

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION NO. 775 OF 2018

BETWEEN

GRISHCHANDRA T. V. CHANDE.....APPLICANT

AND

AUTRAD MINING CO. LIMITED.....RESPONDENT

JUDGMENT

Date of last Order 22/04/2020 & 04/06/2020

Date of Judgment 03/07/2020

A. E. MWIPOPO, J

Aggrieved by the decision of the Commission for Mediation and Arbitration (CMA) in labour dispute no. CMA/DSM/ILA/R.1009/14 dated 29/06/2018 delivered by Hon. Muhanika, J. Arbitrator, the applicant namely Grishchandra T.V. Chande lodged the present Revision Application. The applicant is applying for the order of the Court in the following terms:-

- i. That this court be pleased to revise and set aside the Commission of Mediation and Arbitration Award made on 29/06/2018 by

Honourable Arbitrator Muhanika J. in labour dispute with
Reference no. CMA/DSM/ILA/R.1009/14.

- ii. Any other reliefs that the Court deems fit to grant.

Background of the case in brief is that the applicant was employed by Autrad Mining C. Limited, the respondent, in June 2012 as in house consultant. In March, 2013 he was given a title of Executive Director of the Company. On 30/11/2014 the respondent resigned following failure to raise Usd 300,000/= as capital to the company and non-payment of some of his salaries by the respondent. Following the resignation, the respondent did not pay the applicant terminal benefits as a result the applicant referred the dispute to the CMA which dismissed the dispute for the reason that there is no employment relationship between the applicant and the respondent. The applicant was not satisfied with the CMA decision and decided to institute the present application against the CMA Award.

The applicant have two grounds for the revision which are as follows:-

1. Whether the arbitrator was legally just to denounce Applicant's employment status basing on control and dependency of the Applicant to his employer.

2. Whether the Arbitrator was just to rely on intentions to become shareholder to disregards entitlements of the Applicant as an employee.

The Court ordered the hearing of the application to proceed by way of written submission and both parties lodged their submission within time as ordered by the Court.

The applicant who was represented by Advocate Fredrick Mbise submitted in support of the application that the main issue for determination is whether the Arbitrator was legally just to determine the Applicant's employment status basing on control and dependency of the Applicant in performing his activities assigned by his employer not to be the contract for employment. The Arbitrator was supposed to consider the Applicant's testimony during trial, where he testified that, he was new to mining business and he was receiving instruction on what to do through email from the company managing director one Mr. Anand. The applicant submitted that Mr. Gopal Anand – DW2 testified that he agreed to employ the Applicant as an in house consultant for the period of there (3) months for the salary of United States of America Dollar Ten Thousand only (USD 10,000/=), so as to make the Applicant familiar with the mining activities.

This fact was proved by Exhibit D-6 collectively which were first email exchange engaging the Applicant in the Company. Since the Applicant was new to the mining industry, control of what to be done was upon the Respondent for One Hundred Percent (100%) save for the tasks that required the Applicant expertise like following permits. Moreover, both DW1 and DW2 testified that, the Applicant was given a target to achieve production of two (2) Kilogram of Gold every month, this also confirm that the Respondent was in control of the Applicant's manner of performing his work, hence an employee of the Respondent in the eyes of the law.

The applicant argued that during hearing the Applicant tendered exhibit P-1 which clearly shows the existence of dependency of the Applicant to his employer for his living as the Respondent agreed to pay the Applicant USD\$ 10,000/= as salary for three months which were later extended. That, on the occasion where the Respondent delayed to pay the Applicant his salary, the Applicant had to borrow money from Bureau De Change in Dar Es Salaam for his living expenses waiting for his salary to be paid. This was also confirmed by the Respondent through exhibit D-7 collectively that the Applicant has to borrow money from Anand himself, the managing director, so as to survive and provide for his family which

included paying his son's school fees as the Applicant had no other means of income except from the salary he received from the Respondent. This aspect also proved dependency of the Applicant to his employer, the same condition as articulated in Section 61(a) (b) (c) (d)(e)(f)(g) of the Labour Institutions Act, 2004.

On the second issue whether the Arbitrator was just to rely on the Applicant's intention to become shareholder to disregard his entitlement as an employee, the applicant submitted that the Arbitrator waived to determine the entitlement of the Applicant for unfair termination on the ground that, the Applicant intended to be the shareholder of the Respondent company. During hearing, the Applicant produced exhibit P-2 collectively showing how he agreed to use the Applicant's salaries to buy shares in the company while the Applicant continue to work for the same company. There is no law that prevents an employee from purchasing shares of the company he or she works for, rather it is encouraged for employee to have shares in the company they work for so as to motivate them to work hard.

He submitted further that the status of the Applicant to be shareholder of the Company failed for the reason that he wanted to buy

shares using his salary. When his salary was not paid on time it made the Applicant fails to pay for the shares he wanted to subscribe for in the company. Exhibit P-1 which was an official statement to all shareholders of the company shows that the Applicant was appointed as the Administrator Operational matter of the mine site and Tanzania affairs. The Applicant worked for more than three months as his contract was extended three times each period for three months and he was promoted to the position of Executive director. Therefore, he worked for the company as an employee.

The applicant was of the view that the testimonies of the Applicant and exhibits tendered proved that the Applicant dependent economically from the Respondent for his well-being. Also the Respondent gave the Applicant office, gave him control of the mine site which was fully equipped with machines. The applicant worked for the Respondent alone as he had no other means of income that he had to borrow money form the company managing director.

He argued that the Applicant was constructively terminated by the Respondent for the act of not paying him his salary which made the employment of the Applicant intolerable as he has no means to survive other than to resign and look for other employment as provided under rule

7(1) of the Employment and Labour Relations (Code of Good Practices) Rules GN. No. 42 of 2007.

The applicant prayed for the court to set aside Commission for Mediation and Arbitration Award and order the Applicant to be paid compensation for unfair termination of his employment plus other terminal benefits including his unpaid salaries and leaves.

In reply, the respondent who was represented by Advocate Thomas Massawe submitted that the entire dispute and the revision in general centered on the purported termination of employment of the Applicant at his work place though not true. The submission by the Counsel for the Applicant together with the affidavit supporting the application itself did not contain anything worth disturbing the Commission award. The Commission rightly reached the proper and fair decision on dismissal of the application before it.

Responding to the first issue regarding the employment status of the Applicant, the Respondent submitted that the CMA award was self-explanatory for the reason that as rightly stated from the testimonies of DW1 - Sheikh Kashmir and DW2 - Gopal Anand is that the Applicant joined

the Company specifically as an intended shareholder. While waiting to raise the required money the applicant was requested to act as consultant for three months for fee of US\$ 10,000/=. There is nowhere in the CMA proceedings or Applicants submission where the Applicant states that he was receiving a certain amount of money monthly and meet any other statutory obligations like pension, PAYEE and others but instead the consultation fees. The above clarification are clearly found on the last paragraph of page 3 and paragraphs 1, 2, 3 and 4 of the page 4 of the typed award.

He submitted that the status of the Applicant that he was not an employee of the Respondent was rightly stated during the testimony of DW2 which is appearing on paragraph 2 of page 5 of the typed award specifically lines 9, 10, 11, 12, 13 and 14 which clearly states so. The Commission for Mediation and Arbitration when setting issues for deliberation among them was whether or not the applicant was an employee of the Respondent and upon digesting the evidence of the two witnesses for the Respondent and one for the Applicant Grishchandra Chande who was also the Complainant in the dispute before the Commission clearly deliberated the same. The said deliberation are found

on paragraph 3 of page 7 of the typed award which led to the dismissal of the complaints. The issues of Section 61 of the Labour Institutions Act No. 7 of 2004 which the Applicant raised at the Commission and now at this court again was already determined and the following was how the Arbitrator concluded at page 7, paragraph 3 lines 19, 20, 21 and 22 of the typed award. The Commission held that arrangement that was agreed between the parties was not intended to create the employment relationship, complainant was not economically dependent to the Respondent but rather prospective shareholder. It follows therefore there is no employment between the parties. The respondent averred that the employment status of the Applicant was concluded by the Commission which declared that the applicant was not an employee of the Respondent.

Regarding the second issue where the Applicant argued that the Arbitrator relied on intention of the Applicant to become the shareholder to dismiss the dispute before the Commission, the Respondent contested it since the purpose of applicant joining the Respondents Company is to become a shareholder. According to the testimony of the Applicant and that of the Respondents' witnesses which are in record it is not true that the Arbitrator relied on it. The Applicant in his testimony testified that he

told Mr. Anand who was the Chairman of the Board of Autrad Mining Company Limited he will be able to invest US\$ 300,000/= subject to realization of funding source as he was expecting money somewhere else. That he worked for the Respondent as in-house consultant. The wording of the Applicant are self-explanatory and there is nowhere in the entire proceedings and the award where the Applicant stated that he was going to use his salary to buy shares but he stated that he was looking for money elsewhere. At the same time it was not true that the Applicant was totally depending economically from the Respondent for his wellbeing because he had other business activities such as promoting real estates and some family business. Being a part time consultant the applicant cannot rely totally on the Responded. The Applicant failed to indicate on the specific area where the Arbitrator relied on his intention to become a shareholder as the basis of dismissing the complaint. It is from what has been stated above the Respondent is of the views that this second ground should also fail. The Respondent prayed for the Court to dismiss the entire application for revision.

In rejoinder, the applicant retaliated his submission in chief and continue to maintain his position that the Commission wrongly reached at its decision by dismissing the Application by the Applicant.

From submissions of the parties, pleadings and the CMA records issues for determination of this application are as follows:-

1. Whether there was employment relationship between the applicant and the respondent.
2. If the answer to the first issue is positive, whether the respondent constructively terminated the applicant from employment unfairly.
3. What remedies each party is entitled?

The Labour Institution Act, Act No. 7 of 2004, provides for presumption of employment in section 61. The section provides for factors to be considered in presuming existence of employment relationship. The factors includes the manner the person is subjected to the control and direction of another person, the hours the person is working to that other person, economic dependency to the person whom service is rendered, provision of working tool and the person must render the service to one person only. In the case of **Kinondoni Municipal Council v. Rupia Said**

and 107 Others, Revision No. 417 of 2013, High Court Labour Division at Dar Es Salaam, this Court held that;-

".....among primary facts to be considered in determining existence of employment relationship are economic dependency, remuneration, subordination, discretion, supervision and control of manner service is rendered".

(See **also Mwita Wambura v. Zuri Haji**, Revision No. 45 of 2012, High Court Labour Division at Mwanza).

The applicant submitted regarding the first issue that the Arbitrator erred to hold that there is no employment relationship between the applicant and the respondent. The arbitrator was supposed to determine the Applicant's employment status basing on control and dependency of the Applicant in performing his activities assigned by his employer. The Arbitrator did not consider the Applicant's testimony during trial where he testified that he was new to mining business and he was receiving instruction on what to do through email from the company managing director one Mr. Anand.

The respondent contested the applicant submission and stated that the CMA award was self-explanatory for the reason that as rightly stated from the testimonies of DW1 - Sheikh Kashmir and DW2 - Gopal Anand is that the Applicant joined the Company specifically as an intended shareholder. While waiting to raise the required money, the applicant was requested to act as consultant for three months for fee of USD 10,000/=. There is nowhere in the CMA proceedings or Applicant's submission where the Applicant states that he was receiving a certain amount of money monthly and meet any other statutory obligations like pension, PAYEE and others but instead the consultation fees.

It is not disputed by the parties that the Applicant joined the Company specifically as an intended shareholder who was supposed to inject to the respondent USD 300,000/= which was later on reduced to USD 100,000/=.

The evidence on record shows that it was agreed as the applicant was raising the fund he would act as consultant for three months from July to September, 2012 for a fee of USD 10,000/= which was extended to another three months from October to December, 2012 for the same fee. During this time the applicant was acting as consultant and also

administrative head. According to Exhibit D7 Anand Gopal – DW2 did write an e-mail to the applicant on 16/08/2012 informing that he had cleared with the main Investor for the applicant who as consultant was also Admin Head in Tanzania to be designated as Executive Director. Therefore the applicant while working for two terms of 3 months each as Consultant he was designated Executive Director and Admin Head of the respondent in Tanzania.

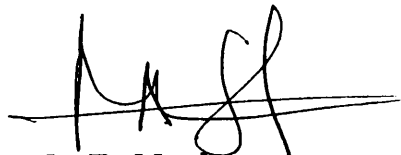
After expiry of the second term in December, 2012, the applicant continued to work for the respondent from January, 2013 onwards. There is no evidence on what terms the applicant continued to work for the respondent. Reading the e mail of Anand Gopal dated 13/01/2013 going to the applicant it appears that the respondent informed the applicant he is in no position to pay him. It is applicant's e-mail to the respondent dated 23/02/2013 where the applicant stated that it was agreed for the month of January and February, 2013 his payment was USD 5,000/ per month. In the e-mail he was requesting to be paid USD 7,000/= per month. There is no evidence which shows that the applicant proposition to be paid on monthly basis was accepted by the respondent. According to the testimony of the applicant and a letter of the respondent to the Manager, Bank of

Baroda dated 27/01/2014 – Exhibit D3 the applicant was among signatories of the respondent. Exhibit D3 was a letter removing the applicant as a signatory for the reason that he have resigned. It is not clear how the applicant as a consultant become signatory of the respondent.

From above it cannot be said that the applicant is subjected to the control and direction of the respondent since there is no evidence to prove the same. Further, hours the applicant was working to the respondent are not known, provision of working tools to the applicant is not seen from evidence and there is no proof that the applicant was rendering the service to the respondent only. Despite the above facts, the applicant appeared to depend financially to the respondent. However, there is no proof that the applicant was paid monthly salary and remunerations by the respondent but rather he was paid consultation fees. Moreover, there is no proof that he was subordinate and under respondent's discretion, supervision and control of manner his service is rendered. Therefore, I'm of the same opinion with the Arbitrator that there is no sufficient evidence to prove that there was employment relationship between the applicant and the

respondent. As a result, it is my finding that the applicant was not employed by the respondent. Thus the answer to the first issue is negative.

Since I held that the applicant was not employed by the respondent, then, the applicant is not entitled to any remedy for unfair termination rather than his unpaid consultation fees. Consequently, the application is hereby dismissed for want of merits and the CMA Award is upheld. Each part to bear his own cost.

A handwritten signature in black ink, appearing to read 'A. E. Mwipopo', with a horizontal line drawn through it.

A. E. Mwipopo

JUDGE

03/07/2020