor the court can depart from such pleadings except where the court has granted leave to amend the requisite pleadings."*

A similar position was held by the Court of Appeal in the case of ***Martin Fredrick Rajab vs Ilemela Municipal Council & Another*** (Civil Appeal 197 of 2019) [2022] TZCA 434, ***Jonathan Kalaze vs Tanzania Breweries Limited*** (Civil Appeal 360 of 2019) [2022] TZCA 312, ***Yara Tanzania Limited vs Ikuwo General Enterprises Limited*** (Civil Appeal 309 of 2019) [2022] TZCA 604, ***Registered Trustees of Islamic Propagation Center (ipc) vs The Registered Islamic Center (tic) of Thaaqib Trustees*** (Civil Appeal 2 of 2020)

[2021] TZCA 342, ***Barclays Bank T. Ltd vs Jacob Muro*** (Civil Appeal 357 of 2019) [2020] TZCA 1875 to mention just a few. It is my view that, that is now settled law. It is my view further that, submissions by Mr. Mgombozi for the respondent that the holding in ***Mtomekela's case*** (supra) does not apply to labour cases, is a great misconception. The principle in the said case and the above cited cases, is of general application. In fact, ***Muro's case*** (supra) is a labour case like the application at hand and the Court of Appeal took a similar stance in ***Motomekela's case*** (supra)that parties and the court are bound by pleadings of the parties. I therefore hold that, the mediator was bound by pleadings of the parties in CMA F1 and was not supposed to change the nature of dispute from unfair termination to breach of contract and proceed to mediate the parties. I further hold that the arbitrator erred to dismiss the preliminary objection that was raised by the applicant after the mediator has departed from CMA F1, i.e., the pleading that was filed by the respondent.

For all what I have discussed hereinabove, I find that the application is merited. I hereby nullify CMA proceedings, quash and set aside the award arising therefrom.

What I have held hereinabove has disposed the whole application. I will therefore, not discuss other issues raised by the applicant. I

therefore, direct the parties to go back to CMA so that the dispute can be mediated and thereafter arbitrated.

Dated at Dar es Salaam on this 16th August 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on 16th August 2023 in chambers in the presence of Issa Mrindoko, Advocate for the Applicant but in the absence of the Respondent.

B. E. K. Mganga
JUDGE