IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

LABOUR REVISION NO. 102 OF 2020

(Originating from Employment Dispute No. CMA/ ARS/ARS/473/19/210/19)

RICHARD NKOMO..... APPLICANT

Vs

HODI (HOTEL MANAGEMENT) CO.LTD

T/A MOUNT MERU HOTEL.....RESPONDENT

RULING

Date of last order:14-12-2021

Date of ruling:8-2-2022

B.K. PHILLIP, J

Before me is an application for revision seeking to revise and set aside the award made by the Commission for Mediation and Arbitration ("CMA") at Arusha , delivered on 26th October, 2020 in Employment Dispute No. CMA /ARS/ARS/473/19/210/19. The application is made under the provisions of sections 91 (1) (a), (2) (b) (c), and 94 (1) (b) (i) of the Employment and Labour Relations Act read together with Rules 24(1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d) and (e) of the Labour Court Rules, G.N. No. 106 of 2007, supported by an affidavit sworn by the learned advocate Meinrad Menino D'souza , who appeared

for the applicant in this matter. The learned Advocate Paschal Kamala , appeared for the respondent. He filed a notice of opposition supported by a counter affidavit sworn by Richard Shanyangi, the respondent's principal officer.

`I ordered the application to be disposed of by way of written submissions. I commend both counsel for filing their submissions timely as ordered by the Court as well as for the research they have undertaken in this matter.

Before delving into the merits of this application, it is worth stating the background to this matter, albeit briefly. The applicant herein is a resident and citizen of Zimbabwe. He was employed by the respondent on 18th May 2013 in a position of a general manager. His employment contract was renewable. Thus, he had been in continues employment with the respondent until 31st July 2019, when he was served with a letter titled *"Rescission of employment contract by operation of the law"* , which stated that applicant had no valid residence permit thus , his employment contract was illegal and contrary to the law. More details on the foresaid letter shall be put in light in the coming discussion. The aforesaid letter was served to the applicant one day after the taking over of the management of the respondent by Blue

Jewel Limited ("BJL"), a Company which was the minority shareholder in the respondent following the South Africa Enterprises Development Fund ("SAEDF") decision which was the majority share holder in the respondent , to sale to BJL all his shares. Following the receipt of that letter by the applicant, there were a number of correspondences between the applicant and the respondent. At the end of the day, no consensus was reached. Eventually, the applicant lodged his complaints on breach of the employment contract dated 1st July 2018 and the collective bargaining agreement at the Commission for Mediation and Arbitration at Arusha, ("CMA"). The applicant claimed for payment of USD 2,333,974.67, whose breakdown is as follows;

i) Salary , August 2019- USD 20,000:=

ii) Revenue Bonus (July 2019) – USD 7,500:=

iii) Four (4) Months' salary in lieu of notice – USD 80,000:=

iv) Payment of leave days and public Holidays (PH) (81.7 days) – USD 54,474.67

v) Payment of severance allowance-USD 32,000:=

vi) Repatriation costs to Harare, Zimbabwe –USD 20,000:=

vii) Payment of Bonus – USD 100,000:=

viii) *Payment of months' salary as damages for breach of contract – USD 1,800,000:=*

ix) *Payment of salary for September 2019 to 1st July 2020-(the remainder of the Contract period) – USD 220,000:=*

At the CMA, both sides filed their opening statements and proposed the issues for determination of the dispute between the parties herein. The Arbitrator framed three issues for determination, to wit;

i) *Whether or not the complainant's employment contract was tainted with illegalities.*

ii) *If the answer to issue No.1 is in negative, whether or not the respondent breached the employment contract dated 29/06/2018.*

iii) *To what reliefs are the parties entitled to.*

The applicant's case at the CMA was as follows; That the applicant had been working with the respondent since 2013. His first contract with the respondent commenced on 18th May 2013 up to 17th May 2014 (Exhibit P1).He was recruited in Zimbabwe and the contract was sent to him by email (Exhibit P2). He was issued with both work and residence permits which were secured by the respondent. The respondent was responsible in assuring that the applicant had valid residence and work permits. His contract of employment was renewed four times. The first

contract was signed in 2013, the second one in 2014, the third one in 2016 and last one in July 2018, which was for a period of two years too.

On 31st July 2019, Mr Emmanuel Wado, the respondent's manager , held a meeting which was attended by the applicant, Eugenia Mark (Lawyer) and Martha Renju (Lawyer) whereby Martha Renju informed him that she went through his (applicant) employment records and found out that there was no residence permit. Thus, he was working illegally. In response, the applicant informed them that he had special pass (Exhibit P5), which was secured by the Human Resources Department and that he was using the same while awaiting for the issuance of the residence permit. Despite the explanations given by the applicant, they insisted that in the absence of a valid residence permit, the special pass was not a valid document to entitle the applicant to continue working with the respondent. Thereafter, the applicant was served with the letter titled *"Rescission of employment contract by operation of the law"* . The applicant called the Human Resource officer and asked him what happened with his residence permit. He demanded to be given concrete explanations on the same. The Human Resource Manager told him that there were some problems in the network system at the Immigration office. Thereafter he had to leave the country. He went to Zimbabwe. On

2nd of August 2019 the applicant received a message from the respondent's Human Resources Manager informing him that the resident permit had been issued and they were waiting for collection of the same. Later on, the Human Resource Manager sent him the residence permit (Exhibit P6 collectively).On 9th August 2019 the applicant wrote a letter to the respondent alleging breach of his contract of employment on the ground that the respondent failed to handle his matter with due diligence and did not properly check the status of his employment. In response (exhibit P8), the respondent insisted that there was violation of the law due to lack of valid residence permit. However, the applicant maintained that there was breach of contract and deserved to be compensated in accordance with the law.

On the other hand , the respondent's defence was to the effect that the applicant's contracts of employment , the subject of this matter was tainted with illegalities and the applicant was fully involved in the negotiations of the sale of SAEDF's shares to BJL. The applicant took advantage of his involvement in the deal to conspire with SAEDF's officers by signing contracts with terms favorable to him. He increased his allowances and benefits at the detriment of the respondent who was not making any profit (exhibit D1). The applicant used to report to the

Board Chairman who lives in the United States of America and was the custodian of his employment records/ file, in such a way that even the Human Resources Manager was not able to know the contents of the applicant's employment records.

With regard to the terms and duration of the applicant's Contract of employment, the respondent argued that upon perusal of the applicant's records of employment , he noted that there were two copies of contracts (Exhibit D2) both dated 2013 with different contents. To him that was a clear indication that the applicant's employment contract was tainted with illegality. The respondent insisted that the applicant used his position to manipulate his employment records in his favour. Moreover, the respondent argued that another aspect of illegality in the applicant's employment contract is in respect of the work and residence permits. The respondent submitted that the applicant entered into a contract of employment dated 9th July 2016 which expired on 9th July 2018 (Exhibit D3) and that contract was used to secure the work and residence permits which expired on 9th May 2019 and 31st May 2019 respectively. The respondent maintained that the aforesaid work and residence permits were supposed to go hand in hand with the duration of the employment contracts, as such were supposed to expire by 9th July 2018

not in the year 2019. In short the respondent insisted that there was something fishy going on with the grant of applicant's work and residence permits. Not only, that the respondent argued that the contract of employment dated 1st July 2018 (Exhibit P2) was entered into before the expiry of the first employment contract which was to come to an end on 9th July 2018. The respondent maintained that the aforesaid contract dated 1st July 2018, did not cancel , amended or nullify the contract that was entered into on 9th July 2016.The respondent was of the view that the legal effect of signing a new contract before the expiry of the current agreement is that the new contract signed is null and *void abinitio.* Furthermore, the respondent contended that upon expiry of the work and residence permits automatically the employment contract dated 1st July 2018 ceased to exist. Therefore, the contractual obligation between the parties ceased to exist on 9th May 2019 upon the expiry of the residence permit because for a non-citizen to legally work and stay in Tanzania must have both work and residence permit.

Also, the respondent accused the applicant of a number of misconducts and misuse of his position which I do not need to reproduce all of them here, among them are ; that the applicant took the respondent's Motor Vehicle (Mercedes Benz) clandestinely and in collusion with SAEDF

officers he arranged the same to be transferred into his ownership, the applicant was involved in the deal for the sale of the SAEDF shares to BJL and was promised to be paid personally, therefore he had conflicts of interests, that is why he arranged for renewal of his employment contract with terms favorable to him and planned to quit from employment immediately after the sale of SAEDF shares to BJL. In short the respondent maintained that the applicant was unfaithful to his employer and planned to steal from his employer.

With regard to benefits, stipulated in the Collective Bargaining Agreement ("CBA") , the respondent argued that the same cannot be applicable to the applicant since he held a senior management position.

In its ruling the arbitrator ruled out that the applicant's contract of employment dated 1st July 2018, (Exhibit P3) the subject of this case, was tainted with illegality and the respondent did not breach the same. It was the Arbitrator's finding that the respondent just noted and communicated with the applicant a legal issue which not only rendered the employment contract unenforceable but also continuation of the employment with the applicant legally impossible without sorting out that issue, that is, the issue pertaining to the lack of residence permit

on part of the applicant. In the upshot, the Arbitrator dismissed the applicant's claim in its entirety.

In this application the applicant has raised the following grounds of complaints;

i) That the Hon. Arbitrator erred in law and fact by his failure to analyze the evidence on record and failed to hold that the respondent was in breach of the employment contract with the applicant.

ii) That the Hon. Arbitrator erred in law and fact by failing to adhere and enforce the contractual obligations between the parties, i,e to uphold "the sanctity of contract".

iii) That the Hon. Arbitrator erred in law and fact having failed to confine himself to the issues raised on record whilst delivering the award now challenged.

iv) That the Hon. Arbitrator erred in law and fact by failing to analyze that the applicant was issued with both the work and residence permits (Exhibit P5 and P6- Collectively.)

v) That the Hon. Arbitrator erred in Law and fact by failing to analyze that the contract of employment between the applicant

and the respondent was successfully performed including Exhibit P3 that was performed for over 12 months without any dispute.

vi) That the Hon. Arbitrator erred in law and fact by failing to evaluate that the respondent's defence evolved from an alleged rescission of contract to subsequent alleged illegalities all of which were not sufficiently proved by the respondent.

vii) That the Hon. Arbitrator erred in law and fact by failing to evaluate that the illegalities claimed by the respondent was a figment of their imagination.

viii) That the Hon. Arbitrator erred in law and fact by failing to evaluate that the respondent's claims of alleged illegalities was an afterthought made after the breach of contract complained of.

ix) That the Hon. Arbitrator erred in law and fact by failing to analyze that the purchase of controlling shares in the respondent Company as a going concern had no effect on the third party rights including the rights of the applicant.

x) That the Hon. Arbitrator erred in law and fact by improperly admitting into evidence and relying upon Exhibit D2.

xi) That the Hon Arbitrator erred in law and fact by not granting the reliefs claimed by the applicant.

Mr D'souza, submitted in detail for all of the above enumerated grounds of complaints and made a rejoinder submission too. Similarly, Mr Kamala responded in detail to all of the arguments raised by Mr D'souza. Both counsel referred me to a number of cases which I read all of them , but I cannot reproduce all of them here as it will make this ruling unnecessary long.

Coming to the merits of this application, I wish to start by point out that most of the grounds of complaint raised by Mr D'souza are basically concern with analysis of the evidence made by the Hon. Arbitrator. However, I have noted that the 6th ground of complaint is about the respondent's defence on the illegalities of the employment contract at issue vis-a-vis the alleged rescission of the contract. I will start with this ground of complaint as it goes to the root of this matter. It is not in dispute that the letter that triggered all what is going on in Court is the one titled " "*Rescission of employment contract by operation of the law*" .To my understanding, a case has to be determined basing on the pleadings and issues raised by the parties , and that drafting of relevant issues is vital in reaching a legally sound decision.

Submitting for the 6th ground of complaint, Mr. D'souza argued that the respondent's defence on the alleged illegalities was framed as an

afterthought and as an alternative after a failed attempt to justify the purported rescission of the appellant's contract of employment. Mr. D'souza contended that the respondent fabricated multiple defenses. The contract which is alleged to be illegal was executed on 18th May 2013. The same is of no relevance whatsoever to the instant dispute since the same arose in 2019 and the relevant contract for this matter is the one executed on 1st July 2018 (Exhibit P2).

On the other hand, Mr Kamala, argued that the issue pertaining to the illegalities of the applicant's employment contracts was framed by the Hon Arbitrator following the opening statements made by both sides and Mr D'souza did not object for that issue to be included in the issues for determination by the Arbitrator. He insisted that Mr. D'souza cannot be heard now arguing that it was wrong for the Hon Arbitrator to determine that issue.

Upon perusing the CMA proceedings, I noted , as correctly submitted by Mr. Kamala that the issue on the illegalities of the applicant's contracts of employment was framed by the Hon. Arbitrator. To my understanding, the powers to draft issues for determination is vested into the Hon. Arbitrator. The parties only draft proposed issues. Therefore , I do not agree with Mr. kamala that Mr. D'souza did not object to the issue

concerning the illegalities of the applicant's contract of employment , thus should not raise that concern here. Mr. D'souza had no powers to reject the issues framed by the Hon Arbitrator.In fact the proposed issues for determination which were filed before the CMA by Mr. D' souza did not include the issue pertaining to illegalities of the contract of employment. It was Mr. Kamala who proposed the issue on the illegality of the applicant's contract of employment. Therefore, raising the concern on whether the issue on illegality of the contract of employment was properly included at this stage is correct.

Looking at the complaint lodged by the applicant at the CMA, I am inclined to agree with Mr. D'souza that the issue on the illegality of the applicant's contract of employment was misplaced because the letter that is the subject of the dispute between the parties stated clearly that the contract of employment was rescinded due to lack of a valid residence permit. Therefore, as correctly submitted by Mr. D'souza, the issue pertaining to the illegality of the contract of employment in respect of the dates it was signed, the way it was procured and the terms contained therein was an afterthought , and not relevant in the complaint lodged before the CMA.As I have intimated herein above, Issues are supposed to be framed basing on the complaint and annextures attached

thereto. If the illegality to be considered in the matter would have been confined to the issues related to the existence or non- existence of the residence permit that would have been legally correct. Unfortunately the CMA proceedings show that the illegality dealt with were concern with new issues which were not indicated in the letter served to the applicant. In fact the respondent in his defence brought a number of new issues including allegations of theft, applicant's collusion with SAEDF officers etc.

In short, it is the finding of this Court that the Hon .Arbitrator misdirected himself to frame the aforesaid issue on the illegality of the applicant's contract of employment .The relevant issue in this matter were whether or not the respondent breached the employment contract dated 1st July 2018 (Exhibit P2) and to what reliefs are the parties entitled to. Thus, in this ruling I will not deal with the arguments raised by the parties on the illegality of the contract of employment which I have pointed out herein above instead I will sort out the arguments related to the issues I have stated herein above only.

Starting with the issue on whether the respondent breached the contract of employment dated 1st July 2018,(Exhibit P2) Mr. D'souza's arguments were to the effect that the Human Resource Manager (DW2) was the one responsible for the all employee's matters including

processing of the residence permit. He referred this court to the respondent's Human Resources Policies and Procedure Manual (Exhibit D4), in particular part of Item 1.3 on recruitment of foreign employees which states that

"The company applies for these permits and the renewal thereof and bears the costs, provided that the individual remains in the company's employment for a minimum period of 12 months after issue."

He insisted that the respondent was the one responsible to process and secure both work and residence permits for the applicant and the respondent should not be allowed to benefit out of his fault in failure to secure the residence permit timely. To cement his arguments he referred this court to section 10(1) of the Non-Citizen (Employment Regulations) Act 2015. Mr. D'souza submitted that according to the testimony of DW2 the work permit had been issued and that the residence permit was at its final stages , and finally it was issued on 25th July 2019 and was collected by the DW2. All requisite fees for the residence permit were paid by the respondent. DW2 wrote the covering letter for the application for the work and residence permits. DW2 was not involved in the deliberations which led to the issuance of the rescission letter at issue (Exhibit P4) and the Chairman of the Board of Directors to whom the applicant used to report, namely Ambassador Carlton Masters was not

consulted before the issuance of said letter (Exhibit P4) .No Board resolution was passed to terminate the services of the applicant or even the appointment of Mr Emmanuel Wado who was involved in the issuance of the rescission letter as a new Chairman of the Board of Directors. Not only that, Mr. D'souza argued that the applicant was not accorded any opportunity to be heard and no any disciplinary action was taken against him to justify the rescission of contract of employment.

Moreover, Mr. D'souza contended that rescission of contract as an equitable relief was not one of the modes provided in the contract and the said rescission cannot be unilaterally applied without first presenting an application to a Court of competent jurisdiction as the same is an equitable relief.

Mr. D'souza also posed a question on whether the simple lack of residence permit makes the contract void or voidable.? His answer to this question was to the effect that, lack of residence permit cannot make the contract void or voidable bearing in mind that the applicant had worked with the applicant for over 12 months. He contended that the sanctity of contract had to be respected.

Relying on the case of **Discovery Health Limited Vs Commission of Conciliation , Mediation Arbitration and another JR 2877/66,** (

Source http:// www.saflii.org), Mr. D'souza submitted that the terms of the contract has to be adhered to unless the contract is terminated under the circumstances contained in the agreement alone. In addition, citing the case of **Chandrakant V. Patel Vs Fank Marealle and another 1984 TLR 231**, he argued that rescission of the contract could not be invoked as the contract was partly performed and certain payments made. It was Mr. D'souza's stance that the respondent did not establish the reason for the rescission of the contract and the restitution of the applicant into employment was not possible.

In conclusion Mr. D'souza maintained that the respondent had already reached a decision to terminate the applicant from employment since the Respondent stuck on its decision to rescind the contract even after being aware that the residence permit had already been issued.

In rebuttal, Mr Kamala submitted that the applicant was accorded the right to be heard as far as the issue of the residence permit is concerned. He contended that the applicant was notified on the issue and asked whether the residence permit was in place. He confirmed that it was not in place. The fact that the applicant had no residence permit was discovered after BJL took over the control of the Company because formerly the respondent had no access to the applicant's employment

records. The respondent was unable to turn a blind eye on illegalities which were obvious as doing so would have resulted into penalties on part of the respondent and loss of reputation.

It was Mr. Kamala's contention that as of 31st July 2019 when the respondent issued the letter to rescind the contract, legally there was no employment relationship between the parties. The employment contract dated 1st July, 2018 was of no effect because residence permit was not in place. He contended that according to the Respondent's Human Resource Manual (Exhibit D4) employment contract would be confirmed upon obtaining the necessary permits. He insisted that by 31st July 2019, there were no residence permit obtained from the relevant authorities. The same was obtained on 5th August 2019 when the respondent paid the facilitation fee to Tanzania Investment Center. However, as per the applicant's letter dated 18th August 2019 (Exhibit P8) by 5th August, 2019, the applicant had already left Tanzania. He just communicated with the respondent alleging constructive termination of his employment contract.

Mr. Kamala maintained that the Respondent's Human Resource Manual provides that the applicant was the one responsible in making sure that the work and residence permits were place. To cement his arguments he referred this Court to the respondent's Human Resources Policies and

Procedure Manual (Exhibit D4), in particular a part of item 1.3 on foreign employees which states that "*Although the Company will assist with the obtaining of the work permit, it is the responsibility of the individual to ensure that the renewal process commences timeously (6 months before the expiry of the contract) .HR will facilitate the application for the work permits and/or their renewal. The Company takes no responsibility for the success or failure of the application; However the Company will endeavor to assist in the facilitation of the renewal of the work permit.*"

It is a common ground that on the 31st July 2019, there was no any residence permit in the applicant's employment records. The residence permit was obtained later on. Now, Who as between the parties herein was responsible in making sure that the work and residence permits were in place. The answer to this question can be obtained from respondent's Human Resources Policies and Procedure Manual (Exhibit D4). I have noted that each party has quoted part of Exhibit D4 which he believes favors his stance. For clarity let me quote the whole of the relevant part in Exhibit D4 as far as the responsibility of securing the work and residence permits to foreign employees is concern. The same provides as follows;

1.3 Recruitment of foreign employees

"In accordance with the country's Immigration Act (Cap 54 R.E 2002) to work in Tanzania, an expatriate has to have a work permit. This is issued by the Immigration authorities for a period of 2-years. Thereafter the expatriate permit has to be renewed . It is possible that the renewal will not be granted. In this event the employment contract with the company is considered to be terminated. This is a clause in all letter of appointment

Although the Company will assist with the obtaining of the work permit, it is the responsibility of the individual to ensure that the renewal process commences timeoulsy (6 months before the expiry of the contract) .HR will facilitate the application for the work permits and/or their renewal. The Company takes no responsibility for the success or failure of the application; However the Company will endeavour to assist in the facilitation of the renewal of the work permit.

Employment of the non Tanzanian applicants should only be confirmed once they have the necessary work permits issued to them.

The company applies for these permits and the renewal thereof and bears the costs, provided that the individual remains in the company's employment for a minimum period of 12 months after issue."

The above quoted part of respondent's Human Resources Policy and Procedure Manual, which both parties have been relying upon to support

their stance, provides for the way of handling the application for work permit, not residence permit. It has to be noted that a residence permit is different from a work permit. The work permit is specifically for allowing a foreigner to work in Tanzania whereas the residence allows a foreigner to stay in Tanzania as a resident. Now, in the letter for rescission of the applicant's contract of employment what was stated to be missing is *a residence permit* not *a work permit*, therefore , in my considered view, both learned advocates misdirected themselves to base their arguments on the item 1.3 of Exhibit D4. For clarity let me reproduce hereunder the letter that was served to the applicant by the respondent (Exhibit P4).

> *" RESCISSION OF EMPLOYMENT CONTRACT BY OPERATION OF LAW*
>
> *Kindly refer to the above captioned matter.*
>
> *Pursuant to handover of the business and affairs of Hodi (Hotel Management) Company Limited to ("The Company") from Southern Africa Enterprises Development Fund (SAEDF) to Blue Jewel Company Limited ("BJL") on 30th July 2019, I wish to notify you that following our review of your employment records we have noted that a valid residence permit for your employment contract has not yet been issued.*
>
> *As you may be aware under the existing labour and Immigration Laws in the Untied Republic of Tanzania, a foreigner cannot engage in work without valid documents such work and residence permit.*

Wish to notify you further that, it is not only a criminal offence for a company and its directors to enter into any employment relation with a foreigner without possession of such stated documents but also it makes any employment agreement entered , illegal.

In the absence of such mandatory documents, this renders any employment agreement illegal and or contrary to the law. As the Company is legally established and registered in the Unite Republic of Tanzania, it is duty and legally bound to respect and implement the laws

For the above mentioned reasons, in compliance of the law your employment agreement is rescinded with immediate effect. Should valid documents be obtained as required by the laws, the Company may at its discretion, consider your re-engagement

Yours

Signed

DIRECTOR"

Since, the evidence adduced does not state specifically who was responsible as between the applicant and respondent to process and secure the residence permit, I decided to resort to the laws of land pertaining to issuance of residence permits. According to sections 30 (1) and 34 (1) of the Immigration Act, Cap 54 , R.E 2016, a foreigner, upon obtaining a work permit issued in accordance with the provisions of the Non- citizens (employment Regulations Act,) and upon the

Commissioner General being satisfied that he possess the qualifications or skills necessary for that employment and that his employment will be of benefit to Tanzania may grant the foreigner a residence permit class "B" which permits him to work in Tanzania. In short the law places the responsibility of applying for the residence permit to the employee. It does not say that the employer is responsible for processing the residence permit.

From the foregoing it is the finding of this Court that the applicant was responsible for processing and securing his residence permit and make sure that all the time he had a valid and appropriate residence permit , which allows him to stay and work in Tanzania, since , in the absence of a valid residence permit a foreigner is not allowed to stay and work in Tanzania.

Now the next pertinent question is; what does rescission of contract mean? To my understanding when a contract is rescinded, it means that it is cancelled. Was the respondent justified to rescind the applicant's contract of employment upon discovering that there was no appropriate residence permit for the applicant to work in Tanzania?. First of all I wish to point out that I agree with Mr. Kamala that the special pass (Exhibit P5) which the applicant had, did not give him a right to engage in any

employment. The fact that the applicant made efforts to obtain the special pass , means that he was quite aware that his residence permit had expired. In my opinion the applicant was at fault for delay in processing and securing a new residence permit timely before the expiry of his residence permit, bearing in mind that the evidence adduced revealed that the applicant was the custodian of his employment records. The special pass (Exhibit P5) shows that it was effective from 21st June 2019 and the residence permit was obtained on 5th August 2019 by the respondent though it was issued on 25th July 2019. This is in accordance with the testimony of DW2, the Human Resource Officer who informed the applicant on the existence of the residence permit. Therefore, it means that by 21st June 2019 up to 25th July 2019 the applicant had no valid residence permit to enable him to continue working in Tanzania. What was the legal implication to his employment contract which was supposed to end on 1st July 2020?. In my opinion the applicant's contract of employment was not enforceable as the applicant had no capacity to continue working with the respondent. In his testimony, the applicant admitted that by the time the rescission letter was written and served to him, there was no residence permit in his employment records. In my considered view the respondent's decision to rescind the applicant's contract of employment was correct. The fact that after rescission of the

applicant's contract of employment the residence permit was obtained cannot be a reason to fault the respondent's action because no one foresaw, including the applicant himself that the residence would be obtained. This explains why the applicant after being served with the rescission letter he went back to Zimbabwe instead of making a follow up of his residence permit because by that time he had the special pass (Exhibit P5) which was still valid since it was issued on 21st June 2019 and was valid for three months from the date of issue. Under the circumstances the respondent was also justified to advertise the position of the general manager as he could not have continued with smooth operation of its business without a general manager.

For avoidance of doubts , I wish to point out that the fact that the respondent's officer is the one who made a follow up of the residence permit , does not mean that the applicant had no legal obligation to process and secure his residence permit. As alluded earlier in this ruling, there is nowhere in the contract of employment between the applicant and the respondent which indicates that the respondent was solely responsible for processing applicant's residence permit. What I have gathered here is that the respondent might have been making the follow up of the applicant's residence permit for convenience only. But strictly

speaking, the applicant was responsible for processing his residence permit. It is not correct to argue that the applicant was supposed to stay aloof waiting for the respondent to bring him the residence permit on the table and file it in his employment records as presented by Mr. D'souza in his submissions.

In addition to the above, Mr. D'souza's contention that pursuant to the provisions of section 32(4) of the Immigration Act, the respondent was entitled to an initial automatic immigrant quota up to five persons has not being substantiated and the entitlement provided in this section is available during the start period of the investment. No evidence was tendered before the CMA to prove that the respondent was at its start period of the investment. What I noted in the evidence adduced is that the respondent had been in operation for quite some time. It is not true that it was in the initial period of its investment. Thus, it is the findings of this Court that section 32(4) of the Immigration Act, is not applicable in this matter.

With regard to Mr. D'souza's concern that the applicant was not accorded his right to be heard and no disciplinary hearing was conducted, I join hands with Mr. Kamala that the applicant was heard. As alluded earlier in this ruling, the applicant's testimony revealed that before being served

with the letter for recession of his employment contract he had a meeting with the respondent's officers and was informed that the residence permit was lacking in his employment records. He had opportunity to air his views on the matter. According to his own testimony he admitted that he had no residence permit but had a special pass only. At the end of the day they informed him that the special pass does not give him right to work in Tanzania. That is the right position of the law. In my considered view, there was no need of conducting a disciplinary hearing because there was nothing which would have attracted such an action. What happened was lack of legal documents in the applicant's employment records for the applicant to continue working with the respondent.

In the upshot, though I have taken a different approach and reasoning in the determination of this matter, I find myself ending in the same conclusion reached by the Arbitrator that the respondent did not commit any breach of the applicant's employment contract. This application is dismissed. This being a labour matter, I give no order as to costs.

Dated this 8th day of February 2022.

B. K. PHILLIP

JUDGE.