

TANZANIA / JUDGMENT

sinohydro corporation limited vs mulidi mputo omary 2023 tzhcld 1457 11 october 2023

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11 October 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LABOUR DIVISION) AT DAR-
ES-SALAAM LABOUR REVISION NO. 144 OF 2023 (Originating from Labour Dispute No. CMA/
DSM/TEM/208/2022/130/2022) BETWEEN SINOHYDRO CORPORATION
LIMITED..... APPLICANT AND MULIDI MPUTO
OMARY..... RESPONDENT

JUDGEMENT

Date of last Order: 21/09/2023 Date of Judgement: 11/10/2023 MLYAMBINA, 3. There are three types of employment contracts recognized in Tanzanian labour laws as provided for under Section 14 of the Employment and labour relations Act, [Cap 366 Revised Edition 2019] (herein ELRA) which provides to the effect that: A contract with an employee shall be of the following types-

- (a) a contract for an unspecified period of time;
- (b) a contract for a specified period of time for professionals and managerial cadre;
- (c) a contract for a specific task. In a nutshell, the above types of contracts were elaborated in my previous decision in the case of City Square Hotel v. Kassim i Copriance, Revision No. 373 of 2022, High Court Labour Division where it was stated as follows: The first type of contract is also known as the permanent contract which is terminated upon reaching the retirement age. The second type is a contract of a fixed term, terminated upon expiry of the agreed term; whereas, the last contract is a contract which is terminated upon completion of a certain task. The ELRA (supra) provides for terminal benefits which may be enjoyed by employees of all categories or types of employment upon termination of their employment contracts. Those terminal benefits are provided for under Section 44 of the ELRA (supra). The stipulated benefits are awarded depending on the nature of each case. However, the specific remedies of unfair termination are awarded differently depending on the nature of employment contract of the unfairly terminated employee. For the employees under permanent contract, the law is very clear under Section 40 of the ELRA (supra) that the

unfairly terminated employee may be reinstated to his employment, re - engaged or be paid compensation of not less than twelve months remuneration. As regards the employee who had fixed term contract, the remedies to be awarded have been developed by case laws. That, such an employee is entitled to be paid salaries for the remaining period of the contract. The principle was established in the landmark case of Good Samaritan v. Joseph Robert Savari Munthu, Labour Revision No. 165 of 2011 reported in High Court Labour Digest No. 09 of 2013 where it was held that: When an employer terminates a fixed term contract the loss of salary by the employee of the remaining period unexpired term is a direct foreseeable and reasonable consequence of the employer's wrongful action. Therefore, in this case, probable consequence of the Applicant's action was loss of salary for the remaining period of the employment contract which was 21 months. To that extent, the arbitrator's award is sound in law and I see no basis to revisit it. As regards to employees who had specific task contract, their remedies is the centre of the decision at hand. What is the remedy to be awarded to an employee who had specific task contract? Before I proceed with the matter, I will point out the brief background of the dispute. The Respondent was employed by the Applicant as a Driver on a specific task contract commenced on 07/09/2021. It was agreed the contract to come to an end upon completion of the specific task. Before the task was accomplished, the Respondent was terminated from employment on the ground of gross negligence that he damaged 2 truck tires and 2 rims due to reckless driving on 25/05/2022. Aggrieved by the termination, the Respondent referred the matter to the Commission for Mediation and Arbitration (herein CMA) where the dispute was decided on his favour. The Applicant was ordered to pay the Respondent a total of TZS 4,628,000/= being twelve (12) months compensation for the alleged unfair termination. Being dissatisfied by the CMA's Award, the Applicant filed the present application urging the Court to determine the following

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 proceeded by way of written submissions. Before the Court, the Applicant was represented by Mr. Tesiel Augustino Kikoti, Learned Counsel. On the other hand, the Respondent appeared in person. The above issues were jointly argued. Mr. Kikoti submitted that; all complaints before CMA are initiated by filing CMA Form No. 1 and what is pleaded in the form should reflect the nature of the employment contract signed by parties. He said, looking at the nature of employment in this case, the Complainant was employed by the Applicant in the construction of Rapid Transport Road Project from Kariakoo to Mbagala for specific terms contract whereby the contract would have come to an end upon accomplishment of the specified task given to the Complainant as it is reflected in the employment contract (exhibit D1). Mr. Kikoti went on to submit that the contract is self-explanatory that the terms of the

contract between the parties was for specific term contract and not permanent one. He added that, the Complainant was employed as a tipper driver for hauling building materials from one place to another whereby the end of his duty would have come to an end after the accomplishment of the hauling of building materials. Mr. Kikoti argued that the Arbitrator wrongly awarded the Complainant 12 months salaries as the remedies of termination of employment which is contrary to the Complainant contract of specific terms. Mr. Kikoti further argued that the complaint of termination before the CMA was wrongly instituted. He was of the view that the nature of the complaint before the CMA was supposed to be breach of contract. He went on to argue that the CMA erred in law and facts for holding that the employment contract was of permanent one without considering tenure of the contract agreed by the parties and proceeded to award remedies of termination of employment which cannot apply to specific terms contract. In support of his submission, Mr. Kikoti relied to the case of Mtambua Shamte and 64 Others v. Care Sanitation and Suppliers, Rev. No. 154 of 2010, whereby my Sister Hon. Rweyemamu, J. (as she then was) at page 8 paragraph 2 had this to say: Now, principles of unfair termination under the Act do not apply to specific task or fixed term contract which come to an end on the specific time or completion of a specific task... In the upshot, Mr. Kikoti urged the Court to revise and set aside the CMA's decision. In response to the application, the Respondent submitted that the employment contract entered between the parties was of unspecified period of time which implies that it was a permanent one. He stated that; his contract run concurrently with the project. Therefore, so long as the project continues to be implemented, his contract would also stay operational. The Respondent insisted that his contract was for unspecified period of time. He further submitted that the CMA's Award was correct. He persuaded the Court to uphold the CMA's Award and dismiss this application. I have dully considered the argument of both parties. Since the grounds of revision were jointly argued, the Court will also proceed to determine the application jointly. The Applicant insisted that the complaint was improperly initiated at the CMA. That the Respondent ought to have sued for breach of contract and not unfair termination as he did. The reason being that his contract was for specific term. This Court encountered similar circumstances of this case in the case of City Square Hotelcity Square Hotel v. Kassim Copriance, Labour Revision No. 373 of 2022, High Court of Tanzania Labour Division at Dar es Salaam (unreported) where it was held that: ... it is my view that it is not fatal for an employee under fixed term contract to fill both part A and B of the CMA FI. I say so because of the following reasons: First, there is no specific part in the referral form to be filled with an employee who claims only for breach of contract. Second, the principles of unfair termination apply to both types of contracts and the only difference between the said contracts will be on the reliefs awarded to the affected employee. In a permanent contract, the remedies available are provided under section 40 of ELRA 7 while in fixed term contract an employee is awarded salaries for the remaining period of the contract, a remedy which was developed by case laws including the case of Azama Rajabu Mbilanga v. Shield Security Services Limited, Rev. No. 113/2019. Third, a party cannot be condemned while the form itself is not exhaustive. As stated above the form does not have a specific part to be filled by an employee who claims for breach of contract.

Fourth, the CMA is encouraged to conduct arbitration with minimal legal formalities as it is provided under section 88(4)(b) of the ELRA which provides as follows: The arbitrator-

- (b) shall deal with the substantial merits of the dispute with the minimum of legal formalities. Also, I maintain the above position in this case. An employee with specific term contract can fill both part of the form because principles of unfair termination apply to both types of the contract whether fixed or permanent. This is the Court's position in the case of St. Joseph Kolping Secondary School v. 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). As to the allegation that the Respondent was awarded remedies awardable to specific terms contract, it is my view that each case should be decided in its own peculiar circumstances. It is undisputed fact that, in the matter at hand, the Respondent was employed for specific task as clearly stated in the employment contract (exhibit D1). At clause 2 of the contract, it is stated as follows: Mkataba huu utanza rasmi leo tarehe 07/09/2021 na utamalizika pindi kazi maalum itakapokamilika na kuthibitishwa kwa maandishi na msimamizi wa idara husika kwa niaba ya mwajiri. The contract was agreed to end upon completion of a specific task. Going through the records, it is uncertain when was the task supposed to end. The Applicant did not tender any proof of when the task was supposed to end. Under such circumstances, the Respondent's contract remained unspecified contract which is also termed as a permanent contract. Therefore, after the finding that the Respondent was unfairly terminated from employment, the Arbitrator was right to award him 12 month's salaries as compensation. The Respondent would have been entitled to specific remedies if there was a certain end of employment. As stated above, the record is silent when would the specific task be accomplished. In the end result, I find the present application has no merit. The Arbitrator properly awarded the Respondent. Thus, the CMA's Award is hereby upheld. Hence, the application is hereby dismissed with no order as to costs. It is so ordered. y.j. r JUDGE 11/10/2023 Ruling delivered and dated 11th October, 2023 in the presence of learned Counsel Rashid Kiliza for the Applicant and the Respondent in person. Right of Appeal fully explained. m V Y. J. MLYAMBINA JUDGE \$// 11/10/2023

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