IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)
AT DODOMA

LABOUR APPEAL NO. 1 OF 2021

SOUTHERN SUN HOTELS TANZANIA LTD..... APPELLANT

VERSUS

THE LABOUR COMMISSIONER.....RESPONDENT

JUDGMENT

9/11/2021 & 10/12/2021

KAGOMBA J,

This is an appeal against the order of the Acting Labour Commissioner (Andrew H. Mwaluswi) given on 14/4/2021 and communicated to SOUTHERN SUN HOTELS TANZANIA LIMITED (the "appellant") on 16th day of April, 2021 vide a letter with reference No. 101/210/01 dated 13/4/2021.

The Memorandum of Appeal made under rule 31(1), (2) and (3) of the Labour Court Rules, 2007 GN No. 106 of 2007 against THE LABOUR COMMISSIONER (the "respondent") sets out five grounds of appeal as follows:

1. The decision /order was illegally issued by the Acting Labour Commissioner who is not empowered by law to make decision/orders of that nature.
2. The order of the Acting Labour Commissioner is tainted with illegality as it purports to have been given on 14th April, 2021, but it was

communicated to the appellant vide a letter with reference No. 101/210/01 dated 13th April, 2021;

3. The Acting Labour Commissioner misdirected himself in law and fact in confirming the Compliance Order of the Labour Officer which did not take into consideration the fact that the contract between the appellant and the affected employees were discharged by frustration caused by Covid-19 pandemic;
4. The Acting Labour Commissioner erred in fact and in law in confirming the Compliance Order of the Labour Officers without considering that employment means the performance of a contract of employment by the parties to the contract under employer-employee relationship and there was no performance by either party since April, 2020 when the hotel services were suspended due to outbreak of Covid -19 pandemic
5. The order of the Acting Labour Commissioner was made in violation of the law as it was made without considering representations and trade union (if any) as required by law to do.

For those grounds, the appellant prayed the court to allow the appeal and set aside the orders of the Acting Labour Commissioner and the Labour officer.

The background of this dispute reveals that on 13th of January, 2021 Amina Mmbaga, Principal Labour Officer acting for the Regional Labour officer, Dar es Salaam, gave an "Order to Appear before Labour Officer" (Form LAIF 1) made under regulation 11 of the Labour Institutions (General) Regulations, 2017 (henceforth "Labour Regulations") with reference No. U. 10/4/45/21/03 to the Director of the appellant, for questioning or

explanation regarding compliance of Labour laws or complaint lodged by Southern Sun employee. The order required the Director of the appellant to appear before the Labour officer with some documents or records pertaining to employees' services contracts, payroll for the months of March -December, 2020 as well as NSSF and WCF Returns for that period. The order cautioned the appellant that non- compliance is an offence under the provisions of section 49(1) (f) and 63(1)(f) of the Labour Institutions Act, [Cap 300 R.E 2019] (henceforth "the LIA"). It is not shown clearly if the appellant complied with the said order.

On 2nd of February, 2021 a Compliance Order (LAIF 4) made under regulation 10(1) of the Labour Regulations with Reference No. DAR/U.10/4/2021/06 from Labour Administration and Compliance Services, was made to the Director of the appellant. This time the Compliance Order required the appellant to pay unpaid remuneration (arrears) for twenty-six (26) employees as prescribed in annexure "A" to the Order made under section 27(1) of the Employment and Labour Relations Act, [Cap 366 R.E 2019] (henceforth "ELRA"). The appellant was required to comply within 30 days from the date of receipt of that order, which was served on the appellant on 2/2/2021. Annexure A, forming part of the order, carries a list of names of 26 employees with unpaid 80% of their salaries from April 2020-January 2021 of TZS 170,987,800/=.

The appellant, on 25/2/2021 filed objection to the Labour Commissioner challenging the Compliance Order dated 2/2/2021, based on the reasons stated in the Memorandum of Objection.

The Memorandum of Objection stated, among other reasons, that the hotel was closed from the end of March 2020 and has remained closed to the date of the objection due to the outbreak of Covid -19 pandemic. The objection also revealed that the Hotel was paying their employees a stipend of 20% of their salaries.

The second ground of objection was that all employees have been at home for all that time from end of March 2020 receiving 20% of their salaries.

Thirdly, the Covid-19 pandemic has resulted in frustration of the hotel's contracts with its employees stating that as a result of that frustration, the Compliance Order is incapable of being implemented.

The Memorandum of Objection also cited how the Covid-19 pandemic has affected the flow of tourists into the country who were potential clients and disruption of hotel business generally.

On the other hand, the Memorandum of Objection informed the Labour Commissioner about a pending Labour dispute at the Commission for Mediation and Arbitration (CMA), namely Labour Dispute No. CMA /DSM/ILA /673/20 over the same claim for payment of full salaries filed by 56 employees. The appellant argued in the said Memorandum of Objection that the implementation of the Compliance Order will adversely prejudice the pending proceedings as the propriety and lawfulness of payment of 20%

was in contention before CMA. The Memorandum of Objection further informed the Labour Commissioner that the hotel was under negotiation for a mutual separation arrangement with staff for part payment as liquidation of the Hotel was imminent if an amicable resolution was not achieved.

The Acting Labour Commissioner Andrew H. Mwalwisi, on 14/4/2021 signed a Labour Commissioner's Order (LAIF. 6) confirming the Compliance Order issued by the Labour Officer on 2/2/2021 having considered the objection filed by the appellant. The Acting Labour Commissioner gave the following reasons for confirming the Compliance Order: -

i. That the Labour Officer had conducted an inspection visit at the appellant's organization and found that the appellant contravened the provision of section 27(1) of the ELRA by failure to pay remuneration (arrears) to her employees;

ii. The decision to close the hotel and let the employees stay home during Covid -19 outbreak without paying their salaries was not a decision based on mutual agreement between the employer and the 26 employees;

iii. It was not clearly stated in the appellant's objection letter whether the 26 employees were among the 56 employees who filed a complaint at CMA.

iv. It was not stated in the objection letter whether a Compliance Order was issued by a Labour officer before or after the alleged filed Labour Dispute No. CMA /DMS/ILA/673/20. Even the filing date was not disclosed.

v. There was no good reason in the objection letter for the Labour Commissioner to vary the Compliance Order issued by the Labour officer on 2/2/2021.

Having stated the above reasons, the Acting Labour Commissioner ordered the appellant to comply with the order of the Labour Officer within thirty (30) days with effect from the date of its receipt. It is this order of the Acting Labour Commissioner that has ultimately aggrieved the appellant, hence this appeal.

On 6/9/2021 when counsels for both parties appeared before me, I ordered, *inter alia*, the hearing to proceed by way of written submissions as well as granting the appellant a leave to adduce additional evidence which was not in place when the matter was before the Labour Officer and the Labour Commissioner. The additional evidence was brought under an affidavit sworn by DAUDI KASSONE, the Financial Controller of the appellant, to the effect that issuance of the Compliance Order, but before its confirmation by the Acting Labour Commissioner, 17 of the 26 employees mentioned in the Compliance Order had withdrawn their claims by each signing a Mutual Separation Agreement ("MSA") with the appellant and that the rest of the employees were retrenched on 31st March, 2021. Sixteen (16) copies of the MSAs collectively marked "A1" were submitted to the court, save for one copy which the court found missing.

Clause 3.1 of the MSA states that a gross lumpsum payment each employee had agreed to receive from the appellant is '*in consideration of the employee's agreement to the termination of his or her contract of employment with the appellant company'*. Clause 3.2 provides that the gross lump sum referred to in clause 3.1 is inclusive of all and any amount that may be owed to the employee at the termination date, including but not limited to, any contractual or statutory notice, benefit scheme, and any other remuneration of whatsoever nature due until the termination date.

Clause 8.1. of the MSA provides that '*the employee acknowledges that the agreement is entered into freely and voluntarily without duress, and having taken advice on relation to it and that he or she will not, under any circumstances, attempt to have it set aside or reviews or revised or appealed*'. And clause 8.2 provides that "*where parties have resorted to the judicial process,* ***'they shall register this agreement as a settlement in the appropriate body where the matter is sub judice'*** [Emphasis added]. I shall revert on discussion of the terms of MSA, in due course.

In the appellant's written submissions, the following arguments were presented on each ground of appeal;

On the first ground of appeal, the appellant's advocate argued that the impugned decision or order was illegally issued by the Acting Labour Commissioner who is not empowered by law to make decision or order of that nature. He argued that such powers of confirming a Labour Officer's order are vested in the Labour Commissioner under section 47 (4)(a) of the Act, who is appointed under section 43(1) of the Act. The appellant argued that in the absence of the Labour Commissioner, such powers may be delegated to Deputy Labour Commissioner under section 44(1) of the Act, and not to Acting Labour Commissioner.

The appellant's advocate further argued that since the Labour Officer stated in the Compliance Order that she was exercising powers conferred to her under section 45 of the Act, the Acting Labour Commissioner did not have powers to confirm the order since section 45 does not confer any powers to the Labour officer, rather it is section 46 (1) of the Act which confers such powers. To this end, he referred to the case of **Jimmy Lugendo V. CRDB Bank Ltd,** Civil Application No. 171/01 of 2017, Court of Appeal, Dar es Salaam (unreported) where the Court of Appeal struck out the application having been moved under a wrong provision of the law.

On the second ground of appeal, the learned advocate for the appellant argued that the order of the Acting Labour Commissioner is tainted with illegality as it purports to have been given on 14/4/2021 but it was communicated to the appellant on 13th of April, 2021. The argument is that the Order was communicated before it was given by the Acting Labour Commissioner.

On the third ground of appeal, it was argued that the Labour Commissioner misdirected himself in law and in fact in confirming the Compliance Order which did not take into consideration the fact that the contracts between the appellant and the affected employees were discharged by frustration caused by Covid- 19 pandemic. It is the argument of the appellant's advocate that the closure of the appellant's hotel from the end of March 2020 through the date of filing the said objection due to Covid -19 affected the contracts too, as employees could not work.

The appellant's advocate submitted that on 25/3/2020 consultations was done involving the appellant's Board of Directors, Off-Shore Directors of Operations and Finance as well as the Chairman of the Worker's Committee where a consensus was reached to suspend operations with effect from 26/3/2020. It was further submitted that a meeting was called on the same date involving all employees to inform them of the suspension of operations and payment of 20% salaries until further notice. The case of **Ndarry Construction V. Ilala Municipal Council**, Commercial Case No. 31 of 2015, High Court Commercial Division, Dar es Salaam (unreported) was cited to the effect that frustration kills the contract itself and discharges both parties automatically.

The learned advocate therefore argued that the Compliance Order can no longer apply to the 17 employees who signed MSAs before the Compliance Order was confirmed by the Acting Labour Commissioner.

In the fourth ground of appeal, the appellant stated that the Acting Labour Commissioner erred in fact and law in confirming the Compliance Order without considering that employment means the performance of contract of employment by the parties to the contract under the employer-employee relationship, and there was no performance by either party since April, 2020 when the hotel services were suspended due to outbreak of Covid -19 pandemic.

It was the argument by the appellant's advocate that while section 4 of the ELRA defines "employment" as the **performance of a contract of employment** by the parties and the Memorandum of Objection stated clearly that performance became impossible, there was no performance of contract because no employee was going to work from April, 2020 to April, 2021.

To cement the above argument article 23(1) of the Constitution of the United Republic of Tanzania was cited to the effect that a person's entitlement to remuneration has to be commensurate with his work. It was also argued that by confirming the Compliance Order, the Acting Labour Commissioner was implying that employees should continue to work despite the Covid-19 scare.

In the fifth and last ground of appeal, the appellant's advocate stated that the Order of the Acting Labour Commissioner was made without considering representation of the appellant, employees and trade union (if any) as required by law to do.

To expound on the above ground, he argued that the Compliance Order which the Acting Labour Commissioner confirmed did not meet the prerequisite under section 46(1) of the LIA as there was no written complaint received by the Labour Officer from the 26 employees covered by the Order. He further argued that form LAIF 1 did not contain the name of any employee who complained to her. He asserted that a written complaint by an employee or employees is a legal requirement under the law.

To concretize the above argument, the learned advocate for the appellant referred to the case of **Labour Officer V. Operation Manager MMG Gold Mine Ltd**, Execution No. 17 of 2020, High Court Musoma (unreported) where the Court stated that a Labour Officer must have reasonable ground that some labour laws have been breached. He argued that such a requirement for reasonable ground presupposes that there must be a complaint in writing to the Labour Officer.

The learned advocate picked issues with the Labour Officer's letter dated 13/1/2021 which referred to "complaint lodged by your employee" which meant that there was only one employee but the Compliance Order dated 2/2/2021 came up with 26 employees. He argued that, as there was no complaint **in writing** from the employees listed in

the Compliance Order, it is not clear how the Labour Officer came up with the computed figure of the alleged salary entitlements.

The learned advocate submitted that section 47(1) of the LIA, requires an employer to object in writing to the Compliance Order and section 47(4) requires the Labour Commissioner while making decision confirming, modify or cancelling the order to consider representations by employer, employees or trade union, a representation which the Labour Commissioner did not get. He argued that by failing to consider that representation, the Acting Labour Commissioner came up with a decision on matters which were not in the Compliance Order, such as:-

i. Holding that the Compliance Order was issued after the Labour Officer had conducted an inspection visit, which was not done.
ii. That the hotel was closed and employee sent home without paying their salaries, while 20% of salaries was being paid.
iii. By holding that it was not stated in the objection if Compliance Order was issued before or after Labour Dispute No. CMA/DSM/ILA/67/20, while the Compliance Order is of 2/2/2021 and the Labour dispute which he referred to bears number of the year 2020.

After completion of the above submission in chief, it was the turn for the State Attorneys for the respondent to reply. On the first ground of appeal, it was submitted that since the impugned order was issued by Andrew H. Mwalwisi who was acting in the position of the Labour Commissioner on the said date, and since the law mentions the said Acting

Labour Commissioner to be among the people who performs all the functions vested on the Labour Commissioner, he had legal powers to issue the said order, and the same is valid. Section 44 (1) of the LIA was referred to on how delegation of powers by the Labour Commissioner can be done. The provision was reproduced thus:-

> *"The Labour Commissioner, may in writing, delegate to the Deputy Labour Commissioner, Assistant Labour Commissioner or any other Labour officers, any of the Commissioner's powers, functions and duties."*

Based on the above, the learned State Attorney's submission that as Andrew H. Mwalwisi was one of the Assistant Labour Commissioners at Head Office in Dodoma, he was mentioned in the above cited provision.

Regarding the legal authority under which the Labour Officer issued the Compliance Order, the respondent's Attorneys argued that the appellant's advocate submitted lies to the Court when he mentioned section 46(1) and not section 45 of the LIA that confers such powers to the Labour Officer. The respondent's Attorney submitted that the powers quoted in the Order are duly vested in the Labour Officer under section 45(1) (b) of the LIA empowering the Labour Commissioner to '*order in the prescribed form any person to appeal before him at a specified date, time and place.*'

The respondent's Attorneys further argued that the prescribed form referred in section 45 (1) (b) of the Act is form LAIF 4 made under regulation 10 of the Labour Institutions (General) Regulations, 2017. It was therefore submitted that the Compliance Order was legal and the appellant was bound to comply with it. It was further argued that by reason of its legality the Order was therefore fit to be confirmed and the cited case of **Jimmy Lugendo V. CRDB Bank Ltd** (supra) was deemed immaterial.

On the second ground of appeal, where the appellant submitted that the order of the Acting Labour Commissioner was tainted by illegality for being communicated on 13/04/2021 while it was issued on 14/04/2021, the respondent submitted that there was no order dated 13/04/2021 which was issued by the Acting Labour Officer (sic), rather the said order was issued by Acting Labour Commissioner who is in law recognized to act in the position of Labour Commissioner.

On the third ground of appeal, where the appellant challenged the Acting Labour Commissioner for not considering frustration of contracts due to Covid-19 pandemic, the respondent' Attorneys argued that there was no justification for not paying the 80% of employees' salaries by the appellant. The learned State Attorneys argued that the decision to pay 20% of employees' salaries was not done in agreement with the employees. It is the State Attorneys' further argument that the appellant was expected to communicate to, and agree with the employees first and not to make a one-sided decision.

The learned Attorneys further argued that even the contracts of employment prepared by the appellant did not have a *force majeure* clause, hence the decision not to pay full salaries was illegal. To clarify this point, the Attorneys argued that what made the pay cut illegal is lack of agreement of both parties on the matter.

Regarding the signing of Mutual Separation Agreements (MSAs) the learned Attorneys enjoined this court to disregard the MSAs because there was no communication about it to the Labour Commissioner.

The learned State Attorneys further argued that, the issue of signing the MSAs would also be expected to be in the Memorandum of Objection field to the Labour Commissioner. The missing one signed MSA was also raised by the Attorneys who pointed out that Exhibit S 5-1 had only 16 and not 17 signed MSAs, and showed how the assertion of MSAs came as an afterthought to ran away from liability of paying the 26 employees.

On the cited case of **Ndarry Construction V. Ilala Municipal Council** (supra) the learned Attorneys submitted that it wasn't useful because the MSAs was an afterthought, and that, when the MSAs were signed the appellant was already contravening the provision of section 27 (1) of the ELRA and Compliance Order was already issued. They argued that the MSAs would have been legal if the remaining 80% salary arrears claimed by the employees was accommodated.

The learned Attorneys further argued that order of the Labour Officer, is an enforceable order in Court and the same is true for the Labour Commissioner's. They further argued that such Order once issued by the Labour Officer it cannot be invalidated by the appellant intervening with MSAs, but can only be entered by the High Court. It is the Attorneys' further argument that the MSAs for 17 employees cannot form part of the proceedings and prayed the Court to scrutinize the additional evidence very carefully.

On the fourth ground of appeal, that the Acting Labour Commissioner did not consider the fact that there was no performance of employment contract by either party since April, 2020, the learned Attorneys insisted that the decision to pay 20% salaries was to be subjected to Collective Bargain Agreement and shouldn't have been a decision by the appellant and his management alone. They argued further that since payment of remuneration is the requirement of the law, whenever there are changes to be made in the mode of payment or any changes to the conditions of contract which affect directly the rights of employees, there must be another agreement to that effect to avoid contravention of the law. The State Attorneys were of the view that since no agreement was entered with the employees and no meeting was conducted between the parties to agree on payment, what the appellant did amounted to contravention of section 27(1) of the ELRA.

On the fifth and final ground of appeal regarding illegality of the order of the Acting Labour Commissioner for not considering representation of the appellant, employees and Trade Union as required under section 46(1) of the LIA, the respondent denied any violation of the law. It was the respondent's submission that the confirmation of the Labour Officer's Compliance Order met all the requirement for such confirmation.

The learned State Attorneys further submitted that the order of the Acting Labour Commissioner was issued according to section 46(4)(a) of the Act, and was issued via prescribed form LAIF -1 which is the only form for that purpose.

They also argued that there is no requirement under section 45 of the Act for the Labour Officer to disclose source of information and that, neither does the law obliges the Labour Officer to serve documents to the parties mentioned under section 46(2) of the Act, rather the Labour Officer should only have reasonable grounds that some labour laws have been breached.

The learned Attorneys further submitted that there is no requirement of the law for a complaint or information lodged by employee to be in writing, in which case the decision in **Labour Officer V. Operation Manager, MMG Gold Mine** (Supra) was deemed irrelevant and distinguishable to the case at hand. Finally, the respondent's Attorneys prayed the Court to dismiss the appeal so that the Labour Commissioner can continue to execute the order accordingly.

Rejoining on denial of illegality of the order issued by Andrew H. Mwalwisi, the appellant's advocate pointed out that no **written** proof of delegation of Labour Commissioner's powers to Andrew H. Mwalwisi, has been adduced as per section 44(1) of the LIA. He reiterated that the powers of the Labour Commissioner were illegally exercised.

On the point that the powers being questioned are duly conferred to the Labour Officer under section 45 of the LIA, the learned advocate rejoined that section 45 of the LIA does not confer any power or jurisdiction to the Labour Officer to issue Compliance Order. The Advocate reiterated that even if the said Andrew H. Mwalwisi was properly appointed as an Acting Labour Commissioner, he could only have confirmed the Compliance Order if it had been issued under section 46 (1) of the LIA and not section 45 which does not provide for issuance of Compliance Order.

Regarding the point that the Compliance Order was made under regulation 10 of the Labour Institution (General) Regulations, 2017, the appellant rejoined that issuance of Compliance Order LAIF 4 under the cited Regulation 10(1) is wrongly premised as the cited Regulation deals with Compliance Certification which is quite different from what the Labour officer issued. He further reiterated that the Labour Officer wrongly cited section 45 of the Act as the provision under which she issued the Compliance Order.

On the legal recognition of a person acting in the position of the Labour Commissioner, the appellant reiterated his earlier submission that for one to be an Acting Labour Commissioner, there must be delegation of such powers in writing, which was not there.

On lack of justification for not paying the 80% of salaries because the decision of paying 20% of salaries was not in agreement with employees, he rejoined that in exhibit "SS-2" attached to the affidavit, the procedure which was followed before suspending operations has been shown. He further rejoined that the respondent has said nothing with regard to that procedure, which in another matter that was before the CMA in respect of the same suspension of operations, the CMA dismissed the employees' claims after being satisfied that there was no good reason for ordering payment of the 80% which employees were claiming.

It was the appellant's further rejoinder that Article 23 of the Constitution of the United Republic of Tanzania, 1977 talks about fair remuneration for work done, adding that in the matter at hand there was no work being done, without any fault of the appellant.

The appellant further reiterated the relevancy of a persuasive decision in the case of **Post Office Retirement Fund V. The South Africa Post Soc. Ltd & 4 Others** (supra) that as a general rule impossibility of performance of a contract excuses performance of legal obligations at least for the period of impossibility, which in this case, he said it was 17- or 18-months closure. The learned Advocate reiterated the relevancy of the referred South African decision in its holding that "*the economic downturn resulting from the Covid-19 pandemic is of magnitude that no one could have predicted*", as well as the decision stated in **Ndarry Construction V. Ilala Municipal Council** (Supra). He added that the respondent did not in his reply deny that there was impossibility of performance of contracts with

employees for which the appellant relied on the doctrine of frustration under the law of contract.

In the last shot regarding the point under discussion, the appellant rejoined that since an employer is excused from performance of legal obligations as held in the cited cases, the issue of there being an agreement with employers on payment of 20% is without merit.

On lack of communication with the Labour Commissioner regarding MSAs and the MSAs being an afterthought, he rejoined that the MSAs are part of additional evidence duly allowed to be adduced by the Court. He added that what needs to be considered is the weight of the additional evidence, whereby under clause 5.1 of the MSAs, those who signed have waived their claims against the appellant while the respondent's Attorneys opted not to say anything about that clause.

He argued that by respondent's Attorneys opting not to challenge the admission of those MSAs, what has been mutually agreed between the appellant and the employees who signed should be honored.

The Advocate further submitted that the MSAs were entered into voluntarily by the employees, hence they remain valid and binding, worth to be taken into consideration, particularly for the purpose of excluding the employees who signed them from this current Court case.

Regarding the point that there is no requirement under the law for the Labour Officer to disclose source of information, he rejoined that the argument is misconceived. He argued that in the cited case of **Labour Officer V. Operation Manager, MMG Gold Mine Ltd** (supra), the Court

interpreted section 46(1) and 46(6) of the LIA, the provision under which the appellant in this matter was summoned by the Labour Officer, the Court at page 6 of the typed judgment held:

> *"The above quoted provisions set four prerequisites for the Court to enforce a Compliance Order from the Labour Commissioner or the Labour Officer. First, the Labour officer must have reasonable grounds that some labour laws have been breached. This condition presupposes* ***that there is a complaint in writing by an employer or employees complaining to the Labour Officer"*** [Emphasis supplied by the appellant]

It is the appellant's further rejoinder that section 45 of the LIA, which the respondent referred is not the provision under which the appellant was summoned before the Labour Officer. The appellant argued that it is the Court's interpretation in the **MMG Gold Mine** case that reasonable ground for believing that some labour laws have been breached can only exist if there is **complaint in writing from employees.**

Lastly, on the argument that the order of the Acting Labour Commissioner was issued according to section 46(4) (a) of the LIA, the learned Advocate denied that the order was issued under that provision. He argued that the Acting Labour Commissioner's Order cited section 47(3) to (8) of the LIA as the provisions conferring power to him. He reiterated that there was no proper delegation of powers by the Labour Commissioner.

Thereafter, the learned Advocate reiterated his prayers made in his submission in chief.

Having covered in such details the rival submissions of both parties, it is my view that the parties have traversed from trivialities to substantiality as far as the arguments raised are concerned. Trivial arguments are in my view, those challenging apparent typing errors or human lapses such as dates, and wrong citation of law. There are however substantial issues raised and argued concerning the legality of the Compliance Order. In general, I am of the view that the arguments raised can be determined under the following broad issues:

i. Whether the Compliance Order dated 2/2/2021 was lawfully issued by the Labour Officer.
ii. Whether the order made by Acting Labour Commissioner Andrew H. Mwalwisi confirming the Compliance Order is lawful.
iii. What shall be the fate of the claims covered under the Compliance Order.

In determining the above broad issues, I shall also be disposing sub issues which have formed the grounds of appeal stated herein.

On the first issue, the appellant has raised several arguments to show that the Compliance Order was unlawfully issued by the Labour Officer who stated that she was exercising powers conferred to her under section 45 of the LIA. The appellant's Advocate argued that section 45 of LIA does not confer any powers or jurisdiction to issue Compliance Order. The respondent's State Attorneys argued that unless the law has

changed, the Compliance Order issued by the Labour Officer under regulation 10(1) of the Labour Regulations was legal and the appellant is bound to comply.

In this argument the respondent has been evasive. He did not address the issues of citation of section 45 in the Compliance Order directly to show whether or not the Labour Officer is vested with such powers to issue Compliance Order under section 45 of the Act as she alleged in the said Compliance Order. For clarity of record and argument the relevant part of the Compliance Order (LAIF-4) is reproduced as follows:

> *' I Amina Mmbaga, a Labour Officer dully (sic) appointed under section 43 of the Act,* ***exercising powers conferred upon me by the provisions of section 45 of the Act, do hereby order you to comply with the following*** *:*
>
> *1.....'*
>
> **[Emphasis mine]**

It has been the contention of the appellant's Advocate that section 45 of the Act cited in the quoted Compliance Order does not confer such powers. Section 45 of the Act provides for powers of Labour Officer as per marginal notes, but in the details, there is power to issue Compliance Orders. The power to issue Compliance Order, as correctly submitted by the appellant's Advocate, is conferred to the Labour Officer under section 46 and not section 45 as it was wrongly cited in the Compliance Order. None of the

of the subsections under section 45 of LIA confers powers to the Labour Officer to issue Compliance Orders.

Likewise, regulation 10(1) of the Labour Institutions (General) Regulations, 2017 which is cited in the Compliance Order as the source of law for the issuance of the Order, and as submitted by the respondent's State Attorneys, does not specifically confer such powers. This regulation which has been quoted in the appellant's rejoinder and reproduced herein above, states that where a Labour Officer is satisfied of non-compliance to the Labour laws by an employer, as it appears to be the case in this appeal, the Labour Officer may recommend such a person to the Labour Commissioner "*for a respective certification as prescribed in a format set out in the schedule to the Regulation*". Going by the respondent's reply, that the Labour Officer used form LAIF 4, as the Compliance Order form, it would mean that LAIF 4 was being used by the Labour Officer to refer to the Labour Commissioner for a respective certification. Such an interpretation is, to say the least, absurd and it does not augur well with powers to issue Compliance Order conferred upon the Labour Officer under section 46(1) of the LIA, which provides:

> *"A Labour Officer who has reasonable grounds to believe that an employer has not complied with a provision of the Labour laws may issue a Compliance Order in the prescribed form".*

From the provision of section 46 (1) of the LIA, three conclusions are apparently clear:

One; it is the provision of section 46(1) of the LIA that confers powers to the Labour Officer to issue Compliance Order and not the provisions of section 45 as wrongly cited in the first paragraph of the order quoted herein.

Two, Compliance Order (form LAIF 4 or any other Form Number that is used as Compliance Order) is a prescribed form whose source of law is section 46 (1) of the LIA. As such, a regulation prescribing the forms was to adhere to the cited provision of section 46(1) of the LIA. Regulation 10(1) of the Labour Institutions (General) Regulations, 2017 does not adhere to the provision of section 46 (1) of the LIA and should be amended for conformity with its mother law.

Thirdly, it is true as submitted by the appellant that the powers to confirm Compliance Orders vested in the Labour Commissioner under section 47(1) – (8) of the LIA, would be properly used to confirm the Compliance Order of the Labour officer issued under section 46(1) of the LIA, under which Compliance Orders are issued, and not a Compliance Order made under section 45 as cited by the Labour Officer. As such the first issue in this appeal is therefore answered in the affirmative, subject to determination of its consequences to the entire appeal, which I shall do in due course.

The appellant's advocate invited this Court to decide that since the Labour Officer moved the Acting Labour Commissioner under the wrong provisions of the law, the Compliance Order should suffer the same consequences as those prescribed by the Court of Appeal in **Jimmy**

Lugendo V. CRDB Bank Ltd (Supra). In that cited case, the Court was moved under a wrong provision of the law. On page 15 of the typed ruling of the Court of Appeal, the Court indicated the proper provision under which it should have been moved and on page 6 of the ruling the Court struck out the application as the provision cited did not confer jurisdiction. The appellant argued that, the Labour Officer having cited a wrong provision of the law, which does not empower her to issue Compliance Order, the Order she issued was of no effect and therefore, the Acting Labour Commissioner did not have jurisdiction to confirm it under any provision of the law.

It was the appellant's further views that the point here is in jurisdiction of both the Labour Officer and the Acting Labour Commissioner, and being a point of jurisdiction, it can be raised at any stage of proceedings including at an appellate stage as per decision on **Zanzibar Insurance Corporation V. Rudolf Temba**, Commercial Appeal No. 1 of 2006, High Court, (Commercial Division) Dar es Salaam (Unreported).

With respect, I don't agree with the appellant's advocate on what he prays to be the consequence of wrong citation of the law. It is not disputed that the Labour Officer has got powers under the LIA to issue Compliance Orders. It is further not disputed that the Labour Officer did, in fact, issue a Compliance Order only that she cited a wrong section of the same law. Under this situation, the Constitution of the Land under Article 107A (2) enjoins Courts to uphold the overriding objective of rendering justice without being unnecessarily tied up by technicalities. It is for this reason, even the jurisprudence previously embraced by the Court of Appeal in the case of **Jimmy Lugendo V. Crdb Bank Ltd** (supra) of overturning decisions of

lower courts for wrong citations of the law has been vacated in recent decisions. The emerging trend in recent decisions of the Court of Appeal is to uphold the overriding objective principle save where a party seeks to circumvent a mandatory provision of the law both in procedure and substance. See the Court of Appeal's decision in **Martin D. Kumalija & Another V. Iron and Steel Ltd** (Civil Application No. 70 of 2018 [2019] TZCA, 542, [27 February 2019] available in *www.tanzilii.org*.

For the reason stated above, I resist the invitation by the appellant's advocate to struck out the Compliance Order for wrong citation of the law. It is my considered view that the wrong citation of a provision of the proper Act, as is the case in this matter, is not fatal for as long as the power to issue such a Compliance Order does exist in the law cited, which is the Labour Institution Act, [Cap 300 R.E 2019]. I therefore hold that the Compliance Order signed by one Amina Mmbaga, the Labour Officer on 2/2/2021 is a valid order.

Turning to the second issue for determination, on the legality of the order made by the Acting Labour Commissioner one Andrew H. Mwalwisi, there are two intertwined sub-issues. Firstly, whether Acting Labour Commissioner is in law recognized as one of those who can act in the position of the Labour Commissioner. Secondly, whether a confirming order signed by Mr. Mwalwisi as "Acting Labour Commissioner" to confirm the Compliance Order, was lawful.

The learned counsels for both parties have not disputed that section 44(1) the Act provides for delegation of powers of the Labour Commissioner to other office bearers in his absence. It is also not disputed that Mr. Andrew Mwalwisi being an Assistant Labour Commissioner could be delegated with powers of the Labour Commissioner. What the appellant's advocate questions is whether Mr. Mwalwisi was so delegated **in writing** as the law categorically provides.

On this sub-issue, I would say that delegation of powers in public offices, much as it is governed by law, it is such a routine exercise done in office files and loose minutes almost religiously. There is nowhere a saying that "government works on papers" is better practiced than in delegation of powers, as matter of general practice. For this reason, questioning whether there was delegation of powers in writing is taking the matter a little too far. Nobody should be made to prove the negative.

On the use of the title of "Acting Labour Commissioner", I agree with the learned advocate for the appellant that section 44(1) of the LIA names office bearers who can be delegated with powers of the Labour Commissioner but "Acting Labour Commissioner" is not mentioned. Those mentioned are the Deputy Labour Commissioner, Assistant Labour Commissioner or any Labour Officer.

It was the submission of learned State Attorneys representing the respondent that the Deputy Labour Commissioner was yet to be appointed. They argued therefore that in the circumstances the Deputy Labour Commissioner was yet to be appointed, the only way to carry out a public

duty was to have someone to act in the office of the Labour Commissioner. This argument is understandable though it does not perfectly hold water in light of what section 44(1) of the LIA provides. The subject provision of the LIA has been coined widely enough. It does not end with the Deputy Labour Commissioner as the learned State Attorney seems to suggest. It enables the Labour Commissioner to delegate his powers to "any Labour Officer". Since it has not been disputed that Mr. Andrew Mwalwisi is among the three Assistant Labour Commissioners in the Labour Commissioner's office at the Head Quarters, the question raised by the appellant's advocate regarding his being delegated with Labour Commissioners' powers is, but a matter of semantics. This Court holds that whoever is delegated with powers of the Labour Commissioner among the categories of office bearers mentioned under section 44(1) of the LIA shall, for all intent and purposes, be acting as Labour Commissioner despite his acting official title.

The legality of the order of Acting Labour Commissioner was also questioned by the appellant's advocate due to date differences. It is true that the order shows two different dates. One date is typed at the top of the order letter which is supposed to be the actual date of the order, that is 13/4/2021 while the other date typed as 14/3/2021 is shown inside the letter. This to me is a trivial matter arising from purely a keyboard error. The error is curable and it does not prejudice the order itself or the rights of the appellant anyhow. The most important point is that despite the letter bearing two dates, the intent and purpose of the order is clearly stated. It confirms the Compliance Order issued by the Labour Officer Amina Mmbaga on 2/2/2021.

The other attack on legality of the Order of the Acting Labour Commissioner was based on the allegation that the order did not consider frustration of employment contracts. This argument was aligned with the decision in the South African Labour case of **Post Office Retirement Fund V. The South African Post Officer Soc Limited & 4 Others,** Case No. 35043/2020 High Court of South Africa (Gauteng Division) at Pretoria, which held that as a general rule impossibility of performance of contract excuses performance of legal obligations at least for the duration of impossibility. Respectfully, I agree with the cited decision. That is how the law of contract provides even in our jurisdiction. However, consideration of frustration of employment contract by the Acting Labour Commissioner necessarily required the appellant to have observed the law in suspending the employment contracts of his employees.

Among the areas the law has jealously and affirmatively gone out to protect in our country are the fundamental rights of workers as well as the employment standards, particularly payment of remuneration. Section 27(1) of the ELRA makes payment of salaries a mandatory obligation to employers. Obviously, the law imposes obligation to the employees to work so as to be entitled to receive salaries. Where for some good reasons the employer is unable to provide employment to his hired employees, as the appellant's Advocate has submitted, proper procedure laid down in the law must be followed before suspending employment contracts.

In Tanzania, Labour laws have stipulated clearly how an employment contract may be suspended or terminated when there are reasons so to do. For example, sub- part E of the ELRA provides for unfair termination and in so doing provides for what may amount to a fair termination of employment contract. Section 38 provides for termination based on operational requirement and sets out, under subsection (1), the principles an employer must comply with. One such principle is a notice of intention to retrench which must be given "as soon as it is contemplated".

According to the submission of the appellant's advocate, the appellant was incapable of continuing providing employment to his employees by the Covid-19 pandemic. He thus considered the employment contracts frustrated for which he seeks to be relieved of the obligation to pay salaries under employment contracts. Pleaded facts revealed that the employer having seen that the work can no longer be performed, he practically laid off most, if not all of his employees. He now holds the view that the Acting Labour Commissioner should have considered that the employment contracts were frustrated. It is his further view that by not holding the contracts frustrated the Confirming Order of the Acting Labour Commissioner is unlawful.

This Court holds that since the principles for retrenching employees were not observed by the appellant, frustration of contracts cannot be pleaded as a defence for failure to pay salaries. The appellant should have first cleaned his hands by following proper legal procedures as was submitted by the learned State Attorneys.

In the Memorandum of Objection filed before the Labour Commissioner, it's true the issue of impossibility of performance of contract due to Covid 19 pandemic was raised. It is true that the appellant hinted that his business was closed from the end of March 2020 and was still closed on that date of the objection. However, the appellant's Advocate has submitted that the consultation was done on 25/3/2020 involving the appellant's Board of Directors, off-shore Directors of Operations and Finance and Chairman of the Workers' Committee.

It was also submitted by the appellant's Advocate that consensus was reached to suspend operations effective next day, i.e 26/3/2020 and that a meeting involving employees was called on the same date **to inform them of the closure and payment of 20% salaries till further notice**. It is this act of not following the procedure of laying off employees that make this Court concur with the learned State Attorneys that the issue is not the employer's act of communicating the impossibility of performance of contract, but lack of agreement or consensus of both parties to cut the salary pay. The decision was unilateral to say the least. It has not been submitted if the Chairman of Workers' Committee, himself being an employee, had mandate to agree on pay cut on behalf of all other employees. Such a unilateral unmandated decision by the appellant contravened the provision of section 27(1) of the ELRA so long as retrenchment principles were not observed. Much as Covid 19 pandemic was a reasonable cause for laying off employees, it cannot be said that it was impossible to meet with employees to agree with them on the salary cut. The meeting involving all employees was held, according to submissions made by the appellant's advocate. As

such it was possible to seek their consent for pay cut by observing the law, but the appellant as an employer opted to seek cover under frustration of contract which appears to this Court to be an afterthought.

The last limb of the argument raised by the advocate for the appellant to challenge the legality of the order of the Acting Labour Commissioner is the fact that the Acting Labour Commissioner did not consider representation by the employer, the employees or a registered trade union in terms of the provision of section 47(4) of the Act. The cited section 47(4) provides:

> *47(4) "After considering any representation by the employer, the employees or a registered trade union, the Labour Commissioner; -*
>
> *(a) May confirm, modify or cancel an order*
> *(b) Shall specify the period within which the employer shall comply with any confirmed or modified order".*

This provision is a culmination of how the order of a Labour Officer, in this case the impugned order signed by Amina Mmbaga on 2/2/2021, can be delt with by the Commissioner. It is the contention of the appellant's advocate that the Acting Labour Commissioner was required to consider representation by the employer, employees of the trade Union but did not get such representation and therefore his decision is rendered illegal.

With due respect to the learned appellant's advocate, the cited provision of section 47 (4) (a) of LIA does not impose any duty on the Labour Commissioner to call or solicit views of the employer, employee or trade union if such views are not there before him. My take from the interpretation of the cited provision is that, in situations where the mentioned labour dispute stake holders (the employer, employees and trade union), (if any) have presented their views to the Labour Commissioner, the Labour Commissioner shall be obligated under this provision to consider such views before confirming, modifying or cancelling an order of a Labour officer to which the views of stakeholders were made available to him. The cited provision does not make it mandatory that at any time the Labour Commissioner considers an order of any Labour Officer there must be views of all those stakeholders mentioned.

Based on the above determination of sub issues forming part of the second issue herein, this Court holds that the order of Mr. Andrew H. Mwalwisi, the Acting Labour Commissioner that confirmed the Compliance Order made by Amina Mmbaga, Labour Officer on 2/2/2021 is lawful and binding on the appellant.

The third issue seeks to determine the fate of the claims covered under the Labour Officer's Compliance Order in view of the fact that this Court had granted a leave to the appellant to adduce additional evidence. It has been submitted by the advocate for the appellant that the Compliance Order dated 2/2/2021 can no longer apply to 17 out of 26 employees listed in the said order because those 17 employees have,

subsequent to the said Order, signed MSAs with the appellant. It was further submitted that the said MSA were signed before the Acting Labour Commissioner had confirmed the Compliance Order. These MSAs were submitted to the Court as additional evidence on ground that the same were not in place when the appellant appeared before the Labour Officer and the Acting Labour Commissioner.

The Court's records show that MSAs for 17 employees which were submitted as additional evidence are between the appellant and the following 17 employees: Andrew R. Temu, Augustino O. Odindo, Aziza Hilary Mbisu, Clara Giliard Ndossi, Elizabeth Leonard Mlawa, Grace Nicholas Shao, Gwakisa John Chikongoye, Halima Nneka Lesbirell, Ibrahim Hashim Ligwe, Ismail Hassan Mwigulu, Johnstone Jovin Ndekuka and Leah Peter Simbeye. Others are Martin Josephat Mbotto, , Omary Enzi Omary, Saleh Ally Hemedy, Veronica William Mukangi, and William Jacob Mkweche.

Clause 5.1 of the signed MSAs, which is uniformly drafted for all the 17 employees, states that the signed MSA was in " in full and final settlement of all and any claims which the Employee may have against the Company and or the Group and or against any of the Company and or the Group's consultants, officers, shareholders, directors and or advisors and whether such claims arise in contract, deduct or in terms of any statutory enactment or otherwise and irrespective of whether any such claim would ordinarily arise in terms of the law of the Republic of Tanzania or elsewhere".

The learned State Attorneys for the respondent resisted the use of such agreements in this case and went further to challenge the legality of the signed MSAs too. They submitted that the MSAs came as an afterthought by the appellant to circumvent the Compliance Order. They said the MSAs were to be legal if it accommodated the 80% salary arrears claims for each employee who signed the same. They asserted further that when the Compliance Order is issued it cannot be invalidated by the MSA save by decision of the High Court.

There is no dispute that the MSAs were signed by parties who were competent to sign the same. There are neither claims nor proof of any illegality of the said MSAs other than what the learned State Attorneys have submitted to this Court.

It is basic that every person is competent to contract if he has attained the age of majority, is of sound mind as is not disqualified from contracting by any law to which he is subject. This is according to the provision of section 11(1) of the Law of Contract Act, [Cap 345 R.E 2019]. As alluded earlier, there is no reason presented to the knowledge of this Court to inter that the 17 employees of the appellant were not competent to sign the MSAs. There is neither a hint that they had no free consent to the proposal laid to them by the appellant to agree to sign the MSAs so as to be paid their dues in full and final settlement of all and any claims which they may have against their employer.

It has been submitted by the appellant's Advocate that since the appellant's business is dependent mainly on tourists who were not coming due to Covid -19 pandemic, employees were informed of the impending danger of the employer going into liquidation. The fate of the employees was said to be in precarious situation with the employer company going under. That, there are rules for preferential payment in case of liquidation whereby employees' dues may not be among preferential payments. It is under such situation employees were to decide to be paid their dues under mutual separation arrangement.

The fact that Covid 19 pandemic existed at the time of conclusion of the MSAs in February- March 2021 does not need proof. The fact that business, especially tourist hotels were hit by Covid -19 pandemic does not need any legal proof to be appreciated. With such facts not disputed in this matter, and there being no allegation of illegality that would make the MSAs void in law, this Court is inclined to hold that the MSAs signed by each of the 17 employees on one hand, and the appellant on the other are binding agreements and parties are obliged to perform what they agreed upon.

Section 37(1) of the Law of Contract Act (Supra) provides;

> *"The parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provision of this Act or of any other law".*

From this cited provision of the law, it follows that where the parties competent to contract have agreed, out of their free will, to perform certain promises and have actually started implementing the same, no Court shall have jurisdiction to interfere with performance of such promises in absence of any allegation of illegality of the signed contract.

For the above reasons, I am settled in any mind that, unless the contrary is proved, the 17 employees who signed the MSAs are bound by their own agreements. As such, the claims of the said 17 employees shall be excluded from the execution of the Compliance Order.

For clarity and avoidance of doubt, the Compliance Order dated 2/2/2021, which has been adjudged to be lawful and binding to the appellant as the employer, shall be performed in respect of the ten (10) employees only who have not yet signed Mutual Separation Agreements.

Having held as above, this appeal partially succeeds to the extent shown above. No order as to costs since this is a labour matter.

Dated at Dodoma this 10th day of December, 2021

ABDI S. KAGOMBA

JUDGE