IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 158 OF 2023

(Arising from the award of the Commission for Mediation & Arbitration of DSM at Kinondoni, Y Ngwashi: Arbitrator) Dated 16th June 2023 in Labour Dispute No. CMA/DSM/KIN/318/19/159/21)

COGSNET TECHNOLOGIES CO. LTD.....APPLICANT

VERSUS

DAUDI NORBERT KABADI.....RESPONDENT

JUDGEMENT

19th Sept to 13th Oct. 2023

OPIYO, J.

Aggrieved with the award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] the applicant has filed this application under Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and 28(1)(c)(d) and (2) of the Labour Court Rules, GN No. 106 of 2007. Also under Section Sections 91(1)(a)(b), (2)(a)(b)(c), (4)(a)(b) and 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 [CAP 366 RE 2019] and any other enabling provisions of the law, praying for the orders that this court be pleased to exercise its revisional jurisdiction and call for and examine the records of the proceedings and the award of the Commission for

Mediation and Arbitration in Labour Dispute No. CMA/DSM/KIN/318/19/159/21 for the purpose of satisfying itself as to the correctness, legality or propriety of the decision.

Historically, the respondent was employed by the applicant on 3rd January 2018 as a Programmer under yearly fixed term contract. Occasionally in February 2019 it was alleged that the applicant breached the automatic renewable contract of one year. Aggrieved by the decision, respondent filed the matter to the Commission. At CMA the matter was decided on his favor by being awarded compensation of 9 month's salary to the tune of TZS 27,500,000/= as a compensation for the remained period. The applicant herein being aggrieved with the award triggered this application.

Along with the Chamber summons, the applicant filed an affidavit sworn by Mr. Thomas Herman, applicant's Principal Officer, in which after expounding the chronological events leading to this application, the applicant challenging the decision of the arbitrator on the ground that the respondent's employment ended after his contract being expired.

The applicant's affidavit at paragraph 10 contains five legal issues are as follows: -

i) Whether it was proper for arbitrator to hold that, there was a breach of contract while there was no contract between applicant and the respondent.

ii) Whether the arbitrator based her award on the evidence tendered during hearing.

iii) The Hon. Arbitrator erred in law and facts by considering and basing her decision on assumptions and documents not tendered and not admitted during hearing of the matter.

iv) Whether it was lawful to award the respondent, TZS 27, 500,000/= while the respondent was not an employee of the applicant.

v) The Hon. Arbitrator erred in law after considering document which was not admissible during the evidence.

The application was challenged by the respondent counter affidavit.

The application was disposed of by a way of written submissions. The Applicant was represented by Mr. Vicent Mlele, Advocate, whereas respondent was represented by Mr. Omega Myeya, Advocate.

Supporting the first ground as to whether there was a breach of contract, Mr. Mlele submitted that basing on the facts and circumstances surrounding this case, a proper deliberation and final answer to this question requires consideration of two limbs that makes up the above issue. These are; (a) whether the respondent was still under the contact of service on the alleged date of breach and (b) whether there was automatic renewal of the respondent's contract of service by the applicant. For Sequential flow of argument, the second limb of question will be dealt with first.

Mr. Mlele argued that, it goes without questioning that, the respondent was employed under a fixed term contract whose span or survival was to expire upon culmination of the intended contractual period. He stated that, the respondent signed a one-year contract from 3rd January 2018 to 2nd January 2019. However, clause 2 of the employment contract shows that the respondent signed indicated categorically that the contract was to commence on date of signing and would remain in effect until 2nd January 2019. He further added that the respondent's contention before the CMA was that the applicant breached the contract on 27th February 2019, when he had already been in continued service for two months since expiration of the original contract.

Insisting on how fixed term contract comes to an end, Mr. Mlele urged that unlike a permanent contract, a fixed-term contract has a specific end date, as per **Rule 4(2) of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007** confirms this position. It therefore terminates automatically when the agreed period expires.

Basing on the above rule, he is of the view that the employer is not even required to give notice upon expiry of the contract except where the contrary exists. According to him the arbitrator finding that the contract was renewed as per Rule 4 (3) of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007 lacks legal posture. He argued that, although the law sets possibility of automatic renewal, this is to be judged much from the circumstances of each case. He added that these circumstances are to be drawn from the contract of employment itself especially on whether the contract is renewable and what are the set conditions for its renewal and termination.

Mr. Mlele submitted that the respondent alleged automatic renewal of the contract, likewise, supported by the arbitrator, but to prove

automatic renewal relying on the provision of rule 4(3) of GN No. 42 of 2007, the respondent is duty bound to prove that he continued working for the applicant even after expiration of the contract. He stated that in this matter, no proof was given to that effect instead the arbitrator relied on his findings on the fact that the applicant did not tender evidence to prove how the employment contract had ended.

Mr. Mlele contended that, the law places the duty to prove a fact to a person alleging its existence. That, since the respondent alleged that his contract had been renewed after working beyond the contractual time, he is of the view that the respondent was duty bound to prove this fact to the arbitrator and not otherwise. The respondent ought to have submitted evidence, which he did not, to prove his continued service with the applicant as stated in **Dotto Shaban Kuingwa v. CSI Engineering co. Ltd** (Revision No. 5 of 2020) 12020] TZHCLD 128. The respondent ought to have submitted his salary slip/salary payment details, accomplished work, work assignment, and other evidence to prove his services to the applicant beyond contractual period. In absence of any evidence to this effect, no one cleanly

submit that the respondent was the employee of the applicant after expiration of the original contract.

It was further submitted that, it is not true that there was no evidence before the arbitrator to prove how the contract of the respondent had ended. He stated that, the contract of employment itself was enough proof, as per Clause 2 of the employment contract between the parties provided the commencement and expiry date. Likewise, the contract signed by the parties was a fixed term and a non-renewable contract. Throughout the contract, there is no any term that talks of renewability; hence, it is surprising that one could think of renewing a contract which is not intended to be renewed. The applicant did not even need to issue notice because termination in this case was automatic and the parties under the contract did not intend the requirement of notice.

Regarding the allegation of email, Mr. Mlele submitted that the same has no legal stand. This is because, the said evidence was presented before the arbitrator and the proceedings shows clearly that it was not admitted for contravening the law on admission of electronic evidence as detailed in the case of **Simbanet Tz Ltd v. Shava Media Group Ltd,** Comm. Case No. 2 of 2016. Wherefore, there

was no any evidence to support respondent's allegation that he remained with the applicant upon expiry of his contractual period. Therefore, there was no evidence to support that the respondent's contract with the applicant had obtained automatic renewal following its expiry. Likewise, there was no renewal expectation established by the applicant's conducts as required by the law.

Finally, Mr. Mlele submitted that having deliberated on the second limb of question, a direct response to the first limb of question is that the respondent was not an employee of the applicant on the alleged date of breach of contract. He stated that the contract of employment was never renewed, and the parties' relation had ended following expiry of the contract. Therefore, the respondent had no right to claim anything from the applicant. He added that, there was no breach of contract, contrary to the finding of the arbitrator, because the contract between the parties had come to an end and the same was not renewed, hence, there was no contract to be breached on the alleged date.

On whether the award by the arbitrator was based on properly

tendered evidence, Mr. Mlele submitted that, the only evidence that was sought to be submitted by the respondent in support of breach of contract was an email alleged to be from the applicant.

He continued to state that, having gone through the CMA file it is clear that when the respondent brought the purported evidence the applicant challenged its admission for contravening legal requirements leading to its non-admission. He added that the evidence sought to be submitted was electronic evidence whose admission requires among other things, filing of a certificate of authenticity before the CMA. This was not done. On that basis, he believes that the arbitrator rightly denied its admission of the said evidence. This implied that, there was no evidence of such nature before the CMA. The relevant question now is whether having denied admission of the evidence, was it correct for the arbitrator to consider such evidence in the award. There are number of decisions by the courts of record in our jurisdiction regarding the foregone question, as was discussed in the case of **Mhubiri Rogega Mong'ateko v. Mak Medics Ltd,** (Civil Appeal 106 of 2019) [20221 TZCA 452 where the Court held, among others, that; -

"It is our considered view that, the purported exhibit D4 which is the alleged admission by the appellant that he occasioned loss to the respondent was not admitted in evidence for it to be acted upon to decide the case. It is trite law that, a document which is not admitted in evidence cannot be treated as forming part of the record even if it is found amongst the papers in the record."

He said that, the above authority puts an embargo on the courts from relying on evidence/exhibits not admitted as evidence. Thus, the arbitrator in the present case had no any other evidence to prove breach of contract and that the respondent was still in service to the applicant apart from the alleged email extract which, as 'records of proceedings shows, was not admitted. Any finding by the arbitrator to show that the respondent was working for the applicant and that his contract was breached points to only one conclusion that, the arbitrator relied his findings on the evidence/exhibit which did not form part of the records, hence, alien, even if it was within the papers in the records.

The counsel argued that, the arbitrator inadvertently acted upon evidence not forming part of the records of the case and as a result reached an erroneous conclusion and award which has prejudiced the

applicant. Luckily, this court can rectify the said error and the circumstances to do so are ripe and calling. He believes that in absence of proof of service beyond the expiration of the contract and evidence on the nature of breach, the respondent's case had no legs to stand. Thus, the award by the arbitrator did not base on properly admitted evidence as required by the laws.

On whether the compensation award by the arbitrator was properly made, Mr. Mlele submitted that, it suffices to state beforehand that answers from the first and second issue disposes the third issue. Since there was no automatic renewal of the contract, then applicant was entitled to nothing, as there was no breach of contract. This is the finding of the Court in **Good Samaritan v. Joseph Robert Savari Munthu,** Rev. No. 165/2011, HC Labour Division DSM (unreported) which quoted with effect in **Jordan University College v. Mark Ambrose** (Revision No. 37 of 2019) [2020] TZHCLD 199: In this case it was held that; -

> *"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 wrongful action…"

From the above authority, the learned counsel submitted that, if the respondent managed to prove the case, it would have been right for the arbitrator to award loss of salary of the remaining period, on that basis he is of the opinion that the arbitrator was wrong to award 27,500,000/= as compensation for breach. He thus, prayed for this Court to revise and set aside the CMA award.

In reply to the application, Mr. Myeya submitted that the entire applicant's submission is grounded on the assertion that the Arbitrators' Award should be faulted for want of proof by the respondent that he continued to work for the Applicant on expiry of the fixed term contract (the 1st contract) that was due to end on 2nd January 2019, contrary to the testimony of Defense witness DWI namely Oscar Kisanga, testifying before the trial commission on 17th February 2023 especially during cross examination when he was asked as to whether the Respondent was notified on his termination he testified that the respondent was notified on his termination by written notice and promised to avail such a notice before the commission. The question is if the Respondent was not working for

the Applicant under automatic renewal contract why such was such termination notice issued? According to him, the termination notice justifies renewal of the 2nd contract, since the 1st one had no such a query.

Moreover, the email that has been discussed at length in the applicant's submission although it was not admitted during the respondent's case due to non-observance of tendering the electronic evidence procedure also may be noted to mean that the renewable contract was breached by the applicant since the email was released by the herself addressed to the respondent during the automatic renewed contract.

Mr. Myeya contended that, even reading between the lines of the applicant's opening statement at paragraphs 7 and 8 indicates an admission by the applicant that the respondent continued to attend at work, in paragraph 8 the applicant seems to promise the respondent to reconsider him for a new agreement while unfortunately there was already in place the renewal by default contract as provided under the Employment and Labour Relations (Code of Good Practice). G.N No. 42 of 2007, under Rule 4(3) which provides that: -

"Subject to sub rule (2), a fixed term contract may be renewed by default if an employee continues to work after the expiry of the fixed term contract and circumstances warrants it"

He viewed that, since there is a proof that the respondent continued to work for the applicant under automatic renewed contract as above shown, the Arbitrator was absolutely correct in the award hereto challenged. Thus, they prayed for the application to be dismissed for lacking merits.

In rejoinder the Mr. Mlele mainly reiterated his submission in chief and pressed more on the need to the application to be granted.

Having heard the counsels for the parties, the main issues for this courts consideration are two; one is whether document that is not admitted forms part of evidence and second is whether the respondents contract of employment was automatically renewed entitling him to the award for breach of the same. Both grounds will be jointly disposed for the interdependence between them.

At trial Commission, the arbitrator found that the applicant's employment contract was breached, on the reason that there was an automatic renewal, hence awarded compensation to the tune of TZS

27,500,000/=. On the issue whether the respondent's contract of employment was automatically renewed, the parties' arguments and evidence on record will be critically considered. Challenging the alleged automatic renewal, the applicant's Counsel alluded that there was no evidence admitted before CMA to justify automatic renewal of employment contract. He further added that the alleged email to have been issued by the applicant constituting alleged notice of termination was not admitted to the Commission for lacking authenticity. For that reason it could not stand as evidence, thus it was wrongly used by the arbitrator in reaching its finding.

On other side, the respondent maintained that non admission of the email relating to the notice of termination, could not invalidate the whole notion that the respondent continued to render services for more than two months, after the previous contract expired. In resolving the contested questions, I feel the urge to stress the gist of the provision of Rule 4(2) of G.N No. 42 of 2007 which provides that:-

> *"Rule 4(2) where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise.*

The above provision indeed as argued by Mr. Mlele draws a demarcation on how contract of fixed term in relation to employment ends, contrary to other types of contracts. In this matter it is undisputed that the respondent was employed from 03rd January 2018 to 2rd January 2019 under yearly fixed term as per Exhibit D-1 (employment contract). It is fundamental that the parties to an agreement be guided by agreed terms governing their relationship, otherwise, it would be a muddled state of affairs if each is left to act as he wishes (see **Hotel Sultan Palace Zanzibar vs. Daniel Laizer & Another**, Civil. Appl. No. 104 of 2004, Court of Appeal of Tanzania).

In the current matter, it is undisputed that the respondent voluntarily agreed to be employed under fixed term contract that was ending on 3rd January 2019. This date passed, meaning that the contract automatically ended on that date. Therefore, claim of automatic renewal must be supported or encompassed with several factors criteria which justify existences of continued employer/employee relationship. That is whether after expiration of the contract, the respondent's alleged continued stay in the office was in furtherance of the employer employee relationship in the context ascribed to it by

provision of section 61 of the Labour Institutions Act, which provides that: -

> *"For the purpose of labour law, a person who works for or renders a service to other person, is presumed until the contrary is proved to be an employee regardless of the form of contract if any, one or more of the following factors is present:*
> *a) The manner in which the person works subject to the control or directions of another person.*
> *b) The person hours of work are subject to the control or direction of another person.*
> *c) In the case of person who works for the organization, the persons form part of the organization.*
> *d) The person has worked for that other person for an average of at least 45 hours per month over the last three months.*
> *e) The person is economically dependent on the other person for which that person renders service.*
> *f) The person is provided with tools of trade or works equipment by the other person.*
> *g) The person only works or renders service to one person.'*

Basing on the above cited provision, it is a principle of law that, for an employer-employee relationship to be established, the above-mentioned factors should not be considered in isolation. In this matter, in my considered view, no evidence was tendered at CMA which qualified to establish employer/employee relationship for an automatic renewal to exist.

Having found that, I agree with Mr. Mlele that by citing the case of ***Simbanet Tz Ltd's Case(supra)*** as the applicant failed to prove his continued working for the applicant on the factors reflected above (within ambit of **Section 61 of the LIA)**, after expire of previous contract, he cannot acquire the status of being applicant's employee after his previous contract ended on 2nd January 2019. On such basis, I am of the view that, the automatic ending of fixed term contract upon expiry of prevails. The respondent could not rebut the same without any evidence on applicant's conduct which justified renewal. As argued by Mlele that, the respondent ought to have submitted his tangible evidence like salary payment details or slips, work he was assigned or accomplished and other evidence to prove his services to the applicant beyond contractual period. In absence of all these it is difficult to note that the respondent was still employed by the respondent after the expiry of his fix term contract. Section 110 (1) and (2) of the Evidence Act, Cap 6, RE 2019 impose duty to the person who alleged to prove. Therefore, the arbitrator was not right in making decision basing on assumptions and documents not admitted to reach a conclusion that the applicant was an employee and entitled to compensation as it did. In such circumstances, I agree with the applicant's Counsel by citing the case of ***Mhubiri Rogega***

Mong'ateko(Supra) where the Court held, *inter alia* that the email purported to constituting termination notice that was not admitted in evidence was not worth acting upon in reaching the finding the Commission had.

In the upshot, it is my finding that, the major issue as to whether the applicant has adduced sufficient grounds for this Court to exercise its revisional power in Labour Dispute No. CMA/DSM/KIN/318/19/159 is answered affirmative. Thus, the application is held to have merits. It is allowed by quashing and set aside the CMA award. I give no order as to the cost of the suit.

It is so ordered.

M. P. OPIYO,

JUDGE

13/10/2023