**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(LABOUR DIVISION)**

**AT MBEYA**

**MISCELLANEOUS LABOUR APPLICATION NO. 15 OF 2022**

**HJF MEDICAL RESEARCH INTERNATIONAL INC ..... APPLICANT**

**VERSUS**

**JOSEPH VICTOR CHINTOWA ..... RESPONDENT**

**JUDGMENT**

Date of last order: 10/11/2022
Date of judgment: 14/02/2023

**NGUNYALE, J.**

The respondent JOSEPH VICTOR CHINTOWA was employed by the applicant on 17th October 2013 in a position as Senior Technical Advisor, he served the respondent until his retirement on 22nd day of September 2020. At the time of retirement, he was already promoted to a position of Chief of Party, TPDF program. It is in record that between November 2017 and October 2018 the respondent was assigned duties of the Executive Director because the one who was the director had left the institution. He took charge of those duties pending hiring of a new Executive Director.

In the course of discharging those duties the respondent claimed to be paid acting allowance from the Global Director of the applicant one Tiffany Hamm. The said global Director responded that there was no HJF policy

for the same but still at the end of serving in such acting capacity a bonus can be applied for and paid based on performance. After retirement he kept claimed such allowance but it was not paid, at the end the applicant told him that the same cannot be paid. The respondent initiated a labour dispute with CMA claiming acting allowance. The dispute was decided in favour of the respondent on 31st day of May 2022, he was awarded payment of Tanzanian Shillings Three Hundred Ninenty Two Million Two Hundred Thirty Five Thousand Nine Hundred and Thirty Nine (392,235,939.48) only subject to tax.

The above decision moved the applicant to file the present application under Section 91 (1) (a) and (2) (b) and (c), Section 94 (1) (b) (i) of the Employment and Labour Relations Act Cap 366 of 2019, Rule 24 (1); Rule 24 (2) (a), (b), (c), (d), (e) and (f); Rule 24 (3) (a), (b), (c) and (d) and Rule 28 (1) (c), (d) and (e) of the Labour Court Rules Government Notice Number 106 of 2007 praying for the orders; -

1. *That the Court be pleased to call for records and examine the proceedings of the Commission for Mediation and Arbitration at Mbeya in Labour Dispute Number CMA/Mby/119/2020 with a view to satisfying itself as to legality, propriety, rationality, logical and correctness.*

2. *That the Court be pleased to revise and set aside the CMA Arbitration Award made on the 31st May 2022 by the Hon. Ndonde Severin, Arbitrator on the following grounds;-*

   *(a) The Arbitrator erred in law and fact in entertaining the dispute which was time barred.*

   *(b) The Arbitrator erred in law and fact in holding that the Respondent acted as Executive Director despite sufficient evidence to the contrary.*

   *(c) The Arbitrator erred in law and fact by arbitrarily awarding excessive amount of money based on non-existing mode of computing bonus or awards.*

   *(d) The Arbitrator erred in law and fact in examining the evidence hence arriving at a wrong conclusion and hence awarding the complainant reliefs which are not justified by facts and/or law.*

The application was supported by the affidavit of Jovither Mirumbe and resisted by the counter affidavit of the respondent. The applicant principal officer deponed that the respondent was their employee and he retired from employment on 22nd September 2020. He was employed on 17th October 2013 in the position of Senior Technical Advisor and was promoted to Chief of Party, TPDF Program effective from 1st March 2019. Sometime in November 2017 the respondent was assigned additional temporary duties in the absence of an Executive Director, such assignment ended around October 2018. He was not paid acting

allowance because the applicant had no such policy and that the respondent had not been promoted to a position of Executive Director, he was just assigned additional duties.

In resisting the affidavit of the applicant, the respondent stated that he was not assigned additional duties but rather he was authorised to act in the position of Executive Director of the applicant. He was told that he was entitled to acting benefits which will be paid after the period of acting.

The hearing of the application took the form of written submissions, both parties honoured the scheduling order of filing the submissions.

The applicant under the service of Juvenalis Ngowi submitted in respect of the first ground of appeal that the Arbitrator entertained the dispute which was time barred. He stated that Rule 10 (2) of the Labour Institutions Mediation and Arbitration Rules state that any dispute other than a dispute of unfair termination shall be referred to the commission within 60 days from when a dispute arose. In the award the arbitrator made a finding that the respondent started to act in the position in November 2017 and he was relieved from those duties after 11 months. It means that the alleged acting period ended in October 2018. The dispute was filed before the CMA on or about 9th October 2020 which is almost two years from when the respondent was relieved from additional

duties. He submitted further that according to rule 10 (2) of the Labour Institutions Mediation and Arbitration Rules, the respondent ought to have referred his dispute to the CMA within sixty days from 14th February 2018 when the applicant communicated to the respondent that there is no policy or practice for acting allowance in the applicant's organization. It was the view of the applicant that the respondent ought to seek extension of time otherwise the suit ought to be dismissed. He referred the court to the case of **Sarepta Network Investment (Saneico) versus Bukoba District Council and Attorney General**, Civil Case No. 16 of 2021 (unreported) the High Court at page 3 quoted with approval the case of **John Cornel versus A. Grevo Tanzania Limited** Civil Appeal No. 70 of 1998 where it was held; -

> *"However, unfortunate it may be for the plaintiff, the law of limitation, on action knows no sympathy or equity. It is a merciless sworn that cuts across and deep into all those who get caught in its web"*

The fact that he filed the suit without applying for condonation means the CMA acted without jurisdiction to entertain the dispute.

In his further submission he cited the case of **Precision Air versus Nancy Ngowi**, Revision Application No. 563 of 2021, High Court (Labour Division) at Dar es Salaam (unreported) where it was observed; -

*"... the position of the law under Rule 10 of the GN No. 64/2004 requires any dispute apart from the disputes of unfair termination to be referred to the CMA within 60 days from the date when the dispute arose. Undoubtedly, the dispute at hand falls within other disputes and not a dispute of unfair termination. Therefore, the same was required to be filed within 60 days from November 2013. In my view, such fact does not waive the respondent to apply for condonation so long as the dispute arose on November 2013. In my view the application was supposed to be accompanied by the application for condonation. ... the CMA had no jurisdiction to determine the matter because it was filed out of time. In the event, the Arbitrator's award and proceedings thereto are hereby quashed and set aside."*

It was the view of the applicant basing on the above observation that the case at hand was supposed to be filed within 60 days after the applicant had made it clear to the respondent that according to its policy or practice there was no acting allowances.

On the second ground that the Arbitrator erred in law and fact in holding that the respondent acted as Executive Director despite sufficient evidence to the contrary, the applicants submitted that; the respondent did not bring any document to prove that at any point in time appointed to act as the Executive Director of the applicant. He has a burden to prove that he was acting such a position. In fact, he was not acting instead he was assigned additional duties. The applicant went on to state that the e – mail dated February 14, 2018 exhibit R2 in the award the applicant clearly informed the respondent that he was not promoted but only

assigned additional duties together with another staff called Eric Black. There is no evidence submitted to the effect that he was in acting capacity, the Arbitrator erred in law and fact in making finding and determination that the respondent was given an acting position as the Executive Director.

The third ground of the application that the arbitrator erred in law and fact in holing that the respondent was entitled to acting allowances despite sufficient evidence that he was not acting and there was no policy or practice to that effect the applicant reiterated her earlier submission that the respondent was assigned additional duties and not given an acting position. It was their view that the additional duties were assigned to the respondent without altering or amending his employment contract therefore he retained his original position as a Senior Technical Advisor. In addition, they submitted that the respondent did not submit any evidence to support his claims including the basis of claiming for acting allowance. Any employee's right must be based either on the statute or on the contract of employment (including policies or practice). The CMA awarded the respondent acting allowances without any legal basis, be it statutory or contractual.

It was the applicants view that the respondent has not discharged his burden of proof per section 111 of the Evidence Act that he who alleges must prove the allegations. The respondent did no produce any agreement, policy or cite any provision of the law which gave him the basis of his claims. To cement the position, he cited the case of **Geita Mining Ltd versus Ignas Athanas**, Court of Appeal of Tanzania at Mwanza; Civil Appeal No. 227 of 2017 (unreported) at Page 5 the Court quoted with approval the case of **Anthony M. Masanga versus Penina (Mama Mgesi) and Lucia (Mama Anna)** Civil Appeal No. 118 of 2018 (unreported) where it was observed; -

> *"Let's begin by re- emphasizing the ever cherished principle of law that generally in civil cases the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provision of section 110 and 110 of the Law of Evidence Act Cap 6 of Revised Edition 2002"*

Since the respondent did not produce any proof that he was actually appointed to act in the alleged position and that he was entitled either under the law or agreement to be paid acting allowances, then he failed to prove his case on the balance of probabilities and therefore the Arbitrator erred in law and fact in awarding the respondent acting allowances. To bolster the point that the award was bad in law he cited the case of **John Hamza Tenga versus Hadija A Sevuri**, High Court at Moshi District Registry, Civil Appeal No. 8 of 2022 (unreported), where

the Court quoted with approval the case of **Cooper Motors Corporation Ltd versus Moshi Arusha Occupational Healthy Services** [1990] TLR 96 that the appellate court will interfere with the illegal award.

The last ground of revision the applicant stated that the Arbitrator erred in law and fact by arbitrarily awarding excessive amount of money based on non-existing mode of computing bonus or award. They submitted in support of the ground that the arbitrator erred to rely on the testimony of Amina Ramadhani Mkwawa on how acting allowances are computed relying on the experience of other employees who were alleged to have been paid such allowances. Those employees were paid because they were actually appointed to act in the positions but the respondent was not appointed to act in the position of Executive Director. And they were not paid acting allowances, instead they were paid token amount of appreciation at the discretion of the employer and it was not calculated based on salary.

The applicant went on to submit that this Court on several occasions has made it clear that bonus is a discretion of the employer, and such allowances must be clearly stated in the employment contract for an employee to have a right to claim then or if there is a clear policy to that effect or there is an established standard in computing bonus. In the case

of **Asha hamisi Mghanja & Another versus Geita Gold Mining Limited**, Revision Application No. 76 of 2017 [2018] TZHC 06 September 2018 the court held; -

> *"It should be known that the bonus is an amount given to an employee in addition to his salary with a purpose to encourage an employee to work for extra miles. I find it purely a discretion of the employer"*

The Arbitrator opted to use her personal standard in computing the bonus which standard does not exist to the applicant. The standard used had no legal justification. He cited the case of **Asha Hamis Mghanja & Another versus Geita Gold Mining Limited** (supra) where it was held;

> *"The employee is entitled to allowances which are stipulated in the employment contract. For example, phone allowances, house allowances, responsibility allowances and entertainment allowances ... In the case at hand the contractual obligation was not established."*

The last ground of revision that the arbitrator erred in law and fact in examining the evidence hence arriving at wrong conclusion by awarding the respondent reliefs which are not justified by fact the applicant submission reiterated on what has been argued before that; **one**, amount awarded had no legal justification or justifiable formulae, **two**, the Arbitrator imposed his own employment terms between the parties, **three**, the respondent failed to prove that he was entitled to such award. If the Arbitrator analysed properly the evidence, he would have arrived at

a conclusion that acting allowance was not a contractual term and it had not basis.

The respondent after having read the submissions of the applicant under the representation of Advocate Daniel Muya submitted that the respondent was not assigned additional duties as submitted, instead, the applicant had promoted the respondent to the position of acting Executive Director.

Responding specifically on the first ground of revision, the respondent submitted that the appropriate time frame for tenure of the acting position was from November 2017 through 30th November 2018. However, the dispute arose in a follow up email dated August 27,2020 when the respondent rejected to pay the acting allowance (Exh C – 2 email dated 27th August 2020 at 15 :16 HRS by Damaris Nyakundi. It stated "... after consultation with the program it was concluded that the acting allowance is not paid as HJFMRI does not have such a policy." It was the submission of the respondent Counsel that the very email serves as the applicant's formal refusal of the respondent's request for payment of acting allowance. On the very date is when the cause of action arose, therefore the dispute was filed within time on October 9, 2020 therefore the Arbitrator acted within the scope of his authority.

In respect of the second ground of revision, it was the respondent's submission that the arbitrator arrived at the right conclusion that the respondent served in the capacity as Executive Director because all the applicants' employees were notified that the respondent's status as the acting Country Director and Executive Director per Exhibit C7 the email dated 6th December 2017 at 10:53 PM. According to PW2 payment of acting benefits was a practice of the applicant as noted in Exhibit C6 that Dr Joseph Chintowa will lead the program. It was stated by the Global Director one Tiffany that the respondent will get additional payment based on performance once the acting duration is complete. The same is illustrated by Exhibit C6 which shows that even though acting payments are referred to as acting bonuses or acting allowances, they actually represent the same thing: an acting allowance.

In the third ground of revision the respondent's submission was to the effect that the respondent proved his case on the preponderance of the evidence, and as a result, the CMA decision was that the respondent was eligible for acting allowance. The respondent discharged his duty of proving the allegations on the balance of probabilities as emphasized by Rule 9 (3) of the Employment and Labour Relations (Code of Conduct of Good Practice) Rules of 2007, GN No. 42 of 2007.

The respondent's Counsel submitted on the fourth ground of revision that the Arbitrator did the right thing in awarding acting benefits on the basis of the title/net difference as per the applicant's practice. On the last ground the respondent Counsel submitted that the commission properly granted reliefs under the applicable law and practice after considering a number of factors and exhibits tendered. The best practice of the employer is revealed through Exhibit C7 an email dated 23/09/2019 at 3:00 PM from Senior Human Resources Officer (Samson Chitalika) that payment of acting allowances was based either on net difference or 10% of the acting staffs. At the end they prayed the court to upheld the decision of CMA.

After having considered the grounds for revision and the rival submissions I thing this matter may sufficiently be disposed by answering the following issues; **one,** Whether the Commission for Mediation and Arbitration (CMA) had jurisdiction to entertain and determine the dispute between the parties, **two**, whether the respondent was the acting Executive Officer of the applicant or not, **three**, in view of the determination of the issues above what are the proper reliefs to the parties.

In the cases of this nature it will sound prudent to determine the issue of jurisdiction by starting considering as to when the cause of action arose.

The applicant is of the view that cause of action arose at the time when the applicant made it clear to the respondent that payment of acting allowance is not within the policy of the applicant. The same was made clear on February 14,2018. The time limitation for suits of this nature is 60 days, so, the respondent ought to file the same within 60 days from February 14, 2018 when it was formerly communicated to him that the institution has no policy to pay acting allowance. Filing the same on October 9, 2020 after expiration of almost two years was fatally out of time.

The respondent stands to the view that cause of action started on 27th August 2020 when he received a formal communication that the applicant will not pay him acting allowance. The alleged February 14,2018 cannot be taken as the day when cause of action aroused because the email of the very day promised payment after the respondent cease from acting the position based on performance.

As rightly submitted by the applicant time limitation in dispute of this nature which is outside the scope of termination is provided by Rule 10 (2) of the Labour Institutions (Mediation and Arbitration ) Rules which provides; -

*"All other disputes must be referred to the commission within sixty days from the date when the dispute arised"*

The important question to be determined is when the dispute aroused? Is it on February 14, 2018 when the Global Director informed the respondent through email that;

*" this is not HJF policy. What is done is at the end of the period of serving in an acting role, a bonus can be applied based on performance in that role. So if you are asking for yourself, we would not review any bonus compensation until a new ED is in place ... at the end of the time, we can discuss what additional work you took on and performance in this area for consideration of a bonus. Please let me know if you have any question."*

Interpreting the above email, the phrase does not give a conclusive answer that the respondent will not be paid because it bears a promise to pay compensation at the end of taking such duties. Such promise made the respondent to remain with a *legitimate expectation* that he will receive acting benefits at the end based on performance. The fact that it bears a promise it cannot be considered to have made open a cause of action against the applicant.

I therefore take the view of the respondent that the Global Director promised acting benefits in favour of the respondent based on performance after the respondents' period of acting expires. Even after retirement the respondent kept waiting for the payment in vain till it was formerly communicated to him on August 27, 2020 that there will be no

payment. Considering Rule 10 (2) mentioned above and the trend of communication between the parties, I am in support of the Arbitrator's finding that cause of action aroused on August 27, 2020. Be it as it may, the Arbitrator acted within his ambit of authority. The first issue is hereby answered in affirmative, the cases cited by the applicant are distinguishable to the scenario of this case, they are relevant to the extent that courts should act within the jurisdiction.

The second issue about whether the respondent was acting Executive Director it will be answered simply in view of the content of the affidavit and the submission of the parties as follows; - The Applicant Principal Officer deponed that the respondent was never promoted to a position of Executive Officer, he was just assigned temporary additional duties undertaken in absence of an Executive Director.

The respondent resisted the above position insisting that the was authorised to act the position and he was promised acting benefits after he will cease to serve such position.

Having weighed argument of both parties it is not in dispute that the position of Executive Director was vacant between November 2017 and October 2018 and the functions of the very officer were being carried by the respondent. The Global Director email dated February 14, 2018 Exhibit

R2 is a good example that the respondent was performing duties of the Executive Director and the affidavit of the applicant Principal Officer is very clear that what he called additional duties which were customarily carried by the Executive Director were assigned to the respondent. The Arbitrator at page 8 & 9 of the award stated in part:

> *"It is my considered view that acting a certain position entails additional responsibilities. Although DW1 states that the Executive Director's roles were divided among the complaint and Eric Black, Exhibit C7 indicates that the Tiffany Hamm stated that the complainant will lead the program with all HODs reporting to him. In absence of evidence to the contrary, I find the complainant was an Acting Executive Director.*
>
> *Regardless of whether the complainant was an Acting Executive Director or he was given the Executive Director's responsibilities with Eric Black, it is not disputable that he was entitled to extra payments apart from his monthly salary because Tiffany Hamm made it clear that a bonus would be paid at the end of the period of serving in an acting role, based on performance. I have noted that those extra payments have been termed differently by parties herein"*

The fact that the respondent performed duties which customary were exercised by the Executive Director means he was an Acting Executive Director as blessed by the Global Director of the applicant. That being said, I am in support of the Arbitrator's informed decision that the respondent was in the official acting capacity entitled to allowances related to the acting of a vacant position. Acting allowances are to be paid to a person who is live performing such duties of acting as insisted in the

persuasive case of this court in **Projest Samson Kaija vs. Marine Services Company Limited**, High Court Labour Revision No. 98 of 2019 at Mwanza.

It has already been established that the respondent was the Acting Executive Director of the applicant from November 2017 till October 2018. The substantive question is whether he was entitled to the acting allowance? The applicants strongly opposed the claim of Acting Allowance for two reasons, **one**, it was not a policy of the applicant to pay such benefits and **two**, the respondent was not the Acting Executive Officer. The latter has been resolved instead I will attempt to answer the complaint that the applicant had no such policy of paying Acting Allowance.

It was the testimony of Ms. Amina Ramadhan Mkwawa (PW2) who was the Senior Human Resource Officer of the applicant that employees who were acting were being paid acting allowance at the end of their acting period i. e after the vacant position is filled. According to her, non-payment to the respondent was unprecedented because all staff who were acting were being paid. The testimony of PW2 opposed the evidence of DW1 that there was a requirement of assessment before payment. The testimony of PW2 is supported by exhibit C6 that other staff were being

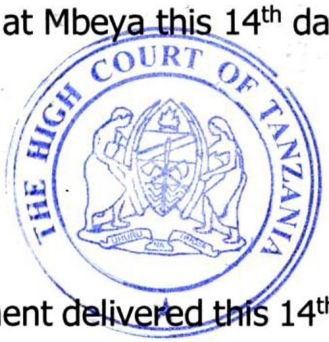
paid cash award as acting allowance. On weighing the evidence, I find that it was the best practice of the applicant to pay acting allowance as a remedy to additional duties which are temporarily performed by the acting officer. The applicant cannot hide himself on calling the same temporary additional duties because they mean acting a position. **Black's Law Dictionary, Tenth Edition by Bryan A. Garner – Editor In Chief** attempts to define the word "Acting" to mean; 'Holding an interim position; serving temporarily'. The fact that he had extra functions from his normal position he was entitled to remuneration termed acting allowance. I think the respondent proved on the preponderance of probability per section 3 (2) of the Evidence Act Cap 6 R. E 2019 that he is entitled to extra mile of acting allowance because it was the best practice of the applicant and a law by usage to reward acting benefits to the employees. I therefore stand in full support to the Arbitrator candid opinion that absence of policy was not the genuine reason to deny the complainant his acting benefits. It will be contrary to justice to assign duties of another office bearer to another without any kind of reward.

The issue of formulae used by the Arbitrator to compute the amount of acting benefits to be paid to the respondent is not a matter to detain long because exhibit C7 gives a clear guidance that it should be computed

based on salary net difference i. e the difference between the salary of the officer in the high post to be acted and that of the person acting the position. The Arbitrator opted to use the net difference formulae instead of taking 10% of the salary of the acting official.

In the end result, the court has been satisfied that the CMA correctly found that the commission had jurisdiction to entertain the matter in view of the time when the cause of action aroused, further it was satisfied that the respondent was the acting Executive Director of the applicant who was entitled to acting allowances which are universally accepted. The application for revision is hereby dismissed. No order as to costs.

Dated at Mbeya this 14th day of February 2023.




**D. P. Ngunyale**
**Judge**

Judgment delivered this 14th day of February 2023 in presence of Beatrice Soka learned Counsel for the applicant.

**D. P. Ngunyale**
**Judge**