IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 56 OF 2021

LARSEN AND TOUBRO LTD .... APPLICANT

VERSUS

RAYMOND RICHARD .... RESPONDENT

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

(Muhanika: Arbitrator)

dated 28th December 2020

in

REF: CMA/DSM/ILA/680/19

JUDGEMENT

1st March & 8th April 2022

Rwizile J

The application emanates from the decision of the Commission for Mediation and Arbitration (the Commission) in Labour Dispute No. CMA/DSM/ILA/680/19 dated on 28.12.2020 by Hon. Muhanika, J. Arbitrator. This court has been asked to call for the records and examine the proceedings with a view of satisfying itself as to the legality, propriety, rationality and correctness thereof.

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Facts that brought about this application can be briefly stated; that the respondent was the employee of the applicant. He was employed on 18th February 2019 as the supervisor-logistics with a contract of two years.

On 29th July 2019, vide letter, the respondent admitted to have committed a gross misconduct by using applicant's money for his personal use. On 7th August 2019, the applicant terminated the respondent by giving him one month notice.

Aggrieved with the termination, he filed a Labour Dispute at the Commission. The dispute was heard and on 28th December 2020 the award was delivered in favour of the respondent. Being dissatisfied with the award the present application for revision was filed by the applicant.

The application is supported by the affidavit of Subramanian Subbaraman, applicant's principal officer in the following grounds: -

i. *The Commission erred in law to reject the admissibility of both parties signed employment contract on technical reasons which resulted to gross injustice on the applicant.*

ii. *The Commission erred in law to give more weight on exhibit P1 (salary proposal) which was only signed by the respondent and gave*

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lesser weight to exhibit D1 (employment contract) which was signed by the applicant only.

iii. *The Commission erred in law to hold that the respondent was not probationary employee.*

iv. *The Commission erred in law to hold that the respondent's termination was required to comply with fair termination procedure.*

v. *The Commission erred in law and fact to hold that there was no reason for termination of the respondent's employment contract.*

vi. *The Commission erred in law and fact to hold that respondent had no knowledge of employment contract (exhibit D1) while the same was shared to him vide email dated 1st March 2019.*

The application was orally heard. At the hearing, Mr. Laurent Leonard, learned Advocate appeared for the applicant whereas the respondent went unrepresented.

Mr. Laurent submitted that the respondent was employed by the applicant on 18th February 2019. The contract was of two years with six months' probation, he stated. He went further and stated that on 7th August 2019, he was terminated due to misappropriation of his employer's funds. He stated, he was given 1000 USD for his job but converted into his own use

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as exhibit D3 provides. The facts which were admitted by the respondent via a letter on 29 July 2019 as exhibit D3 shows, he stated.

He continued to argue that, the respondent did a misconduct of dishonest and he was terminated under 5th schedule of the Code of Good Practices. He stated that, in law, what he did was a major breach of trust which merited termination. He prayed, the award be set aside.

Dealing with ground four, Mr. Laurent submitted that, the contract was a fixed term of two years and only five months and twenty days were served. To support his point, he cited Section 35 of Employment and Labour Relations Act [CAP 366 R.E. 2019] (ELRA) and the **Jordan University Collage v Flavia Joseph**, Revision No. 23 of 2019, High Court where it was held that unfair termination rules do not apply to an employee who worked less than six months.

When arguing ground three, Mr. Laurent submitted that the respondent was a probationary employee as exhibit D1 shows. The award was not right since it based on salary offer which is not the contract of employment.

Ground one and two were argued together by Mr. Laurent that, exhibit P1 and D1 were signed by single party because it was done via emails.

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He further stated that the Commission used the contract with signature of one side which to him is against Article 107A of the Constitution and was given higher weight than exhibit D1.

On the last issue, he stated that at the Commission, it was held that the respondent was unfairly terminated and the award was for paying the remaining party of the contact. He stated that it is not the remedy for unfair termination for such an award as held in the case of **Jordan University Collage** (supra). Lastly, Mr. Laurent prayed for the decision to be set aside.

Opposing the application, the respondent stated that the offer was sent to him on 2nd February 2019, he accepted it on the same day. He continued to argue that he told them he had to start working on 4th February 2019. He said, it was rightly held by the commission. To support his finding, he referred to section 25(2) of Electronic Transaction Act of 2005. He stated further that the contract sent to him had no terms of probation.

He continued and said that exhibit D1 is contrary to exhibit P1 as he did not accept the same until seven days had passed. He stated that, exhibit D1 was sent to him on 3rd March where he was already on duty. For him terms of probation were to be made before the employment started and

cited Rule 2 of G.N. 42 of 2007 in support of his proposition. He stated that he did not accept it. In his view, if exhibit D1 was duly signed, it could be true that he was under probation, but he did not do so, hence it is not valid.

The respondent continued to state that the termination letter referred to the contract which was not valid. He therefore argued that termination was with no valid reasons. He stated further that, about the money, he was given after the safari, he spent it but he did not admit that he had no reason to do so. He submitted that the salary offer is a contract governed by section 2(1)(b) Law of Contract Act, it could therefore be enforced. He stated that, he was presumed an employee based on the law before given the second contract with probation. The respondent held the view that section 61 of Labour Institutions Act and section 21(2) of Electronic Transaction Act have the effect of governing the conduct of the matter. He stated that under section 6(b) of the Law of Contract Act, the offer was sent to him, he accepted it and so was a contract. He asked this court to dismiss the application.

In a rejoinder, Mr. Laurent stated that CMAF1 which shows the respondent started to work on 18th February 2019, exhibit P2 (salary slip) shows the date of joining as 18th February 2019 as in the award at page 6, and that

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he was terminated on 7th August 2019. Also stated that exhibit D3 shows that the respondent used the money for his own use. Further, he stated that the respondent accepted that he signed exhibit D1 and so was binding on him. He stated that exhibit P1 was sent to him and upon accepting it, he was to go through other processes which are as per exhibit D1 and so prayed for the award to be set aside.

Upon perusing the submissions of both parties, the court has to first determine *when was the respondent employed.*

The line of departure between the parties is when exactly was the respondent employed. The applicant through the evidence of Dw1 and Dw2 stated that the respondent was employed on 18th February 2019. Their evidence was supported by exhibit P2, a salary slip and D2 which is full and final settlement consolidated, both mentioning the date for the employment of the respondent to have started on 18th February 2019. While the respondent relied on exhibit P1 stated that he was employed on 4th February 2019.

Examination on exhibit P1 shows the respondent was offered terms of the employment. It was sent to him by email. He was therefore to accept it as submitted and testified by the respondent. The acceptance of the same was done through the emails and it was all done on Saturday 2nd

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February 2019. The respondent was clear that he accepted the terms and as the email proposed, he appointed the date for which to start working as Monday 4th February 2019. Further email exchange with Sonoj Pillai upon acceptance was as follows;

> *Thanks for your acceptance, first you need to complete pre-employment check up in Dar before joining, hospital details we will share with you on Monday.*

On Monday 4th February, he was informed by the same person to contact Mr. Subramanian Subbaraman for pre-employment issues. The email provided him with phone number of the said contact person and attached the pre-employment medical check-up form. All this detail is found in exhibit P3 which are email exchanges.

According to clause 1 of the offer attached to the email, exhibit P1, it categorically states that appointment is subject to medical fitness. The respondent testified that although he was employed on 4th February but started working on 18th February because the office was being set up. According to the applicant as testified by Subramanian Subbaraman, the respondent was not employed on 4th February since he was on medical check-up. His evidence is supported by Sonoji Pillai who said upon acceptance of the offered job, the respondent was to meet three

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conditions, medical check-up, certificates verification and background verification. He said when the same were completed, he was employed on 18th February. In this case therefore, there is no evidence showing when the respondent completed the medical party of it. It goes without saying therefore that since it was expressly provided in exh. P1 that appointment depended on medical fitness, and because on the date the respondent appointed to start the work, was given medical forms. It cannot be said that he indeed started employment on that day. There is evidence that until 8th February, the respondent had not appeared for medical check-up at Hindu Mandal hospital, this piece of evidence has not been controverted by the respondent. Had that not been the case, then the respondent ought to give an account of what happened.

From the record, the exhibits P1, P3 and D2 show, the respondent was employed on 18th February 2019. Having answered this point in clear terms, I think, the issues raised shall be answered together.

To start with, it is clear that counting from the date of employment to the date the respondent was terminated, I am convinced that the respondent had not worked with applicant for six months of employment.

Section 35 of the Employment and Labour Relations Act [CAP 366 R.E 2019] provides: -

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"The provisions of this Sub-Part shall not apply to an employee with less than 6 months' employment with the same employer, whether under one or more contracts."

The commission, held that there was unfair termination of contract, but it did not state that the respondent did not complain of unfair termination but breach of contract. In law since the respondent had not attain the six months as a minimum threshold, he was therefore not to be covered under the law of unfair termination. Further to that, based on the evidence of the applicant, Dw2 told the Commission that there was a conversation based on contract terms even after 18th February and that a contract was signed. I have no reason to fault the fact that the same was signed by both parties. But exhibit D1 shows the content terms. The respondent was well aware of the same and was actually party of its negation. This is shown in an email attached to exhibit P5 a termination letter. It shows the respondent negotiated the terms of it and had proposals to that effect. I am therefore convinced that he new the same and actually is bound by it. This is important because parties are bound by their agreements.

Since the same had terms of probation, for six month he was terminated when on probation as per clause 4. Rule 10(1)-(4) of the Employment and

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Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 which provides: -

> *"(1) all employees who are under probationary periods of not less than 6 months, their termination procedure shall be provided under the guidelines.*
>
> *(2) Terms of probation shall be made known to the employee before the employee commences employment.*
>
> *(3) The purpose of probation is normally to enable the employer to make an informed assessment of whether the employee is competent to do the job and suitable for employment.*
>
> *(4) The period of probation should be of a reasonable length of not more than twelve months, having regard to factors such as the nature of the job, the standard required, the custom and practice in the sector."*

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In the case of **David Nzaligo v National Microfinance Bank PLC**, Civil Appeal No. 61 of 2016, Court Appeal held that: -

> *"This being the case Part III Sub Part E of ELRA being a part addressing unfair termination of employment, it goes without saying that, taking all the circumstances pertaining in this appeal as alluded*

to herein above, it would have been prudent if the applicant would have waited for the assessment to be finalized for him to proceed accordingly and enjoy the benefits of the provision under dispute, that is being recognized as an employee of above six months...Particular circumstances of this case lead to only conclusion that the appellant was still a probationer at the time he resigned and cannot benefit from remedies under Part III of ELRA."

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The above notwithstanding, the exhibits D3 shows, the respondent admitted to have misused the funds. He had negotiation between him and the applicant. He actually negotiated the way out based on the nature of the misconduct. Even, if it is ruled out that the respondent was not in probation or had completed six months of employment. It is my considered view that when a person admits the misconduct that is grave to merit termination, then the rest of the termination procedures if done is an exercise of passing time. For the foregoing, I hold that the application has merit. It is allowed, the award is quashed and orders set aside, with no order as to costs.

A. K. Rwizile

JUDGE

08.04.2022