IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. APPLICATION NO. 15 OF 2022

(C/F Labour Execution No. 49 of 2021)

MONSANTO TANZANIA LIMITED..... .....APPLICANT

Vs

SHUHUDIA SAMWEL MBEBE .....1ST RESPONDENT

ADVANCED CREDIT AND RECOVERRY COURT BROKER.....2ND RESPONDENT

RULING

Date of last order: 20-3-2023

Date of ruling: 25-5-2023

B.K.PHILLIP,J

This application is made under Rule 24 (1) (2) (a) (b) (c) (d) and (f), (3) (a) (b) (c) (d) and 11(b) 55 (1) (2) of the Labour Court Rules, 2007 and section 68 (e) and 95 of the Civil Procedure Code (Cap 33 R.E 2019). The applicant is praying for the following orders:

i) That, this Honourable Court be pleased to set aside the warrant of execution issued by the Deputy Registrar on 18th February 2022 sanctioning the 2nd respondent to attach and sale the applicant's properties in satisfaction of decretal sum of Tshs. 65, 000,000/=.

ii) Any other orders that this Honourable Court deems fit and just to grant.

The application is supported by an affidavit sworn by the applicant's advocate. The 1st respondent filed a counter affidavit in opposition to the application. The 2nd respondent was served with the application but did not file any response thereto. The learned advocate Asubuhi John Yoyo appeared for the applicant whereas 1st respondent was represented by Frank Maganga, his personal representative.

The facts deponed by the applicant in his affidavit are as follows; That on 18th May 2021 this Court (Hon. Masara, J), issued a judgment in Revision Application No. 3 of 2020 in which it set aside the Arbitral Award issued by Commission for Mediation and Arbitration ("CMA") at Arusha and ordered the 1st respondent to be paid a total of Tshs. 65,000,000/= by the applicant as a compensation for unfair termination his employment. The 1st respondent lodged an application for execution of the court order aforesaid but before any order was issued by the Deputy Registrar in respect of the aforesaid application for execution, the 1st respondent and the applicant entered into an agreement for settlement of the matter out of the Court. They signed a deed of settlement to the effect that the applicant shall pay the respondent a Tshs. 48,000,000/= in settlement of the matter between them. The deed of settlement was filed in court on 23rd July 2021.Thereafter, the 1st respondent received a notification from his Bank that a sum of Tshs. 35,840,100/= had been deposited into her Bank account. He was not satisfied with the amount deposited in his Bank account because he expected that the applicant would pay him a total of Tshs. 48,000,000/=. Thus, he decided to come back to court to seek for a warrant of attachment for a satisfaction of the decretal sum to a tune of Tshs. 65,000,000/= which was awarded to him in Revision Application

No.3 of 2020. The warrant for execution was issued by the Deputy Registrar as requested. The 2nd respondent was appointed to execute the court order. The applicant lodged the instant application to challenge the warrant of attachment issued by the Deputy Registrar on three grounds enumerated in his affidavit.

This application was disposed of by way of written submissions. Mr.Yoyo started his submission by adopting the contents of the applicant's affidavit in support of the application. On the 1st issue raised in the applicant's affidavit, to wit *Whether it was legally sound to issue warrant of execution of Tshs 65,000,000/= which was already settled and exhibited to court by the deed of settlement*,Mr. Yoyo submitted that it is apparent on the face of annexture A3 to the applicant's affidavit, the original decretal amount of Tshs. 65,000,000/= was changed / varied through the deed of settlement to Tshs. 48,000,000/= , hence it was factually and legally wrong for the Deputy Registrar to issue an attachment warrant for a sum of Tshs. 65,000,000/=which did no longer exist at the time of issuance of the same. He further contended that it was not in dispute that at the time the Deputy Registrar issued the warrant of attachment for a sum of Tshs. 65,000,000/= the applicant had already paid to the 1st respondent a sum of Tshs. 36,000,000/=.Thus, Mr. Yoyo was of the view that the Deputy Registrar wrongly issued the warrant of attachment for a sum of Tshs. 65,000,000/= in total disregard of the deed of settlement which varied the decretal sum and the fact that the sum of Tshs. 36,000,000/= had already been paid to the 1st respondent through his the Bank account.

With regard to the 2nd issue, to wit; *whether it is leally correct to exonerate the 1st respondent from tax liability on pretext that she never agreed to such deduction in the deed of settlement,* Mr. Yoyo submitted that it is undisputed that according to annexure A4 to the applicant's affidavit a sum of Tshs. 12,000,000/= was withheld from Tshs. 48,000,000/= (the agreed settlement amount) and remitted to Tanzania Revenue Authority ("TRA"). He contended that compensation for unfair termination of employment is an income from employment in terms of section 7(2)(e) of the income Tax Act [Cap 332 RE 2019] , hence it is taxable under the income Tax Act. The Applicant had the obligation under section 81 read together with First Schedule of the income Tax Act to withhold 30% from the settlement or the decretal amount before paying the net amount to the 1st respondent. To support his argument, he cited section 7 (2) (e) and 81 of the Income Tax Act. He insisted that since Tshs. 48,000,000/= was income from employment, the applicant withheld a sum of Tshs. 12,000,000/= in the course of exercising its obligation as a withholding agent of the TRA, hence, the Deputy Registrar wrongly issued the warrant of attachment in disregard of the statutory payment made by applicant to TRA. By withholding the 30% from the amount agreed in the deed of settlement the applicant was acting as a withholding agent of the TRA , contended Mr. Yoyo.

On the 3rd issue, to wit; *Whether in labour law justice system the phrase Gross sum of Tshs 48,000,000/=can be accorded the same meaning with the phrase Net sum of Tshs 48,000,000/= as deemed by the 1st respondent,* Mr. Yoyo's submission was to the effect that it is clearly stated in the deed of settlement that the amount agreed by the parties

was a "gross amount" and not " net amount". That the applicant's obligation to withhold 30% from 1st respondent's income from his employment was a statutory obligation which did not require to be discussed and agreed upon by the parties since it is a legal requirement. Parties to a deed of settlement could not agree or disagree on the payment of tax. To bolster his argument, he cited the case of **Pan African Energy Tanzania Vs Commissioner General TRA, Civil Appeal No. 81 of 2019** (unreported) in which it was held as follows;

> *"We are of the settled mind that in view of the clear language used in the provisions of section 7, 81 and 84 of the Income Tax Act, the employer is mandatorily required to withhold employee's chargeable taxes from the employment earning and remit the same to the TRA".*

Furthermore, Mr. Yoyo submitted that the 1st respondent's argument that the applicant should have used her own sources to pay the tax is contrary to what the law provides. When employer pays tax on behalf of the employee without deducting from the employee's income the payable tax that is called grossing up and it is prohibited by the law, contended Mr. Yoyo. He insisted that employer is mandatorily required to withhold from the employee's income and remit taxable amount from the employee's income to TRA and no any arrangement is acceptable under the law for the employer to pay the employee's tax. He prayed this application to be allowed and a court declaration to the effect that settlement amount has been fully paid be issued.

In rebuttal, Mr. Maganga started his submission by raising two concerns, one, that Mr. Yoyo has submitted on new legal issues different from the one indicated in paragraph 17(a) (b) and(c) of the affidavit in support of this application. Two, that the applicant failed to challenge the decision of Deputy Registrar for issuing a warrant of attachment since he did not lodge any appeal against the same pursuant to section 57 of Employment and Labour Relations Act (Cap 366 R.E 2019) which requires a party aggrieved by a decision of the Registrar to appeal to the Labour Court. He was of the view that the applicant wrongly instituted this application since he was supposed to file an appeal.

With regard to the 1st issue, Mr. Maganga submitted that immediately after the judgment of this Court in the Revision Application No 3 of 2020 was delivered on 18th May 2021, the 1st respondent lodged an application for execution of the court order in this Court and the applicant lodged a notice of appeal to the Court of Appeal. Thereafter both parties agreed to solve the matter amicably and settlement agreement was signed on 14th July 2021. He further contended that it is not correct that the 1st respondent lodged an application of execution after being paid the by the applicant as submitted by Mr. Yoyo.

Moreover, Mr. Maganga argued that the first clause in the deed of settlement states that the applicant shall pay the respondent a gross sum of Tshs. 48,000,000/= as a full and final settlement of the dispute between parties. Clause six of the said agreement emphasizes that upon the recording of the deed of settlement the same having been filed at the High Court of Tanzania in the District Registry of Arusha and the

respondent having paid the full amount of money in the applicant's Bank Account, the dispute between parties shall be marked settled. Clause nine states that in case of default of any of the terms agreed then either party shall be at liberty to resort to executing the Court order against the defaulting party.

It was Mr. Maganga's contention that there is no clause in the deed of settlement which provided for taxation issues to the effect that the same shall affect the agreed payable amount. The 1st respondent received a message from the Bank that a sum Tshs. 35,840,100/= only had been deposited in his Bank account instead of Tshs 48,000,000/=as agreed. During that time nobody was aware where the amount of Tshs. 12,159,900/= was and why was not being paid, contended Mr. Maganga. He further argued that the 1st respondent explained to the Deputy Registrar that they agreed that applicant is supposed to pay Tshs. 48,000,000/= but the applicant paid only Tshs. 35, 840,100/=. Mr. Maganga prayed that execution should proceed in respect of the remaining amount. In answering whether it was legally proper for the Deputy Registrar to issue warrant of execution for Tshs. 65,000,000/=, Mr. Maganga was of the view that it was a human error that is why the Honourable Deputy Registrar corrected her order and ordered the 1st respondent to amend the execution form by stating the remaining amount as it is and that order was delivered in the presence of both parties in the open court and the same have being served to the applicant and up to now there is no order for payment of Tshs. 65,000,000/= before this Court except for the remaining amount.

With regard to the issue stated in the applicant's affidavit in paragraph 17 (b), It is Mr.Maganga's contention that because this is the Court of record the execution records must be called and the court be pleased to inspect the records and examine the same for its satisfaction. He contended that some of the contentions stated by Mr. Yoyo in his submission in respect of the 1st issue are hearsay and some intend to mislead this Court.

With regard to the 2nd issue, Mr. Maganga submitted that the Deputy Registrar's order was correct due to the fact that she was enforcing what the parties have agreed on and nothing was presented to her to prove that there was some amount from Shuhudia Mbebe paid to TRA. Even annexure A4 does not show the name of Shuhudia and there is no anywhere showing that the amount of Tshs. 12,159,900/= paid to TRA is the amount that was deducted from the amount agreed in the settlement agreement. He added that the applicant is responsible for the payment of the tax not the 1st respondent.

Moreover, he submitted that the applicant failed to defend his application. The Deputy Registrar was correct to honor the deed of settlement and there was no proof of TRA deductions. He was emphatic that annexure A4 shows that the tax payer is not the 1st respondent and the TIN No. 128638695 shown in annexure A4 is different from what was used by 1st respondent to pay tax from his salary which is TIN No.116491222. Mr. Frank was of the view that the amount deducted from the agreed amount was not paid anywhere and applicant has to pay the same to the 1st respondent for full payment of the agreed amount. To support his position, he cited the case of **Arold Sekiete**

and Florence Kokujama Mkyanuzi Vs African Banking Corporation Tanzania Ltd (ABC) and Nkya Company Limited, Civil Appeal No. 46 of 2022 (unreported). In answering the issue on whether the Deputy Registrar was correct to exonerate the 1st respondent from tax liability for the reasons that parties had not agreed to such deduction in the deed of settlement, relying on clause six of the deed of settlement and the case of **Arold Sekiete** (supra), Mr Maganga argued that the Deputy Registrar's order /decision is correct. He contended that doing anything which is not agreed is a breach of agreement which is not fair and unacceptable. He insisted that the cases he cited in his submission gives that legal position of all legal issues framed by the applicant in paragraph 17 (a) (b) and (c) of the affidavit in support of this application although the applicant skipped all of them and submitted on new issues.

Mr. Maganga contended that if the applicant wants this court to believe that the parties' agreement and the agreed amount to be paid full was illegal then the whole agreement must be nullified and the decretal amount remain 65 million instead of 48 million as per section 20 (1) and 23 (1) a-e of the Law of Contract Act which explain clearly that where both parties to an agreement are under mistaken believe as to matter of fact essential to the agreement the agreement is void.

With regard to the 3rd issue, Mr. Maganga submitted that Mr. Yoyo has failed to refer this Court to any Labour Laws in which the words gross sum and net sum were interpreted instead he jumped to a discussion on withholding tax. He was of the opinion that apart from the contradiction of the words gross and net sum parties wished to settle

the matter by the payment of the net amount of Tshs 48 millions in one installment that is why in paragraph six of the deed of settlement it is stated categorically that the applicant herein was supposed to pay the full amount of money stated in the deed of settlement.

Expounding on the interpretation of the contents of the deed of settlement, Mr. Maganga argued that if applicant wishes to deduct the amount awarded to the applicant he was required to deduct from Tshs 65,000,000/= which was the taxable income not in the agreed amount indicated in the deed of settlement. The law does not put mandatory requirement to the employer to deduct any tax from the amount negotiated and agreed to be paid by the parties, contended Mr. Maganga. He insisted that the amount agreed in the deed of settlement is not taxable unless otherwise there is an agreement to that effect entered into by the parties. He further argues that the word "full" used in the deed of settlement means the whole amount of Tshs means Tshs 48,000,000/= which agreed to be paid by the applicant. He added that the words "gross amount" used in the deed of settlement do not change the intention and consensus of the parties.

Furthermore, Mr. Maganga, contended that the applicant tricked the respondent by not stating clearly the terms of the deed of settlement for the amount offered that was subject to taxation. If he would have made it clear that the agreed amount for settlement of their dispute was subject to deduction of payable taxes may be the 1st respondent would not have agreed to sign the deed of settlement for an amount below or less than Tshs 48,000,000/=. He added that what convinced 1st respondent to agree the said amount of Tshs 48,000,0000/= is clause

6 of the deed of settlement which states that the applicant was supposed to pay the agreed amount in full. He prayed this Court to dismiss this application with costs for lack of merits.

In rejoinder, Mr. Yoyo reiterated his submission in chief and added that Mr. Maganga's totally misdirected himself on his argument on the employer's liability to pay withholding tax. He contended that the same is hopeless, unfounded and devoid of merit. He further maintained that Mr. Maganga conceded that it was wrong for the Deputy Registrar to issue a warrant for payment of Tshs. 65,000,000/= while there was already deed of settlement for payment of Tshs 48,000,000/= only. Mr. Yoyo insisted that the law protects sanctity of the contract. The commitment made in the deed of settlement was sacrosanct as against the contradicting parties and the agreed amount was to be paid as in whole sum as agreed no more no less. He further argues that it is a fatal misdirection for Mr. Maganga to argue or to think that the commitment of the parties made in the settlement deed exempted the employer from deducting the withholding tax required by the law which is tantamount to saying that parties can agree on evading tax.

Mr. Yoyo further submitted that the case cited by Mr. Maganga on the sanctity of contract are distinguishable and cannot be applied in contravention of the law and avoidance of the obligations created by the law. He contended that there is a different between the obligation created by the parties themselves which are sacrosanct against themselves and the obligation created by the law in a contract which binds parties even when not expressly provided in the contract. He insisted that there was no agreement whatsoever that the 1st

respondent was to be paid without tax deduction as the word gross amount means payment before deductions and the case could be different if it was net pay which was not the case.

On the allegation that TRA pay slip does not bear the name and 1st respondent's Tin number, Mr. Yoyo submitted that the allegation is made out of ignorance of the specific provision of the law as the law requires and imposes the duty on employer to withhold tax and remit the same to TRA and not the employer to pay by himself through his or her personal control number. The correct complaint if any concerning the payment of the withholding tax in question could have been on the authenticity of the pay slip which ought to have been attacked by filing counter affidavit containing material information from TRA or affidavit verifying that no such payment was made to TRA.

Moreover, on the concern raised by Mr. Maganga that applicant was required to appeal instead of filing this application, Mr. Yoyo submitted that the enabling provision cited in the chamber application confers the powers to this Court to entertain this application. On allegation that he submitted on different issues which were not raised in the affidavits in support of this application, his reply was to the effect that he has not deviated from the gist or substance of the suggested legal issues in the affidavit, what features in the submission is slight change of wording which is not fatal as there is no hard and fast rule that binds applicant to conform to the wording, he used and Mr.Maganga did not cite any authority to support his arguments. He insisted that taxes are chargeable to real and actual income not otherwise. In the matter at hand the real and actual income which was subject to tax was Tshs.

48,000,000/= and more importantly, the deed of settlement is recognized by the law that is why after being signed it was filed in court and adopted as the court decree. He prayed this application to be allowed for the interest of justice.

Before delving into the merit of this application I am compelled to determine the preliminary issues raised by Mr. Maganga, to wit; one, that Mr. Yoyo submitted on different issues not contained in the affidavit in support of this application. Two, that this application is not proper before this court on the reason that the applicant was supposed to appeal to the High Court Labour Division pursuant to section 57 of the Employment and Labour Relations Act,2004.(ELRA)

I wish to state outright here that I am not inclined to agree with the 1st preliminary issue raised by Mr. Maganga because there are no differences between the issues indicated in the affidavit in support of this application and what was discussed/submitted by Mr. Yoyo in his submission in support of this application . Nothing new was discussed by Mr. Yoyo in his submission which is not reflected in his affidavit and the 1st respondent did not point out the allegedly new issues.

The 2nd preliminary issue lacks merit too. Section 57 of the ELRA which was cited by Mr. Maganga is under part IV of the ELRA which is concern with the registration of organizations or federations and employers' associations. Thus, the same is irrelevant in this matter. However, upon perusing the court's records I noted that this application is not proper before this court on the reason that shall be put to light soon hereunder.

According to the court's records as well as the arguments raised by both sides during the hearing of this application, the following facts are not in dispute;

i) That there is a deed of settlement between the parties herein which was registered in court on 23rd July 2021.

ii) That on 12th August 2021 the 1st respondent received Tshs. 35,840,100/= through his Bank account.

iii) That on 18th February 2022 the Deputy Registrar issued a warrant of attachment of the applicant's property for recovery of Tshs 65,000,000/= and appointed the 2nd respondent to execute the said Court order by attachment of the applicant's movable property which were mentioned in the application for execution filed in court by the 1st respondent on 18th May 2021.

In addition to the above, the court's record reveal that the 2nd respondent did carry out the court order issued by the Deputy Registrar and filed his report in court on 4th March 2021, in which he indicated that the applicant herein informed him that there is a deed of settlement signed by the applicant and 1st respondent and that the applicant paid the amount agreed in the deed of settlement after deducting the tax payable to TRA as required by the law.

I have also noted that the case file in respect of said Labour Execution No.49 of 2021 where this application emanates from have not been closed because after the report from the 2nd respondent was filed in court, the applicant lodged the instant application. Consequently, the

Deputy Registrar stayed the proceedings to await the outcome of this application. Now, the pertinent question which arises here is whether it was proper for the applicant to file this application before the closure /final determination of the application for execution before the Deputy Registrar? In other words, what was the proper course to be taken after the report from the 2nd respondent was filed in court. My stance is that it was not proper for the applicant to file this application since the issue on the existence of the deed of settlement and payment of tax on the agreed amount was not yet decided by the Deputy Registrar who has the powers to deal with execution of Awards from CMA. The Deputy Registrar has not made her decision on the report made by the 2nd respondent. It is also noteworthy that the warrant of attachment issued by the Deputy Registrar in respect of the sum of Tshs 65,000,000/= the subject to this application, has been acted upon by the 2nd respondent. Therefore, the applicant's prayer for a court order lifting up the same in misconceived and overtaken by events. In my considered opinion the issues raised by the applicant in this application are supposed to be raised before the Deputy Registrar when she will be dealing with the report made by the 2nd respondent. And if at all the applicant will not be satisfied with the orders of the Deputy Registrar that will be made thereafter, he take appropriate legal steps to challenge the same.

It is noteworthy that if this court determines the merit of this application will be usurping the powers of the Deputy Registrar in handling applications for execution of the CMA orders/ award.

Having said the above, I do not see any plausible reasons to go on with the determination of the issues raised by Mr. Yoyo in this application as well as the response made thereto by the 1st respondent.

In the upshot this application is struck out. This being a labour case, I do not give any order as to costs.

Dated this 25th day of May 2023.

B.K.PHILLIP

JUDGE.