IN THE HIGH COURT OF TANZANIA

(MTWARADISTRICT REGISTRY)

AT MTWARA

LABOUR APPLICATION NO. 4 OF 2021

TANZANIA UNION OF INDUSTRIAL AND

COMMERCIAL WORKERS (TUICO) .....APPLICANT

VERSUS

DANGOTE CEMENT LIMITED.....RESPONDENT

RULING

24th August & 7th October, 2021

DYANSOBERA, J.:

The applicant, a trade union registered under the laws of Tanzania with Reg. No. 01 has, by a chamber summons and a notice of application, filed this application against the respondent on the following grounds:

1. That this Hon. Court be pleased to order the respondent to issue or provide employment contracts which are unspecified period of time to her employees who are not professional nor (sic) managerial cadre.
2. That this Hon. Court be pleased to make interpretation of professionals and non-professionals employees

3. Any other reliefs this Hon. Court may deemed just and fit to grant.

The provisions under which the application has been made are Section 94 (1) (f) (ii) of the Employment and Labour Relations Act No. 6 of 2004 (the Act), rule 24(1), (2)(a))(b))(c)(d))(e)(f), (3) (a) (b))(c)(d) of the Labour Court Rules, GN. No. 106 of 2007 (the Rules) and any other enabling provisions of the law.

The application has been vehemently resisted by the respondent through her notice of opposition and a counter affidavit.

The hearing of this application was made in writing. Ms Mwanakombo Chaponda, learned Advocate appeared for the applicant and argued in support of the application whereas Mr. Steven L. Lekey, learned Counsel, stood for the respondent and argued in opposition.

Supporting the application, Counsel for the applicant proposed only one legal issue which is *whether the employees who are neither professional nor managerial cadre are entitled to contracts of employment which are specific period of time/ fixed term contract.*

She adopted the affidavit as part of her submission and further submitted that on 2015 Regional Labour Office conducted the Inspection to

the respondent work premises, and through the report, particularly under paragraph 3 (1), it was identified that the respondent herein has been supplying inappropriate employment contracts to her employees, the said paragraph state as following:

> **"That the employer does not use appropriate written contracts of employment contrary to provision of section 14 of the Employment and Labour Relations Act as it was observed that most of the contracts provided to the employees are specified period of time contracts of employment which are required to be provided to the managerial cadre and professional."**

The said report was issued in 2015 and the respondent was given 21 days to rectify the anomalies found. The respondent did not rectify those anomalies. She supported her argument by attaching an employment contract of one of the employee. According to her, the said employee is neither professional nor employee from managerial cadre but the respondent gave him specified period of time contract which means that the order by the Commissioner for Labour was not complied with and such contracts are contrary to the Labour Laws. This court was referred to Section 14 (1) of the Employment and Labour Relations Act, No. 6 of 2004

on the types of employment contracts. Ms Chaponda pointed out that according to Section 14 (1) (b) of the Act, a contract for specified period of time is for professionals and those employees in managerial ranks meaning that those who are not professionals or managerial rank cannot be employed basing on the said type of contract, rather, they have to be employed under contracts for specific task (14 (1) (c)) or contracts for an unspecified period/permanent contract (14 (1) (a)).

It was her earnest request that the respondent herein be ordered to provide to her employees the employment contracts which do fall under Section 14 (1) of the Act. As per the law that kind of employment contracts are supposed to be given to the professionals or employees from managerial cadre. According to her, in the respondent premises, not all of the employees do fall on those two kinds (professional employees and employers and employees from managerial cadre). She mentioned such other kinds of employees to include instrumental employees, production employees, electrical employees, store employees: handling and storing luggage/production, mechanical employees, packing plant employees and transportation employees/drivers. It is her view that such kind of employees, their tasks do not require professionalism rather, a little skill and experience which they get through practising the said task, hence as

per the law they are not supposed to be given employment contract for specific period of time which is supposed to be given to the professionals and managerial cadres employees. Learned Counsel complains that despite the call by the Labour Commissioner to do rectification, the respondent still provided specified period of time contracts of employment to her employees and, therefore, it is through the court's interpretation, the determination of what kind of employees, will be entitled to be provided with specified employment contracts under section 14 (1)(b) of the Act. Learned counsel reiterated her prayers.

Responding to this submission, Mr. Stephen L. Lekey, learned Advocate for the respondent pointed out that the applicant in their Affidavit and submission puts their allegations that the Respondent has the attendance of providing incorrect employment contracts to their employees. Counsel for the respondent contends that Ms Chaponda has neither provided proof nor mentioned the names of employees who were supplied with such contracts but has only appended a sample of contract of Sylivanus Selis Nazar (Annexure TUC 3) which, according to Mr. Lekey, is of no assistance to their case. He admits that section 14 (1) of the Act provides for three different types of employment contracts being a contract for unspecified period of time, a contract for specific period of time for

professionals and managerial cadre, and a contract for a specific task and that it is the second type of a contract for specified period of time for professional and managerial cadre that the Applicant claims that they should not be supplied to their purported members.

Mr. Lekey explained that clause 3 (f) of the Respondent's affidavit is clear on different kinds of employees and who enjoy different types of employment contract but that the applicant failed to prove under the law, as to who among the many employees of the Respondent, was supplied with the contract which they legally do not deserve. According to him, the list of names attached to the application serves no purpose as they were attached with the notice to produce. Moreover, the applicant did not even refer them in her affidavit or even explain the reasoning for their attachment. Such an attachment should have been attached to the affidavit since it is a substitute of oral evidence. Mr. Lekey insisted. He made reference to the decision in the case of **Uganda v Commissioner of Prisons, Exparte Matovu** [1966] 1 EA 514 to buttress his argument. He further argued that the list is neither signed nor dated to authenticate it, it does not even have a heading explaining as to those people whose names appearing therein. In addition, Mr. Lekey complains that there is

also no explanation or even indication of whether they are applicant's members.

Mr. Lekey was also of the view that a person can be in transportation or any other department or field and still be in managerial or professional cadre. He clarified that the use of fixed – term contracts offer employers some flexibility in how they engage staff. For example, where employers only have a temporary need for staff or where the availability of work or funding may be uncertain.

In a further elaboration, Counsel for the respondent insisted that even if she could have proved or argued to have proved the existence of such employees, the provision of such contracts could still not be against the law. Reliance was placed on the case of **Serenity on the Lake Limited V Dorcas Martin Nyanda, Civil Appeal No. 33 of 2018, C.A Mwanza (unreported)** at page 9 when deliberating on a case of employee who was neither in managerial nor professional cadre though was being supplied with contracts of three months renewable it did not term it illegal rather it blessed the same.

Respecting the compliance order of 2015, Counsel for the respondent stated that it is now more than 5 years and there has never been never

been any other order or reminder or any correspondence regarding the alleged order suggesting that the order was complied with. Learned Advocate was more focused that the said compliance order was not issued by or to the applicant and it does not involve or even mention the applicant in any way whatsoever and wonders how it could be sought to be enforced against her by an individual who even lacks *locus standi*. This court was referred to section 46 (6) of the Labour Institutions Act and the case of **Paul Vicent v. Sherally Transport Ltd** [2013] LCCD 123

Submitting on the prayers of interpretation of the meaning of professional and non – professional employees and the prayer to compel the respondent to provide unspecified employment contracts to employees who are neither professional nor managerial cadre, Mr. Lekey argues that these prayers are misconceived and ought not to be granted rather the entire application be dismissed with costs.

He explained that the respondent being a company with different types of contracts as per the nature of their work, the prayer for the court to compel the respondent to provide such contracts would, if granted, create confusion and chaos at work place and the prayer aims to benefit the .

Moreover, the prayer aims to benefit to "employees of the respondent who are not even members of the applicant and that the alleged employees have their contracts and it is not the applicant's prayer that such existing contracts be amended.

In another dimension, Mr. Lekey brought to the attention of this court some legal issues for consideration that arise from the nature of this application and which touch on the jurisdiction of this court and the *locus standi* of the applicant. Counsel pointed out that a Trade Union as is the applicant, being not privy to the employment contract, her *locus standi* is built from **one**, members who have subscribed to their constitution and **two**, in the case of this nature, after complying with Part VI of the Act. It is argued on part of the respondent that the applicant did not show in the affidavit as to who among the employees of the respondent are her members. Furthermore, the applicant's affidavit and submission purport to speak for all the respondent employees as per paragraph 3 (i) of the Affidavit. It was, therefore, imperative for the Applicant to satisfy this court that, she is, pursuant to Section 67 (1) of the Act, a recognized as an exclusive bargaining agent at the respondent's workplace. This court was referred to the case of **Conservation Hotels Domestic Social Services and Consultancy Workers Union v Southern Sun Hotels Tanzania**

Ltd T/A Southern Sun Dar Es Salaam Labour Dispute No. 2 of 2017, H.C My Lord, it is also our humble submission that the claim before you is premature. Counsel clarified that the applicant should have first been recognized as exclusive bargaining agent pursuant to Section 67 of the Act, engage with the employer in Collective bargaining agreement and register the same as per section 71 of the Act. Further that if any disputes ensue on the agreement, challenge it pursuant to **Section 74 of the Act** by referring a dispute to the Commission for purposes of Mediation and if mediation fails the same may be referred to your Honourable Court for decision. Counsel for the respondent argues that that should have been a proper procedure for the application to be properly placed in the court instead of the applicant clinging on Compliance Order which she has no locus to enforce.

With regard to paragraph 3 (vii) of the applicant Affidavit on the complaint about termination of employment, Counsel for the respondent was of the view that such complaint should have first been referred to the Commission for Mediation and Arbitration pursuant to Section 86 of the Act.

On a notice to produce, Mr. Lekey argued that no copies of the said contracts were annexed to the affidavit and the issue was not raised in the

submission which means that the respondent should not be faulted for not complying with Section 68 of the Evidence Act.

In conclusion, learned Counsel for the respondent urged this court to dismiss the application and award costs to the respondent as an exception to Rule **51 of the Labour Court Rules, G.N 107 of 2007** that provides for general rule that costs are not payable in labour matter.

I have heard learned Counsel for both parties and perused the documents. The issues calling for determination in this application are, in my view, the following: one, whether the applicant has *locus standi*. Two, whether this application is competent.

According to the application, the applicant seeks two reliefs, namely, an order against the respondent to issue or provide employment contracts which are unspecified period of time to her employees who are neither professional nor of managerial cadre and a prayer to the court to make interpretation of professionals and non-professionals employees.

As far as the first issue is concerned, there is no dispute that this application has been brought by the applicant which is a registered trade union. Generally, there is a distinction between an individual dispute and a dispute in a representative character. In the present application, the

dispute is in a representative character. However, it has neither been established that the applicant, though a registered trade union, represents the majority of the employees in an appropriate bargaining unit nor that she is recognised as the exclusive bargaining agent of the employees in the bargaining unit as defined under Section 66 (a) (i) of the Act. There is no Concluded Collective Agreement of Recognition produced by the applicant. Indeed, nothing is placed on record to show the recognition of the union by the respondent and the number of persons the applicant represents in the respondent's establishment. It has not even been suggested that the applicant is a representative union of the entire employees in the respondent's establishment and this explains why written contracts are being sought for some category of employees. In such circumstances, it is not clear if the applicant is duly authorised to espouse the instant dispute. I find that the applicant has failed to prove her *locus standi* in this matter.

Respecting the second issue, there is nothing on record showing who are those employees the applicant is representing in this application who are neither professional nor of managerial cadre who are likely to benefit from the orders the applicant is seeking from this court. There is no dispute and as rightly pointed out by Mr. Lekey, the respondent's establishment has different employees with different statuses. Section 14

(1) (a), (b) and (c) of the Act stipulates three types of contracts of employees. The first category are contracts for unspecified period of time otherwise called permanent or indefinite contracts. These contracts normally cater for non-professional employees and unskilled workers. The second category are contracts for specified period of time which are only available for professional employees and those employed to fulfil managerial posts. The third category are contracts for specific task. These contracts are for employees who are engaged specifically to perform certain tasks and upon the completion of that task, the contract is terminated.

In the instant application, there is no necessary and material facts relating to the subject matter of the questions the court is called upon to decide. For instance, there are no beneficiaries of contracts of unspecified period of time for the orders the applicant is seeking from this court. In the absence of the necessary and material facts relating to the subject matter, I am not ready to decide abstract questions of law or facts arising from hypothetical facts. Granting the orders sought by the applicant would amount to evincing lackadaisical approach in the administration of justice. I decline the invitation. The application is, to that extent, incompetent.

That said and for the foregoing reasons, I am satisfied that application has no any legal merit. The same is dismissed. No costs.

W.P. Dyansobera

Judge

This ruling is delivered under my hand and the seal of this Court on this 7h day of October, 2021 in the presence of Mr. Emmanuel Ngongi, learned Counsel holding brief for Ms Mwanakombo Chaponda and Mr. Charles Magai, learned Advocates for the applicant and Mr. Ms Lightness Kikao, learned Counsel for the respondent.

W.P. Dyansobera

Judge