IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO.44 OF 2019

BETWEEN

MUTLU AHMET KORKMAZ..... APPLICANT

VERSUS

EUROPLAST COMPANY LTD..... RESPONDENT

JUDGMENT

Date of Last Order: 02/10/2020

Date of Judgment: 09/10/2020

Z. G. Muruke , J.

MUTLU AHMET KORKMAZ the applicant, being aggrieved by the award of the Commission of Mediation and Arbitration [herein to be referred as CMA] in the Labour Dispute No. CMA/DSM/KIN/R.298/18 dated 4th January, 2019 which was in favour of the respondent, filed this application seeking to revise, the CMA decision. The application is supported by the affidavit affirmed by the applicant himself. Challenging the application, the respondent filed counter affidavit sworn by Huseyin Gercerk the respondent's Managing Director.

The brief facts of the case are; the applicant was the first Managing Director and a shareholder of the respondent since 20th December, 2016. He held the said position until November, 2017 when through Board resolution he was removed from that position. The applicant alleged that

on 10th October, 2017 he was employed by the respondent as a Country manager with a monthly salary of 5000 USD. That he was not paid his salary for the three months of October, November and December 2017.The applicant found the same as constructive termination. He thus refereed the matter before CMA where decision was on the respondent favour. Being resentful with the decision, he filed the present application hence the present judgment.

Hearing was by way of written submission. Both parties were represented by advocates whereas Ambroce Menance Nkwera was for the applicant, while Godfrey B. Namoto was for the respondent.

In support of the application, the applicant's counsel submitted that, the arbitrator failed to assess the evidence on record and finally arrived to a contradictory decision. It was her finding that the applicant was the first Managing Director off the Company. That affirms that the applicant was employed by the respondent first as a manager and later as a Country manager. Referring Section 61 of the Labour Institution and Section 4 of the Employment and Labour Relations Act Cap 366 RE 2019(Cap 366 RE 2019).

It was further submitted that the arbitrator failed to analyze the evidence on records and arrived to a decision that the applicant was fairly terminated. The applicant before CMA evidenced that they had a two years contract while the respondent failed to execute his duty as per Rule 9 (3) of the Employment and Labour Relations (Code of Good Practice)

Rules,2007(GN.42/2007. The arbitrator in her decision failed to comply with the requirement of Section 37 of Cap 366 RE 2019.

Responding to the applicant's submissions, the respondent counsel prayed to adopt counter affidavit to form part of his submissions. It was contended that CMA was correct to hold that there was no employer employee relationship between the applicant and the respondent. It was the arbitrators finding that the parties had signed the employment contract on October 2017 and the same was to be effective from January, 2018. The respondent objected the said contract and made clear that they have never signed any contract of employment with the applicant. And the applicant had no any proof that he was paid his salary from the respondent's bank account and he had no work permit if he was a non-citizen employee. That the said contract was illegal and un enforceable under the laws, citing the case of **Rock City Tours Ltd v Andry Nurray**, Rev. No. 69/2013 and Section 9 of the Non-Citizens(Employment Regulations) Act,2015 No.1 of 2015.

Further, it was submitted that, CMA having found that there was no employer employee relationship between the parties, had no need to determine the fairness of termination since for fairness of termination is only where there is valid, legal and enforceable contract. Hence the cited provisions of GN.42/2007 as cited by the applicant are irrelevant in circumstances of this case. That the arbitrator properly decided the matter, they thus prayed for dismissal of the application.

In rejoinder, the applicant's counsel reiterated his submission in chief, and added that it was not the applicant's duty to acquire the work permit. The respondent's faulty cannot be used to waive the employee's rights referring Section 10(1) of Non-Citizen (Employment Regulation of 2015. He thus prayed for the application be granted.

After careful consideration of the submissions, records and the applicable laws, the following are the issues for determination;

i. **Whether there was employer employee relationship between the parties.**

ii. **Whether the applicant was fairly terminated.**

iii. **What are the reliefs entitled to the parties?**

In regard to the 1st issue, I must state that it is undeniable facts that the applicant was one of the first Managing Director, shareholder and founders of the Company. And his directorship ended on November, 2017 after the Board's resolution to remove him on that post. From records the applicant alleged that he was employed as a Country Manager on 10th October, 2017. The respondent denied to have employed the applicant and denied to have signed the said contract (exhibit M1) the employment contract. I have thoroughly gone through Exhibit M1 and found that the said contract was signed by the applicant and Husseyn Gercek on 10th October, 2017 and it has the respondent's company seal. Therefore, I find the respondent's contentions that they had not engaged with the applicant in the employment contract with no basis.

Again on the 1st clause of the Contract of Employment (Commencement clause), the parties had agreed that the contract shall commence on 1st January, 2018 though signed on 10th October, 2017. This implies that the parties were not into employer employee relationship until January, 2018 when the contract was supposed to commence. I thus join hands with the arbitrator that, the applicant was employed by the applicant with a contract to be effected from January 2018. That means, from October to December the parties had no employment relationship.

Section 61 (a), (b), (c), (d), (e), (f) and (g) of the Labour Institution Act No. 7 of 2004 provides for the factors to be considered when presuming the existence of the employment relation. It provides that:-

> "Section 61 For the purpose of law, a person who works for or renders a service to other person, is presumed until the contrary is proved to be an employee regardless of the form of contract if any , one or more of the following factors is present.
>
> a) The **manner in which the person works subject to the control or directions of another person**.
> b) The person hours of work are subject to the control or direction of another person.
> c) In the case of person who works for the organization, **the persons forms part of the organization.**
> d) The **person has worked for that other person for an average of at least 45 hours per month** over the last three months.

e) The person **is economically dependent on the other person** for which that person renders service.

f) The person **is provided with tools of trade or works equipment by the other person.**

g) The person **only works or renders service to one person."**

[Emphasis is mine].

The position was well explained by Hon. Rweyemamu, J (as she then was) in the case of **Mwita Wambura Vs Zuri Haji**, Revision Application No. 42/2012 at Mwanza. LCD 2014 Part II page 182 that:-

> "**there are no hard and fast rules regarding how to determine existence of employment relationship** but, there are a number of common factors running through which can aid a decision maker in determining existence of an employment relationship. These principles are among others,
>
> (a) **defining employment relationship by looking at parties roles** ,considering matters among others; **dependency, subordination, direction, supervision and control of services rendered**; (page 19 to 23 of the report).
>
> (b) **principle of primacy of facts looking at what was** actually agreed and performed by each of the parties.
>
> (c) use of burden of proof.
>
> [Emphasis is mine].

From that position of the law, the said factors are not reflected in the circumstances of this case. There is no proof that the applicant

performed his duties as a country manager and he was paid that 5000 USD salary by the applicant. The applicant had a duty to prove that he has executed his duties on the said posts under the circumstances stated under Section 61 (supra).

In that regard the applicant is not entitled to the claim of salaries for October, November and December 2017, because the contract was not yet into force. Thus, I find no need to fault the arbitrator's finding, hence I will not labour on determining the remaining issues, because 1st issue has disposed present revision.

On the basis of the foregone discussion, I find the application with no merit, I hereby dismiss the same. It is so ordered.

Z.G.Muruke

JUDGE

09/10/2020

Judgment delivered in the presence of Allan Mchaki for the applicant and Doris Kawonga for the respondent.

Z.G.Muruke

JUDGE

09/10/2020