

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 297 OF 2020

THE REGISTERED TRUSTEES OF
THE CIVIC UNITED FRONT CUT..... APPLICANT

VERSUS

JUMA KISESA.....1st RESPONDENT
SAADA KATIMBA.....2nd RESPONDENT
SHABANI A. MWENGE.....3rd RESPONDENT
YUSUFU KITIMBA.....4th RESPONDENT
JABIR IDDRISSA YUNUS.....5th RESPONDENT
FABIAN MKOBA.....6th RESPONDENT
LUCY P. MAGANGA.....7th RESPONDENT
EMMANUEL MALIMA.....8th RESPONDENT

(From the decision of the Commission for Mediation & Arbitration of DSM at Ilala)

(Massay : Arbitrator)

dated 12th June 2020

in

REF: No. CMA/DSM/ILA/R.928/16/496

JUDGEMENT

20th September & 1st November 2021

Rwizile J.

The applicant, a political party commonly known as CUF, applies for revision of the award made by the Commission for Mediation and Arbitration (to be referred herein as the Commission). The application has

been commenced by the chamber summons supported by an affidavit of Abdul Rajabu Magomba which advances 4 grounds for determination at its para 11 as follows;

- i. That, whether it was correct for the arbitrator to arrive into the findings that the respondents were the employees of the applicant and ignoring the employment contract of the Respondents reducing oral evidence into writing.
- ii. That, whether it was proper and correct for the trial arbitrator to disregard the weight of the evidence of the applicant and Respondent's witnesses in respect of the employment relationship between the respondents and Fahamu Co. Ltd.
- iii. That, whether it was correct for the arbitrator for not making any findings to the claims made against the Fahamu by the respondents in connection of their employment.
- iv. That whether it was correct for the arbitrator not to exclude Fahamu Co. Ltd from its findings of unfairness of termination of the respondents.

Albeit brief, it can be factually stated that the respondents worked with Fahamu Newspaper, the property of Fahamu Company Limited, as journalists and staff. They happened to have worked with the same since 2012 to 2015. As it turned out, their employment was terminated by failure to pay salaries. The applicant is alleged to have unceremoniously appeared in their offices and took all the working tools and that was the end of their employment. Further, it was stated that the applicant formed Fahamu Newspaper and later formed Fahamu Company Limited to run the same, under its supervision. When their employment was so terminated, the applicants approached the Commission by filing a labour dispute.

They successfully got terminal benefits as the result of unfair termination. The commission upon hearing their claims found the applicant to have unfairly terminated them. She was ordered to pay notice of one month, leave, severance pay, compensation of 12 months' salary and the 7% interest on the awarded amount calculated from the date of the award.

The applicant was aggrieved by it, hence this application. Mr. Mashaka Ngole learned advocate appeared for the applicant. In his written submission, the first and second issues were argued seriatim while the 3rd and 4th were taken together.

Submitting on the first point, he said, the respondents proved before the Commission to have been employed by Fahamu Co. Ltd for one year in 2013. According to exhibit P1, he said, which is a search report from the Registrar of newspapers, showed that Fahamu newspaper was owned by Fahamu Co. Limited from 2013 to 2016, as testified by Pw1.

The learned counsel, submitted further that there is no evidence proving that the applicant formed and owned Fahamu Co. Ltd. It was his view that it was wrong for the Commission to simply rely on the evidence of Julius Mtatiro who was the secretary general of the applicant but who left the office following the Late Maalimu Seif's exist.

On the second ground, it was argued that the applicant being a political party, as a matter of law, is not allowed to own newspapers. He said, in 2012, she sold ownership and printing rights to Fahamu Co. Ltd as per the evidence of Pw1 and exhibit P1. Since then, Mr. Ngole argued, the applicant had no control of Fahamu Newspaper. To conclude this point, the learned counsel held the view that the evidence given by the applicant showed there was no employment relationship between the applicant and the respondents.

On the last two grounds, the learned counsel was very brief. He argued that had the Commission considered and gave due weight to the evidence called by the applicant it could have been found that the applicant is not answerable for the same.

Mr. Nyaranyo Mwita Kicheere learned counsel appeared for the respondent. He argued that the alleged contracts stated by the applicant as signed in 2013 were not contracts at all. He was firm that the same were not signed by the respondent. They had the signature of one party. They cannot be therefore relied upon by the applicant. He went on saying, that exhibit P1, clear shows, owners of Fahamu Co. Ltd were applicant's top officials. In his view, the applicant terminated the respondents without paying them their rights. He submitted that it is the applicant's officials who took tools from Fahamu Co. Limited and were providing funds for running the same.

Dealing with the second ground, it was argued that the applicant indeed was prevented from owning newspapers. This is what led to the applicant form Fahamu Co. Ltd, but they continued to pay salaries to the respondents. In his view, the evidence of Mtatiro is good to that effect.

Lastly, it was submitted that the respondent tendered four witnesses to include a district Commissioner for Tunduru District, who testified that as

the secretary General to the party by then, was an architect to formulation of Fahamu Co. Ltd for the purposes of owning Fahamu newspaper. It is the same person(party) that prepared salaries to all employees of the newspaper including journalists. It is the secretary general who recruited them as well. Further, he submitted, as per annexure Z-6 attached to the affidavit supporting this application, showing the officers of the applicant are directors of Fahamu Co. Ltd. And he said, that upon, selling rights to the Fahamu Co. Ltd, the applicant did not terminate the respondent's relationship but it deteriorated to some extent as held by the commission. He said, CUF cannot be disassociated with Fahamu Co. Ltd. He then asked this court to raise an amount of compensation to 36 months as prayed.

Given time rejoin, Mr. Ngole bitterly attacked the reply submission by the respondents. He was clear that Julius Mtatiro signed the contracts of employment of the respondents admitted as exhibit C. He did so, he said as the CEO for Fahamu Co. Ltd, and paid salaries in that capacity. He is therefore estopped from denying the truth of the same. He said, in the bank statements which he attached for reference by his submissions in rejoined, it was said that the salaries to the respondents were paid by him in that capacity. They were not paid by the applicant.

In yet another drummer, the learned counsel attached and referred in his rejoinder, the CMA exparte award that was set aside before the impugned one was obtained. He referred the evidence given by the respondents as to have proved that the same were and admitted to have been employed by Fahamu Co. Ltd. He asked this court to set aside the award and find no reason to award 36 months compensation.

Having gone through the rival submission of the learned advocates, and before I venture into the merits of the application, I wish first to note two important things that have long been established as the matter of procedure. **First**, it is a well-known principle that submissions are words from the bar, they do not constitute evidence. It is not expected therefore that when drafting submissions, one has to attached documents for consideration by the court as the applicant's lawyer did. In his rejoinder, he attached and actually quoted extensively some extracts from the exparte award. Despite being an award that was set aside, he still attached it and referred it to beautify his submission.

Second, even though Rule 24 of the Labour Court Rules enjoys parties to attached documents to be relied upon in the affidavit supporting the application, it does not give a room to attached evidence that was not

submitted before the Commission. It is therefore cardinal that at the revision stage the court is to venture into the existing evidence. Any diversion from the principle is uncalled for. It should be to some extent discouraged.

Turning to the merits of the application, I have to determine first, if there was a contract of employment between the applicant and the respondent. This is the only key issue to determine. Under the labour laws, contract of employment in Tanzania may be either oral or written. This is according to section 14(2) of the Employment and Labour relations Act. It does not matter therefore if the respondents were employed under an oral or written contract. What is important is whether there is sufficient evidence to prove such relationship.

In this matter, it is apparent that the respondents were workers of Fahamu newspapers. The applicant does not dispute that. There is also no disputed that the same paper was sold to Fahamu Company limited. The rights as per Dw1 were sold to Fahamu Company limited upon having discovered that the applicant as a political party is not allowed to own a newspaper.

It is noted with concern that the applicant did not show what were terms of the transaction after selling rights of ownership and printing to Fahamu Co. Ltd.

There is no suggestion that even employees were equally transferred. If they had short term contracts, how did they come to an end. Were they terminated or rather expired as it was agreed?. The applicant's evidence has established that upon selling the same, her liabilities were discharged. This, however contradicts, the evidence of Pw4, who in between 2011 to 2014 was the general secretary to the applicant. His evidence was that upon forming the newspaper that was wholly owned by the applicant, it was later sold to Fahamu Co. Ltd. The same company was run by the applicant.

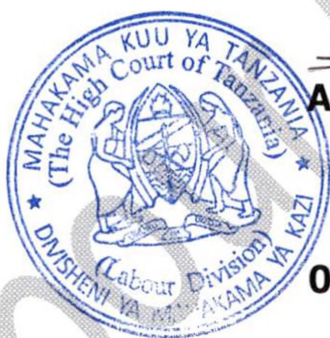
It is evident therefore that evidence of Pw4 was not contradicted. It is absurd that the applicant raised an allegation in the submission that Pw4's evidence should be not trusted because, he left his position when the conflict between the Late Maalimu Seif and the current chairman. I have examined his evidence; he was not cross-examined in that aspect. It is therefore an after sought. It cannot be entertained at this stage.

The Commission upon concluding that there was sufficient evidence proving the relationship between the applicant and the respondent proceeded to hold that termination was unfair. The test used is that stated under section 61 of ERLA. I agree with the reasoning and the finding of the Commission. There is ample evidence from Pw4 and bank statement, exhibit P2. He said, the directors of Fahamu Co. Ltd were the applicant's top officials, second, that payment of salaries of the respondents was done to the bank by the employee of the applicant, he was referring to Rhoda Swila.

From the bank statement, on 29th May 2014, 6th August, 13th October and 8th November 2014, sums of money were deposited in the account of Fahamu Co. Ltd. There is evidence from the same bank statement showing Rhoda Swila made deposits. It is therefore, clear to me that the applicant despite having sold rights to Fahamu Company Limited still, she went on paying the salaries. Paying salaries means direct control of the employee. Providing tools of work is among other thing that proves control. There is no dispute that the respondent's office was rendered impotent when officers from the applicant took tools of work. This is what is in line with section 61 of the ELRA. I have the opinion that the commission was right in so holding. I therefore see no merit in the application. It is dismissed.

Lastly, it is important to comment on the reliefs awarded to the respondent. The Commission awarded, apart from other termination benefits, interest of 7% of the awarded amount. I do not think, it was proper. The applicant and the respondent were not doing business between each other. There is no reason to award interest because the Commission had already awarded compensation of 12 months, which is statutory benefit upon such unfair termination.

For the foregoing reasons, I quash and set aside the order for interest. The rest of the award remains undisturbed.




A.K.Rwizile

JUDGE

01.11.2021