**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT MTWARA**

**LABOUR REVISION NO.8 OF 2021**

*(Originating from the Decision in Labour Dispute No. CMA/MTW/42/2020)*

**BETWEEN**

**DANGOTE CEMENT LTD TANZANIA..... APPLICANT**

***VERSUS***

**HOST MAPONDERA.....RESPONDENT**

**RULING**

*20/10/2022 & 09/02/2023*

**LALTAIKA, J.:**

The applicant herein, **DANGOTE CEMENT LTD TANZANIA**, by way of a Chamber Summons and Notice of Application has invoked the provision of Section 91(1)(a) and (b),Section 91(2)(b) and (c) of the Employment and Labour Relations Act [Cap.366 R.E.2019] read together with Rule 24(1),24(2)(a)(b)(c)(d)(e) and (f),24(3)(a)(b)(c) and (d),28(1)(a)(e) of the Labour Court Rules, GN No.106 2007. The gist of the present application is for this Court to call upon the records of the Commission for Mediation and Arbitration (herein after the CMA) in Labour Dispute Number CMA/MTR/42/2020 and satisfy itself as to the correctness, legality and

propriety of the proceedings, orders and the award and thereafter quash and set aside the award issued thereof.

It is instructive to note at the outset that the applicant herein is a legal person established and registered under the Companies Act to carry out its operation in Tanzania. As will be apparent in this ruling, the exact relationship between the applicant and the Nigerian based Dangote Cement PLC frequently referred to here is, to say the very least, fuzzy. The respondent, on the other hand, is a natural person and a national of Zimbabwe with a record of working in Tanzania.

When the application was called on for hearing, the applicant was represented by Mr. Stephen Lekey, learned advocate while the respondent enjoyed legal serviced of Mr. Remmy E. William, learned Advocate. Pursuant to the prayer by learned counsel, this court ordered the hearing of the application to proceed by way of written submissions. I take this earliest opportunity to commend the learned counsels for their strict compliance to the court schedule.

The brief facts leading to this application are as follows. Vide letter dated the **26th day of March 2018** Dangote Cement PLC of **Alfred Rewane Road, Ikoyi, Lagos, Nigeria** offered the Respondent a job position as Chief Finance Officer. A part of the letter that forms this court's records reads: "Subsequent to the discussions you had with us, we are pleased to offer you the position of Chief Finance Officer of our Tanzanian operations. Your position is transferrable within the group." Other parts of this letter will be referred to later during analysis of the main issue.

The Respondent accepted the offer and reported to his workstation in Tanzania. As required by law, the respondent was issued with a **Class C Work Permit** as per Section 12 of the Non-citizens (Employment Regulation) Act No 1 of 2015 which governs employment of non-Tanzanians in the country. The work permit was valid for two years 27th February 2019 to 27th February 2021.

To cut the long story short, on the 13th day of March 2020 Dangote Cement PLC of the same address quoted above wrote the Respondent a letter with the Subject line **"Termination of Appointment".** A part of the letter which forms part of this court's records provides "We regret to notify you of Management's decision to terminate your appointment with Dangote Cement Plc with effect from Monday 13th April 2020...Management would like to express its gratitude for your service to the company and wish you well in your future endeavors."

Aggrieved by that termination the Respondent (then Complainant) filed a complaint at the Commission for Mediation and Arbitration (hereinafter "CMA") claiming both unfair termination and breach of contract against the Applicant. After hearing both parties and submissions the CMA rendered its award in favour of the respondent reasoning that the applicant breached and unfairly terminated respondent's Contract.

Aggrieved, the applicant brought this application before this court as alluded to in the introductory part of this ruling. Under paragraph 4 of the affidavit in support of the application, the applicant raised 9 grounds in

opposition to the award. For ease of reference the grounds are reproduced herein below: -

> *4(a) The Arbitrator erred in law in entertaining the complaint without requisite jurisdiction.*
> *4(b) In the circumstances of the case the Arbitrator erred in law and fact in ordering the Applicant to begin adducing evidence.*
> *4(c) The Arbitrator erred in law in applying the provisions of Section 61 of the Labour Institutions Act, No. 7 of 2004 in the circumstances of this case.*
> *4(d)The Arbitrator erred in law and fact in deciding that the Applicant had employment contract with the Respondent.*
> *4(e)The Arbitrator erred in law and in fact in relying on Exh P1, P2 and P3 to conclude that the Respondent was employed by the Applicant.*
> *4(f)Having admitted the evidence of PW1 (Host Mapondera) on payment of salary, the Arbitrator erred in law and fact in shifting the burden of proof to the Applicant.*
> *4(g)Having admitted Exh P11 the Arbitrator erred in law and fact in deciding that the Applicant breached the Respondent contract.*
> *4(h)The Arbitrator erred in law and fact in deciding that the respondent termination was procedurally and substantively unfair.*
> *4(i)The Arbitrator erred in law and fact in awarding reliefs which were not pleaded.*

Arguing on ground 4(a) it is the applicant's submission that the CMA was not clothed with the requisite jurisdiction to try and determine this matter. The basis for this contention, the learned counsel for the applicant asserted, is centered on the role of the CMA as provided for under section 14 of the Labour Institutions Act [Cap.300 R.E 2019] (hereinafter "LIA") namely to mediate and arbitrate labour disputes. Although LIA does not define "labour dispute" or "dispute" argued Mr. Lekey, Section 4 of the Employment and Labour Relations Act (Cap. 366 R.E 2019) (hereinafter "ELRA") defines dispute to mean, among others, any dispute concerning labour matters between employer and employee.

Since the employer-employee relationship could not be established, contended the counsel for the respondent, the matter should not have been entertained by the CMA at all. To support his contention, the learned counsel referred this court to the case of **Rashid Mwema v Elias Nonnious Mapoga,** Revision No. 363 of 2019 H.C-Labour (Unreported).

Moving on to grounds 4(c), (d) and (e) combined, it is Mr. Lekey's submission that the respondent was not employed by the applicant. The learned counsel for the applicant vehemently opposes the CMA's approach in establishing existence of employment through interpretation of the letter of offer and contract of employment (Exhibit P1 and P2 respectively) as well as presumption of employment as per section 61 of the LIA (supra).

On the first limb, the learned counsel vehemently distanced the applicant from having created a contract with the respondent. He insisted that the offer of employment was issued by Dangote Cement PLC, a company in Nigeria. To this end, averred Mr. Lekey, since the respondent accepted the offer, a contract between him and DC PLC was created. He cited the case of **Hotel Traventine Limited and two others v National Bank of Commerce Limited** [2006] TLR 133 to support his contention. On the relationship between the applicant and DC PLC, the learned counsel was quick to argue rather simply that "[I]t was not proved neither suggested that Applicant is a DC PLC's operation in Tanzania." He went on to cite the case of **Belton Tanzania Ltd v Vedastus Maplanga Makene** Revision No. 571 of 2019, H.C (Unreported) on applicability of the separability of a juristic

person as per the landmark English case of **Salomon V. Salomon** (1897) A.C. 22

On the Contract of Employment, counsel for the applicant argued that the same was signed between the respondent and one Roger Goldschmidt, Pan-Africa CFO based in Nigeria. He went on to argue that the respondent was not in the payroll of **the** applicant.

On presumption under section 61 of the LIA, the learned counsel argued that it was erroneous for the CMA to apply presumption to what it had already recognized that it existed as it would be a contradiction. He argued further that DC PLC was respondent's employer as he retained control over him. Retention of control was a ground to determine status of an employee, argued Mr. Lekey citing the case of **Balton Tanzania** (Supra).

Moving on to ground 4(f) and (g) combined, counsel for the applicant averred that the duty to prove breach of contract lied with the party claiming its existence and that to do so one must first prove existence of such a contract and then a specific clause breached. Referring to the cases of **Upendo Malisa v. Kassa Charity Secondary School**, Labour Revision No. 68 of 2019 H.C-Labour [Unreported] and **Penna Pura Oil Tanzania Ltd v Ekta V. Karsanji** Rev. No. 317/2020, among others, the learned counsel is of a firm view that such an obligation was not fully discharged by the respondent.

On ground 4(h) Mr. Lekey faulted the CMA for finding that the respondent's termination was procedurally and substantively unfair. Citing several of this courts' decisions counsel for the applicant is of a firm view

that principles of unfair termination were unapplicable to the respondent whom, he asserted, was still on probation.

On the last ground namely ground 4(i) the applicant is vehemently opposed to CMA's award of reliefs not prayed for by the respondent namely subsistence allowance. The learned counsel for the applicant, however, admits that subsistence allowance was claimed in the opening statement but argued strongly that the opening statement was neither evidence nor pleadings. Rule 24 (2) of the **Labour Institutions (Mediation and Arbitration Guidelines) Rules,** 2007 (G.N No. 67 of 2007) were cited by the learned counsel to bolster his argument.

It was time for counsel for the respondent, Mr. William, to respond to the grounds argued by his learned brother. On ground 4(a) Mr. William was emphatic that the provisions of section 14 of the LIA cited by his learned colleague clearly vested power to the CMA to determine labour disputes between employer and employee. He added that from the evidence tendered it was clear that the Employer- Employee relationship existed between the parties to the dispute.

On the second limb of applicant's counsel submission that at the time of termination respondent was still a probationary employee thus CMA had no jurisdiction; Mr. William strongly argued that such a contention was a **new issue** which was never raised at the CMA. Citing the case of **George S/o Senga Mussa versus The Republic,** Criminal Appeal No. 108/2018 counsel for the respondent argued this court to dismiss the ground as the

same was not discussed in the CMA and could not be raised at the appeal stage.

Responding on grounds 4(c), (d), and (e) on whether employer-employee relationship existed, counsel for the respondent forcefully argued that exhibit P1 and P2 had established the relationship adding that counsel for the applicant's action of arguing to the contrary was tantamount to misleading the Court. It was undisputed, Mr. William argued, that the Offer Letter was issued by Dangote Cement PLC whose operation in Tanzania is Dangote Cement Ltd Tanzania.

The said P1 (Offer Letter) states clearly that "we are pleased to offer a position of Chief Finance Officer of our Tanzania Operations" emphasized the learned counsel. Such documents, averred the learned counsel for the respondent, were enough to prove that the Respondent's **employment was channeled to Dangote Cement Ltd Tanzania** subject to the conditions contained in the said Exhibit P1. Expounding further, Mr. William averred that the very first paragraph of the employment contract cites the applicant as the employer and the respondent as the employee.

Mr. William was quick to correct his learned colleague on definition of employment contact arguing that Section 15 of the ELRA shade lights on what contract of employment is and what particulars should be contained therein and that Exhibit P2 contained all such particulars by referring to Exhibit P1.

The learned counsel for the respondent forcefully argued in support of application of section 61 of the Labour Institutions Act by the CMA. The

provision of the law was applied, argued Mr. William, since the applicant was denying the existence of employer-employee relationship giving the CMA no choice but to apply the provision. To support his contention, the learned counsel cited the case of **Mwita Wambura v. Zuri Haji** Revision No. 45/2012 High Court Labour Division Mwanza Sub Registry (Unreported).

Referring to the Work Permit and Residence Permit (Exhibit P3 collectively), Mr. William averred that both indicated that the applicant was the respondent's employer. To this end, the learned counsel wondered how then, was it possible, that the applicant could apply for the respondent's work permit if he was not her employee.

Responding to ground 4(f)(g) Mr. William was rather brief. His only argument is that the Arbitrator's reliance on Exhibit P11 (termination letter) was evidencing existence of the employment relationship between the applicant and the respondent or else there was no meaning in issuing the termination letter through the applicant and entrusting her with the handover process.

Moving on to ground 4(h) the learned counsel averred that the provisions of section 37(2) of the Employment and Labour Relations Act, 2004 as amended provides that termination of employment contract will be unfair if the employer fails to prove that he had a valid reason for termination and that the reason is a fair reason. In that regard, argued the learned counsel for the respondent, exhibit 11 mentions no reason for termination hence such termination was substantively unfair.

On procedural fairness, the learned counsel averred that the respondent was never accorded with the right to be heard before the disciplinary committee in respect of the allegations as required under the law. The learned counsel averred that such omission contravened Rule 13 of the **Employment and Labour Relations (Code of Good Practice), 2007** GN No. 42 of 2007. To support his contention, he referred this court to the case of **Kulwa Solomon Kalile versus Salama Pharmaceuticals Ltd,** Revision Number 155 of 2019.

Opposing ground 4(i) Mr. William forcefully argued that the position of the law was that the Arbitrator after making a finding of unfair termination had the power to grant reliefs even those not pleaded if they were statutory rights. He cited section 43 of the ELRA (supra) and referred this court to the case of **Sangija Joseph Masaaga Versus Ultimate Security (T) Ltd,** Revision No. 566 of 2016. Mr. William concluded his submission by a prayer that this application be dismissed, and the CMA Award be upheld.

In a not-so-brief rejoinder, Mr. Lekey emphasized that the issue of jurisdiction was raised at the CMA. He argued further that even if the same was not, jurisdiction was such a vital issue that it could be raised any time even in the appeal stage. To buttress his argument, he referred this court to the case of **Total Tanzania Limited V. SEET PENG SWEE** (Revision Application No. 500 of 2020) [2022] TZHCLD 216.

Having dispassionately considered the rival submissions and disinterestedly examined the lower court records including all exhibits

tendered, I find this application very interesting. It touches upon the increasingly dynamic ways of handling the body corporate.

As an attempt to avoid making this ruling unnecessarily long, I am inclined to go straight to ground 4(d). According to the applicant the Arbitrator erred in law and fact in deciding that the applicant had employment contract with the respondent. I firmly believe that this ground can dispose of the entire application. However, for the sake of expounding on some ethical issues in the business world and not-so-straightforward employment arrangements of Transnational Cooperations (TNC's) in the light of traditional labour law, I will discuss, albeit in passing, ground 4(c) on presumption of employment.

It is elementary contract law that for a contract to be valid, it must contain the following essential elements: **Offer and acceptance, capacity of parties to contract, privity, consideration, and intention to create legal relations.** I will examine both P1 and P2 in the light of the above essential elements of a valid contract. The aim is to decide whether there was a contract between the applicant and the respondent and if the answer happens to be in the affirmative, whether such a contract was valid.

The very first stage in formation of a contract is exchange of promises known in technical language as offer and acceptance. Learned author Professor MP Furmstone in ***Cheshire, Fifoot & Furmston's Law of Contract*** 13th Edition (London: Butterworths 1996) p. 30 provide as follows on the importance of offer and acceptance in contract formation:

> *"In order to determine whether, in any case given, it is reasonable to infer the existence of an agreement, it has long been usual to employ the language of offer and acceptance. In other words, the courts examine all the circumstances to see if the one party may be assumed to have made a firm 'offer' and if the other may likewise be taken to have 'accepted' that offer. These complementary ideas present a convenient method of analyzing a situation, provided that they are not applied too literally and that facts are not sacrificed to phrases."*

There is no doubt that an offer for the position of "Chief Financial Officer" was made by an entity called DANGOTE CEMENT PLC and dully accepted by the respondent. See the famous case of **Carlill v. Carbolic Smoke Ball Co.** [1892] 2 QB 484 and [1893] 1 QB 256 on the difference between an offer and an invitation to treat. It is noteworthy however that the emphasis here is not whether a contract was formed but rather who made the offer the "offeror" and who accepted the same that is the "Offeree" My most careful examination of the entire court record leaves me with no iota of doubt that the current applicant is nowhere in this equation.

This brings me to the second element namely **capacity to contract.** For practical purposes, with some minor exceptions, the law of contract exempts people of unsound mind and minors (below the age of "majority" which is 18 years for Tanzania) from being considered capable of entering a contract. I do not entertain any doubt in my mind that parties herein above namely DC PLC and the respondent had the requisite capacity to enter a valid contract. There was no need for Dangote Cement PLC to enter a contract on behalf of the applicant because they are both legal persons capable of suing and being sued See **Salomon v. Salomon** (supra).

**Privity of contract** presupposes that only parties to the contract should benefit from it or be liable for omission arising therefrom. Professor Furmstone in ***Cheshire, Fifoot & Furmston's*** (supra) p. 462 provides the following historical backdrop to this position of the law.

> *"In the middle of the nineteenth century the common law judges reached a decisive conclusion upon the scope of a contract. No one, the declared, may be entitled to or bound by the terms of a contract to which he is not an original party."*

Leading English cases in this area include **Price v Easton (**1833) 4 B & Ad. 433 and **Tweddle v. Atkinson** (1861) I B & S 393. It should be noted that the above rule is not without exception. A contract may be entered upon between A and B and implemented by A and C where C is duly authorized to represent B. In this scenario, C would be bound by all terms as if they were B. The law of Agency is a typical example. As alluded to in the introduction to this ruling the relationship between DANGOTE CEMENT PLC and the applicant is unclear.

Available records of the CMA indicate that both parties played the avoidance game when it came to the relationship between the applicant and Dangote Cement PLC. None of them dared hold the bull by the horn. As a result, this court is unable to establish the exact parameters through which the contract clearly entered upon by the DC PLC could be enforced by ***or rather against*** the applicant. Be it as it may, our law of evidence is rooted on the principle that he who alleges must prove. See **Berelia Karangirangi Vs. Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017 (CAT-unreported) at pg. 7

I must emphasize that as Chief Finance Officer, the respondent was no ordinary employee. As a senior member of management, he ought to have known that lack of transparency was not only harmful to the economy of this country but could also come back to bite him at some point. It did. Consequently, this court is not in the position to allow him to benefit from the wrongful acts he knew about but chose to keep quiet. I will go back to the documentary exhibit to support this argument. As a matter of fact, exhibit P1 (Offer of Appointment) raises several ethical issues. It provides in part:

> *"Salary and Benefits: A Tax-free salary of USD $12,500 (US Dollars Twelve Thousand, Five Hundred Only) per month, to be paid into an offshore bank account nominated by you. Local salary of TZS 1,400,000 (One million four Hundred Thousand Tanzanian Shillings only) per month, which shall be paid in a tax-efficient manner, to cover your local expenses during your period of stay."*

It does not take much thought to realize that this arrangement for compensating a senior foreign employee of a Transnational Cooperation (TNC) is exploitative and harmful to any host country. In fact, I can sense some elements of fraud here. No one in their right mind would accept that **TZS 1,400,000** is the *actual* monthly salary of the respondent paid "in a tax-efficient manner." The extent to which the unknown "offshore account" credited with 12500 USD every month occasioned loss in revenue in Tanzania, goes beyond the confines of this ruling. Nevertheless, the saying of the wise "what is good for the goose is good for the gander" speaks loud and clear. In the persuasive landmark case of **Riggs v. Palmer** 115 N.Y. 506, 22 N.E. 188 (1889) it was held that no one shall be permitted to found any claim upon his own iniquity or to acquire property by his own crime.

**Consideration** is yet another element of a valid contract for our analysis. This simply means the price of the promise. As explained above, DC PLC exchanged the two salaries with services of the respondent as Chief Financial Officer of her "Tanzania operation". No one could have said better that my brother in the bench Rwinzile J thus "He who pays the piper calls the tune". **See Balton Tanzania** (Supra). For all practical purposes, the respondent was playing the tune called by DC PLC and not otherwise. This is evidenced by the fact that when he allegedly played a different tune related to banking, the fearsome response leading to this application was wholly engineered by DC PLC.

The last element for analysis by this court is what is known in contract law as **Intention to create legal relation.** This means willingness to bear consequences for the breach of a contract. An examination of the records indicate that both the offer letter and contract of employment were signed by authorized officers of DC PLC. This means there was not any intention to "transfer liability" to some other company or institution millions of kilometers away.

Premised on the above, it is the holding of this court that **there has never been any contract known to law** between the applicant and the respondent. Counsel for the applicant had prayed a declaration to that effect. That is exactly what I am going to do. However, before arriving to that very last part of my ruling, I feel obliged to discuss albeit in passing application of Section 61 of LIA (supra) on presumption of employment.

The philosophical underpinnings underlying labour statutes in many if not most jurisdiction is that the employee is a weaker party. Under this unwritten convention, an Arbitrator or courts of law in general are justified to take some not-so-strict measures to ensure that justice is done. Nevertheless, the fast-changing job market in the globalized world requires avoiding a one-size-fits all approach. The way business is conducted also has a bearing. Having transitioned from barter trade to modern trade in sole proprietorship, agency, partnership, company, corporation to transnational corporation different yardsticks must be used. As advised as far back as 1965 by **Lord Wedderburn (1927-2012)** in Wedderburn, KW in ***The Worker and The Law*** (Macgibbon & Kee, 1965) p 33. (See also Dukes, R. (2015) Wedderburn and the theory of labour law: building on Kahn-Freund. *Industrial Law Journal*, 44(3), pp. 357-384.) "...the courts though bound by the principles expressed in the older cases, may attempt to apply them in new ways more consistent with current social conditions."

In the light of the above wisdom, irrespective of the case law available, I would find it very difficult to assume, as the CMA did, that a Chief Financial Officer of a TNC with an offshore account an employee in the strict, traditional sense. I would rather assume he is an independent contractor or a consultant to a "host country operation". Equality applies to all employees, equity does not. In this case equity-based statutory interpretation on presumption of employment should be reserved for the poor downtrodden employees who hardly know anything about offshore banking.

In the upshot, I allow the appeal. I declare that no contract has ever existed between the applicant and the respondent. The Award issued by the CMA therefrom is hereby quashed and set aside. I make no orders as to costs. It is so ordered.

**E.I. LALTAIKA**

**JUDGE**
**09.02.2023**

**Court**

This ruling is delivered under my hand and the seal of this court this 9th day of January 2023 in the presence of Mr. Stephen Lekey for the applicant and Mr. William for the respondent.

**E.I. LALTAIKA**

**JUDGE**
**09.02.2023**

**Court**

The right to appeal to the Court of Appeal of Tanzania fully explained.

**E.I. LALTAIKA**

**JUDGE**
**09.02.2023**