IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 286 OF 2020

BETWEEN

YE HONG.....APPLICANT

AND

CHINA DASHENG BANK LIMITED..... RESPONDENT

JUDGMENT

Date of Last Order: 08/03/2021
Date of Judgment: 21/05/2021

A.E MWIPOPO, J.

This is revision application against the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/ILA/1244/18/37 which was delivered on 19/06/2020 by Hon. R. William, Arbitrator. YE HONG, the applicant herein, is applying to this Court for an order in the following terms: -

1. That, this Court be pleased to call for and examine the records of the proceedings and award of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/ILA/1244/18/37 delivered on 19 June, 2020 by Hon. William R., Arbitrator.
2. That, upon call for the records of the proceedings and the decision which has been delivered in favour of the

respondent, this Honorable Court be pleased to revise the decision and make other orders as this Honourable Court may deem fit and just to grant.

3. Any other reliefs the Court deem fit and just to grant thereof.

The application is accompanied with Chamber Summons and is supported by Affidavit sworn by Frank Kifunda, Applicant's representative. The Applicant's Affidavit contains five proposed legal issues for determination which are found in paragraph 14. The respective legal issues are as follows;

a) Whether it was proper for the Arbitrator to conclude that the 1st contract dated January 2017 between Applicant and Respondent was a contract for service by relying on the mere document without considering the nature of relationship between the parties.

b) Whether it was proper for the Arbitrator to conclude that the Commission had no jurisdiction to decide on salary arrears as the claim was submitted beyond time limitation without considering the fact that parties agreed salary arrears to be paid after obtaining BOT license in 8th November 2018.

c) Whether it was proper for the Arbitrator to conclude that an employee under probation can be terminated without providing any reason or following any procedure.

d) Whether it was proper for the arbitrator to rely on uncollaborated testimony of witness who was not present during the Applicant employment with the respondent.

e) Whether it was proper for the Arbitrator to conclude that the Applicant is not entitled to any relief sought at the Commission.

At the hearing of the application, the applicant was represented by Mr. Anwas Katakwaba, Advocate, whereas the Respondent was represented by Mr. Charles Kisoka, Advocate. Hearing of the application proceeded by way of oral submission.

Submitting in support of the first issue, the Applicant's Counsel was of the view that the Arbitrator erred to rule that the first contract was a contract for service and not the contract of service by relying on the terms of contract and not the agreement between the parties. Section 61 of the Employment and Labour Relation Act, 2004, provides who is employee under the law. Despite the contract being titled consultancy agreement, the Applicant's relations with the Respondent meets the categories provided under section 61 of the

Act. The applicant signed several contracts in favor of Respondent. Things were far beyond consultation and created the employment relationship regardless of employment contract they had. The applicant as director of the company was an integral part of the Respondent business hence was not consultant. The employment relation was created as proved by Board Resolution and lease agreement in Exhibit A2. To support this position Mr. Katakweba cited the case of **Summit Lodge Limited vs. Daniel Jeremiah Mngale,** Revision No. 130 of 2018, High Court, Labour Division, at Arusha, (unreported).

On second ground of revision the Counsel submitted that the issue of salary arrears to be paid upon obtaining the BOT license was never disputed before the Commission. The license was obtained in November, 2018. The complaint was brought before the Commission on 17th December, 2018 which means the dispute was brought within 60 days provided by the law. But, the Commission decision was that the matter was filed out of time as stated at page 11 of the award which is wrong.

The Applicant's Counsel submitted on third issue regarding the second contract dated 15th August, 2018 that the arbitrator erred in law by relying on the Respondent's claims that the Applicant

absconded himself from the work. Thus, the Applicant has no any right regarding his termination as he was under probation period. He stated that Rule 10(8) of Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007, provides how to terminate employees who is under probation. The procedure includes the right to be informed of employer's concern, employee to respond to the employer's concern and employee to be given enough time to improve performance or to rectify the behavior. The Respondent failed to issue notice of termination within 28 days as provided by the law. Exhibit A3 was just a mere notice on the ground that it lacks reason for termination also doesn't show how applicant's right to be heard was guaranteed. In supporting his submission, he referred this Court to the case of **TANELEC Limited vs. The Commissioner General, Tanzania Revenue Authority,** Civil Appeal No. 20 of 2018, Court of Appeal of Tanzania, at Dodoma, (unreported).

It was further submitted that since the Applicant is protected by the law substantially and procedurally, and there is no proof that the applicant absconded from the work, therefore, CMA erred to deny the Applicant's right basing on unproven allegation.

The Counsel submitted on the fourth issue that the Arbitrator relied on the testimony of witness which was not collaborated. DW1

was employed on 26th November, 2018. By that time the Applicant has already left the Company. What was testified by DW1 is hearsay evidence. Thus, the Arbitrator erred to rely on the same.

On the last issue, the Applicant submitted that the Arbitrator erred to hold that the Applicant is not entitled to any relief sought while the contract was terminated before its expiry. He stated that the Applicant is entitled for remaining period of the contract as it was terminated before its time. Thus, the Applicant prayed for the application to be allowed.

Replying to the Applicant's submission, the Respondent Counsel submitted that the Applicant was never terminated from the employment. It was the Applicant who absconded from employment in November, 2018 during his probation. The Court has no jurisdiction to entertain the consultancy agreement which the Applicant pray for the Court to grant remedy from such contract. Exhibit A1 collectively contains consultancy agreement and employment contract. The consultancy agreement was entered before the bank got its operational license. If the Applicant was employed before license that's means he was employed by non-existing entity.

The Counsel submitted that the Respondent got the license from BoT on 08th November, 2018 as per Exhibit A3. The consultancy

agreement was entered on 15th May, 2018. He is of the view that there is a contradiction on the party of the Applicant between consultancy agreement and employment contract. Consultancy agreement dispute are referred to normal civil suit and employment contract dispute are referred to Labour Court. In page 3 of CMA's award the Applicant alleged to have claim under consultancy agreement. DW1 testified that with the aid of Exhibit D1, D2 and D3 it shows that the Applicant being foreign expatriate form China was issued an employment contract from 15th August, 2018 so as to comply with BoT's vetting. Also, the contract was issued for the purpose of obtaining residence permit and work permit before commencing employment contract.

The Counsel averred that DW1 testified that the Applicant acquired the work permit on 17th August, 2018 as per Exhibit A2. Then, he left the Country in November 2018 while he was under probation period. However, the Applicant failed to get the residence permit. This could have allowed him to live in Tanzania. On such reason the Applicant failed to work with the Respondent.

Further, the Respondent's Counsel submitted that there are no details on how and which agreement was breached. During cross examination the Applicant admitted to have no claim over

employment contract however he was asking the Commission to order the payment of consultation fees. He stated that Notice of termination - Exhibit A3 was written notice of appointment and dismissal and was addressed to the Department on the resolution of the 2nd meeting of the Board of Directors held in 2008. It was not addressed to the Applicant neither acknowledged by the Applicant to have been received. The notice was reported to the B.o.T for approval. The Applicant skipped the vetting process which was against B.o.T policies as per rule 21(1) of the Banking and Financial Regulations, 2014. The Regulations provides that a financial institution shall not employ a non-citizen or renew any contract of such person unless it seeks and obtain prior approval of the B.O.T. The Applicant never opposed the evidence that he never obtained B.o.T approval.

It was averred by the Respondent's Counsel that the Applicant breached the terms of employment contract by absconding himself from the work during probation period contrary to Rule 10(2) and (3) of G.N No. 42 of 2007 and Article 5.1 and 5.3 of the Employment contract. The first 6 months of the employment contract are probation period starting from 15th August, 2018 and it ends on 14th

February, 2019. There is no any evidence which proves that the Applicant was confirmed by the employer.

It was further submitted by the Respondent's Counsel that the cases cited by Applicant are distinguishable to this matter at hand. In the **Summit Lodge Limited vs. Daniel Jeremiah Mngale**, (supra), the Respondent was never issued with contract of employment while in this matter at hand the applicant was offered a contract of employment. Again, in the case of **TANELEC Limited vs. The Commissioner General**, (Supra), the disciplinary proceeding was initiated while in the present case the same was not implemented against the applicant. Thus, the cases are not applicable in our situation. Then, the Counsel prayed for the application to be dismissed.

In rejoinder, the Applicant retaliated his submission in chief and emphasized that the Respondent had no licence by 08th November, 2018 but it was legal entity incorporated according to introductory part of consultancy agreement. The consultancy agreement between the parties is employment agreement for specific task. Also, if the Applicant absconded to his employment there is no disciplinary measures taken against him.

As I was constructing this judgment I came across the issue of jurisdiction that the Commission entertained the dispute while the parties herein entered into consultancy agreement and contract of employment unlawfully. The evidence available in record shows that these contracts were entered before the Applicant obtained the work permit which is contrary to section 9 of the Non-Citizens (Employment Regulation) Act, 2015, section 26(1), (2), and 27 (1), (7) of the National Employment and Promotion Services Act, Cap. 243 R.E. 2002, and section Section 16(1) of the Immigration Act, Cap. 54, R.E 2002. This means that the Commission had no jurisdiction to entertain the matter. Thus, on the 7th May, 2021 which was the date set for judgment I ordered the parties to address the Court on the issue.

The Applicant Counsel submitted that the Non-Citizen (Employment Regulation) Act provides in section 10(2) (b) that it is the employer who applies for non-citizen employees work permit. Among the documents which are needed in the application according to second schedule to the Act is employment contract of the respective employee. This means that the employment contract of non-citizen employee is voidable upon obtaining work permit. Since

the work permit was obtained by the Applicant in October, 2018 it means the respective employment contract was valid.

The Respondent Counsel admitted that the non-citizen employment contract is voidable upon fulfilment of several conditions according to the law. Among the condition is work permit and resident permit according to section 34 of Immigration Act, Cap. 54 R.E. 2016. The Applicant contract of employment was entered on 15th August, 2018 but he obtained work permit on 17th October, 2018. This means that the Contract was supposed to commence on that day. Unfortunately, the Applicant did not obtained resident permit thus he failed to start working with the Respondent according to the employment Contract. Further, the Applicant left the country before he obtained resident permit and before he started to work with the Respondent.

From the submissions regarding jurisdiction of the Commission to entertain the matter, I agree with both the Applicant and the Respondent that the Applicant's contract of employment was voidable upon fulfilment of certain conditions including obtaining of work permit as a result the Commission had jurisdiction to entertain the matter.

From the submissions, the remaining issues for determination are as follows; -

i) Whether the applicant was terminated from his employment by Respondent.

ii) If the answer is positive, whether the termination was fair.

iii) Whether this Commission had no jurisdiction to entertain dispute relating to consultancy agreement as it was held by the Arbitrator.

iv) What are the reliefs entitled to parties?

Commencing with determination of the first issue whether the Applicant was terminated from employment, the Applicant averred that he was terminated from employment by the Respondent. The Applicant submitted that the arbitrator erred in law by deciding that the Applicant absconded himself from the work and has no right regarding his termination as he was under probation period. In opposition, the Respondent argued that the Applicant was never terminated from the employment but it was the Applicant who absconded from employment in November, 2018 during his probation. And that the Applicant did not obtain resident permit from the relevant authorities to allow him to work in Tanzania.

I have read the evidence available in record and it shows that the Applicant testified before the Commission that he was employed by the Respondent on 15th August, 2018 as Chief Executive Officer for a monthly salary of USD 22,500 and that he was terminated on 26th November, 2018 hence he worked for two months. The Applicant stated that he have claims for 2 months' salary arrears. In cross examination the Applicant admitted that it was not possible to work without work permit and the Respondent had no license hence it was not possible to work. Nurdin Mwaikoki – DW1 testified that the Respondent obtained the license from Bank of Tanzania on 8th November, 2018, and the bank was launched on 26th November, 2018. During cross examination DW1 stated that the Bank had provisional license which allow the bank to employ key personnel for the bank. It is the names, CV and contract of this key personnel which are submitted to the Bank of Tanzania for vetting. This evidence prove that the bank was working under provisional license hence the allegation that the bank was not working prior to obtaining of license from Bank of Tanzania has no basis.

The Applicant is of the view that he was terminated without following procedures for termination of employee under probation and he relied on Exhibit A3 – notice of appointment and dismissal.

The Exhibit A3 dated 26th November, 2018 was informing departments that the board of directors of the Respondent decided dismiss the Applicant and appoint Mr. Zhu Guojiang as the president of the Dasheng Bank. This is sufficient evidence to prove that the Respondent terminated the Applicant from the employment.

The second issue is whether the termination of Applicant employment was fair. The Applicant's Counsel submitted that his client was terminated without following procedures for termination of employee under probation. In opposition the Respondent submitted that the Applicant absconded from employment for 57 days hence he was not terminated.

The evidence available in records shows that the Respondent witness DW1 testified that the Applicant left the country for 57 days hence he absconded from work and that the Respondent knew about the Applicant where about after he instituted complaint before the Commission. In cross examination DW1 testified that when the employee abscond for 5 days the disciplinary procedures was supposed to be taken against the employee. But, there is no disciplinary action which was taken against the Applicant but on 26th November, 2018. The Respondent dismissed the Applicant and appointed another person in his post. Despite the facts that the DW1

testimony that the Applicant absconded from employment from September, 2018 was not disputed or challenged during cross examination which means it is true, the Respondent was supposed to terminate him by following procedures provided by the law. At the time of termination, the Applicant was still under probation as paragraph 5.1 of the employment contract – Exhibit A1.

Rule 10(8) of Employment and Labour Relations (Code of Good Practice) Rules, G.N 42 of 2007, provides how to terminate employees who is under probation for a period of less than 6 months. The rule reads as follows, I quote:-

> *"10 (8) Subject to sub-rule (1) the employment of a probationary employee shall be terminated if-*
>
> *(a) the employee has been informed of the employer's concerns;*
>
> *(b) the employee has been given an opportunity to respond to those concerns;*
>
> *(c) the employee has been given a reasonable time to improve performance or correct behaviour and has failed to do so."*

From the above cited rule, the procedure for terminating employee under probation includes right of employee to be informed of the employers concern, employee to be given opportunity to responding to the employee concern and to be given opportunity to improve performance or to be given enough time to rectify the behavior. There is no evidence on record to prove that the Respondent followed the procedure. This court in the case of

Happiness Geff vs. Wadhamini KKKT (Dayosisi ya Mashariki Ziwa Victoria), Revision No. 35 of 2013, High Court of Tanzania, Labour Division, at Mwanza, held that, I quote;

> *" the Employment and Labour Relations Act embodies principles of fair labour practices in respect of all employees irrespective of their categories; although such principle do not extend to coverage under unfair termination for all categories".*

Failure of the Respondent to comply with rule 10 (8) of the GN No. 42 of 2007 amount to unfair labour practices.

The third issue is whether the Commission had no jurisdiction to entertain dispute relating to consultancy agreement as it was held by the Arbitrator. The Applicant argued that the Arbitrator erred to rule that the consultancy agreement was a contract for service. The Applicant's relationship with the Respondent meets the categories provided under section 61 of the Act as things were far beyond consultation and created the employment relationship. On the other hand, the Respondent Counsel was of the opinion that Court has no jurisdiction to entertain the consultancy agreement as it was held by the Commission.

I have read the consultancy agreement between the Applicant and the Respondent which was signed by the parties on 16th February, 2018. The agreement shows in paragraph 2.0. (a) that its

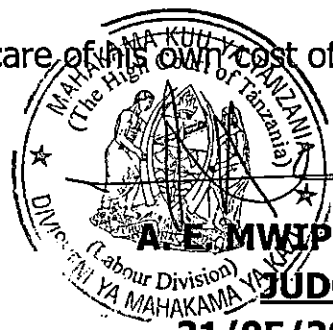
duration is 17 months commencing from 1st January, 2017 and ending on 30th May, 2018. The contract provides in paragraph 4 that it is a contract for services and not of services. The contract states that the consultant have discretion on working hours. The contract provides further in paragraph 7.1 and 7.2 that parties have entered into independent contract for rendering service and that the consultant is not employee, agent or servant of the company. Further, it does not create any partnership, joint venture, master-servant, employer-employee, principal – agent or any other relationship apart from that of independent contractor. This prove that the respective consultancy agreement was contract for service as it was rightly held by the Arbitrator.

Regarding Applicant's opinion that his relationship with the Respondent meets the categories provided under section 61, I'm of the view that the presumption as to who is an employee under section 61 of the Labour Institutions Act, 2004, arise when there is no proof of the employment relationship where a person works to or renders service to another person. In the present application the respective consultancy agreement prove that there was no employment relationship between Applicant and Respondent.

Further, the Applicant's payment claims on the consultancy agreement was referred to the Commission on 17th December, 2018 while the agreement shows that it ended on 30th May, 2018. This means that the dispute was referred to the Commission out of 60 days provided by law for referring dispute other than for termination of employment according to rule 10(2) of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007. Thus, I'm of the same opinion with the Commission that the Commission had no jurisdiction to determine the Applicant's payment claims arising from consultancy agreement.

The last issue is what are the reliefs entitled to parties? As I did find in third issue that the Respondent's termination of Applicant's employment amount to unfair labour practices, the Respondent is supposed to pay compensation to the Applicant for unfair labour practices. In deciding the amount to be paid as compensation I have considered the circumstances of the case especially the testimony of DW1 that the Applicant left the country without permission in September, 2018 hence he was not working. This evidence was not contradicted through cross examination or testimony of the Applicant. Thus, I order for the Respondent to pay one month salary as compensation for unfair labour practice and one month salary in lieu

of a notice pay. In this application, the only available evidence about Applicant's salary is his own testimony that he was paid monthly salary of Usd 22,500. The Respondent's witness (DW1) did not state the amount of Applicant's salary which was determined by the board of directors. Thus, I take the Applicant's monthly salary to be Usd 22,500. Therefore, I order for the Respondent to pay the Applicant a sum of Usd 45,000 as one month salary compensation for unfair labour practices and one month salary in lieu of a notice pay. Each party to take care of his own cost of the suit.



A. E. MWIPOPO
JUDGE
21/05/2021