IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 06 OF 2020

BETWEEN

DEVERGY EAST AFRICA LIMITED .....APPLICANT

VERSUS

ANTONINO GIOVANNI CATANIA ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The application before me is lodged under the provisions of Section 91(1),(a) and S. 91(2)(c), S.94(1)(b)(i) of the Employment and Labour Relations Act, Cap 366 R.E 2019 and Rule 24(1), (2) (a)(b),(c),(d),(e),(f) and (3)(a),(b),(c),(d), 28(1)(c),(d) (e) of the Labour Court Rules, 2007 and other enabling provisions of the law.

(i) That the Court may be pleased to call for records, revise and set aside the whole of the Award or Commission for Mediation and Arbitration at Dar es salaam Zone (Hon. Kachenje; J.J.Y.M. Esq, Arbitrator) in respect of Labour Dispute No. CMA/DSM/KIN/R.1192/2016/374 dated 8th November, 2019 which was issued to applicant on 6th December, 2019.

(ii) That the Hon. Court may be pleased to determine the dispute in the manner it considers appropriate.

(iii) Any other reliefs that the Hon. Court may deem fit to grant.

(iv) The Honourable Court may, having quashed the Arbitral Award and determine the matter in the manner it considers appropriate.

(v) Any other relief that the Honourable Court may deem fit and equitable to grant.

In her affidavit to support the application the applicant deponed to have been aggrieved by the findings of the arbitrator and lodged this revision on the following grounds:

1. Hon. Arbitrator erred in law and facts in disregarding the fact that when respondent joined another employer he terminated his employment with applicant
2. Hon. Arbitrator erred in law and facts by failing to evaluate evidence tendered by applicant and thus reached to erroneous conclusion that respondent was constructively terminated and he was entitled to his claims which had no proof.

3. Hon. Arbitrator erred in law and fact in awarding terminal benefits contrary to the law and without proof.
4. Hon. Arbitrator erred in law and facts in awarding severance pay contrary to the law
5. The CMA erred in law and facts by failing to exercise its discretion judiciously by granting condonation without valid reasons for long time delay in filing respondent's dispute before it.
6. Hon. Arbitrator erred in law and fact by entertaining respondent's claims against applicant while it was undisputed that respondent who is foreigner had no work permit for the whole period he worked with applicant.
7. Hon. Arbitrator erred in law and facts in awarding claims basing on illegal and un enforceable employment contract (relationship).

The brief background of the matter is that the respondent was employed by the applicant since 11th January 2013 in a position of Production Coordinator (AGC-1). The contract was for a renewable fixed period of six months. On 01st August 2013, the respondent was re-engaged by the applicant this time for a fixed period of four years and the Head of

POLe Section, although the subsequent contract was to end on 31st July, 2017, it not get to that end following a dispatch of the respondent by the applicant to provide technical services as an independent contractor to a company trading as African Management Services Company with acronyms AMSCO. The applicant worked for AMSCO until 28th February 2016, when he tendered a resignation to the applicant on the on grounds of intolerable work conditions by the applicant's denial to pay him any remuneration for several years. He eventually lodged the dispute at the CMA on 08th July, 2018, almost five months after his resignation.

While lodging the dispute at the CMA, in his CMA Form No. 1 the applicant sought for and was granted condonation of time. The substantive dispute was on alleged constructive termination and the respondent was seeking for several reliefs including salaries arrears, repatriation costs, subsistence allowances and other terminal benefits. At the conclusion of the arbitration, the CMA decided in favor the respondent awarding him a total of USD 66,000/- in various claims including subsistence allowances, repatriation allowances, salary arrears including underpayment, compensation for unfair termination and severance pay. The applicant was not gratified with the award of the CMA and has lodged this application

moving the court for the aforementioned prayers on the following legal issues:

(i) Whether the Commission for Mediation and Arbitration had jurisdiction to determine the dispute involving a foreigner who had no work permit for the whole period he worked with applicant;

(ii) Whether the CMA exercised its discretion to grant respondent condonation judiciously.

(iii) Whether the respondent there was constructive termination by applicant.

(iv) Whether the act of respondent to join another employer amount to termination of employment by respondent.

(v) Whether the respondent's claims were proved on the required standard.

(vi) Whether the respondent was entitled to what he was granted.

The application was disposed by way of written submissions. The applicants submissions were drawn and filed by Mr. Evold Mushi, learmed advocate while the respondent's submissions were drawn and filed by Mr.

Jacktone Koyugi, learned advocate. The parties' submissions have been considered and will be taken aboard in construction of this judgment.

Before I embark into the determination of the factual issues as raised by the parties, I have noted an irregularity that I need to address. It appears that on 20/07/2018, the respondent's advocate requested to re-call his PW1, Mr. Giovani, the respondent herein. This issue was strongly objected by the respondent's advocate Mr. Mushi. Upon hearing of the parties, the Commission adjourned the matter to come on a later date which is then scheduled to be the 30/07/3028. However, both the handwritten and the typed records are silent on a ruling being delivered to that effect instead; the matter is shown to have come for hearing on 04/10/2018 whereby the PW1 was recalled. This was a serious irregularity because once a witness concludes the evidence she/he cannot be recalled unless there are sufficient grounds to do so and the same is not objected by the other party. As I said, Mr. Mushi strongly objected the recalling of the witness and no ruling with reasons was issued to explain the grounds for doing so. In that case, the evidence of PW1 when he was recalled is hereby expunged from the records, this includes the exhibits tendered therein which are Exhibit AGC-11, AGC-12 stock option.

I will also at this point make a determination on the 2nd issue, whether the CMA properly exercised its discretion to grant respondent condonation judiciously. I agree with the concern raised by Mr. Mushi, the Arbitrator should have raised eyebrow as to why the if the respondent was not so receiving his salaries, he kept quiet for 2 years from the time the alleged salaries stopped to be paid and came back in February 2016, started to demand his salaries; resigned on 18th February, 2018, secured another employment on 07th March, 2016 and eventually lodged a dispute in July, 2016 way out of time after he resigned. At this point, I must emphasize my concern as to how the time so extended after such a long time of five months post resignation. However I am not reversing the decision of the CMA since the CMA had used her discretionary power to extend time and it is now more important to determine the substance of the application.

Having clarified the irregularity above, then my determination of the Revision will start with the fourth issue, whether the act of respondent to join another employer amount to termination of employment by respondent. I have decided to start with this issue because I find that the issue overlaps and will also automatically determine the third issue whether

the respondent there was constructive termination by applicant; the fifth issue on whether the respondent's claims were proved on the required standard and the last issue whether the respondent was entitled to what he was granted. The other reason is that the misunderstanding between the parties is much based on the signing of the Exhibit AGC-4, a contract with another company trading as AMSCO. In due course, I will also have to see whether it was proper for the respondent to sue only the applicant at the CMA without including the said AMSCO.

To support the grounds, Mr. Mushi submitted that it was undisputed that the respondent on 1st April 2014 joined another employer AMSCO as per exhibit AGC04 as his employer. That this company was contracted by applicant to provide management services to applicant and respondent was seconded by AMSCO to applicant from 1st April 2014. The respondent admitted clearly that from 1st April 2014 AMSCO was the one paying him salary, he was reporting to AMSCO and this was supported by exhibit AGC04 item no.5.2, hour of work was also determined by AMSCO as per exhibit AGC04 item 5.3 and also the code of conduct was that of AMSCO as per item 5.4 of the same exhibit.

He submitted further that in his testimony, the respondent clearly admitted that immediately after he joined AMSCO, he was given work permit applied by AMSCO that means AMSCO was his employer from 1st April 2014 and not the applicant which means that from 1st April 2014 the contract he had with applicant terminated automatically. That for two years the respondent worked with AMSCO there was no employer employee relationship with applicant. He argued that it was after expiry of respondent's two years contract with AMSCO on 2016 when he came back with unfounded allegations of forced resignation. He argued that if at all there was such kind of allegation, one could expect to be raised from 1st April 2014 not 2016 because in this case the respondent alleged to have been forced to resign on 2016 not 2014.

Mr. Mushi submitted further that the act of respondent to join another employer on full time basis impliedly amount to termination of his employment contract with applicant and that the respondent admitted clearly that he was paid all his salaries up to 1st April 2014 by applicant and from there he was paid by AMSCO. On this part, Mr. Mushi's argument was that there is no an employee who can work full time for two employers at the same time hence it was an error for hon. Arbitrator to disregard

evidence on record which showed clearly that the respondent employment with applicant ended way back on 1st April 2014 when he joined a new employer and not on 2016 when he finished his two years contract with that new employer.

In reply, Mr. Koyugi submitted that the evidence shows that from 01st April, 2014, the respondent was dispatched by the applicant to provide technical management services to AMSCO, as shown on clause 1 in page 3 of the contract, EXAGC-4and he was referred to as AMSCO Manager. He hence argued that there was no employment relationship between the respondent and AMSCo as per the Clause 2.4 of EXAGC-4 which stated the same.

Mr. Koyugi submitted further that in executing EXAGC-4 the respondent was not terminated by the applicant's contract EXAGC-5 either orally or expressly as the contract was terminated on 28th February, 2018 at the instance of the respondent. He also pointed out that the terms of contract between the respondent and the applicant in EXAGC-2 and that of the respondent and the AMSCO EXAGC-4 were the same word to word and that even the working tools remained the same as he was using with the applicant. further that under clause 8 of the EXAGC-4, it was the applicant

who had a duty to reptrate the respondent in case of emergency or at the end of the contract. Further that under Clause 9.1 of the EXAGC-4 the applicant was the one to pay basic fee to the AMSCO so that AMSCO would pay the respondent his salaries and that under Clause 9.2.3, the respondent was required to obtain permission from Devergy in order to be absent from work and on page 17 of the contract u ubdicated that the applicant would provide medical insurance for the respondent and that the respondent was to report to AMSCO under a two year Bi-annual basis which meant that there was no employer-employee relationship with the her.

Having considered the submissions, I will start with the evidence that was adduced during arbitration. Starting with the testimony of the DW1, the evidence is much based on the fact that after signing of the AGC-4 between the respondent and AMSCO, the applicant had no liability in non-payment of the respondent's salary. He also testified that the respondent's salary, working hours and reporting relationship was with AMSCO. The reasoning of the CMA is that after signing the contract with CMA, the record is silent on the existence of the AGC-1 and 2 after the signing of

AGC-4 with AMSCO and that it was Mr. Fabio of the applicant who facilitated the first contract.

Thorough scrutiny of the records, they are silent as to who was to pay the respondent post the signing of AGC-04. My take of the AGC-04, it was AMSCO who was to pay the respondent **after receiving money from the clients**. This is found in clause 9 of the AGC-4 as follows:

> *"9.2.2.* ***It is specifically recorded that the AMSCO Manager shall have no claim whatsoever against AMSCO*** *for payment of any bonus, commission, benefit and/or allowance, or any portion thereof,* ***should the Client Company fail to make payment of or provide same for any reason whatsoever.***
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> *9.3.1.* ***It is specifically recorded that no payments*** *(including the Basic Fee and bonuses and benefits as set out in clauses 9.1 and 9.2* ***shall be remitted to the AMSCO Manager unless and until AMSCO has received from the Client Company the Management Fees, and has deducted therefrom****;*
>
> *The AMSCO Manager specifically agrees that he/she shall have no claim against AMSCO for payment of any amounts due to him/her,*

or any part thereof ***should AMSCO not have received the Management Fees from the Client Company*** *for any period in question*

9.3.2. ***The AMSCO Manager specifically agrees that,*** *save to the extent that is set our in the Agreement, or unless the Parties have agreed otherwise in writing,* ***he/she shall not accept any payments directly form the Client Company of the amounts due to be paid to him/her by AMSCO in terms of this Agreement.***

9.3.3 The Basis Fee and nay other amounts due to the AMSCO Manager in terms hereof shall be paid into such bank account as I designated by the AMSCO Manager in the MDA MSS."

From the cited conditions, the respondent was to be paid by AMSCO after receiving payments from the *client company* therefore it was for the AMSCO to demand payments from the applicant and not have the respondent directly claim against the applicant. I presume that in the said contract, the client is Devergy energy. Clause 2.4 of the AGC-4 is clear that the AMSCO manager is engaged as an independent contractor and that no employment relationship exists between AMSCO Manager and AMSCO

and/or the Client Company, he was just an independent contractor. I have also not found anywhere in the evidence that the applicant seconded the respondent to the said AMSCO. It was therefore important to see whether it was the applicant who failed to pay the respondent or it was AMSCO because that subsequent contract is clear that the respondent will be paid after receiving money from the so called "clients" of AMSCO.

The cited terms of the contract in Clause 9.3.2 of the EXAGC-4 is very specific that the AMSCO Manager specifically agrees that, he/she shall not accept any payments directly form the Client Company of the amounts due to be paid to him/her by AMSCO in terms of this Agreement save to the extent that is set in the Agreement, or unless the Parties have agreed otherwise in writing. There was not tendered such agreement allowing the respondent to receive the money directly from the applicant. So what is the meaning of this Clause?

It is pertinent to note where there is a written contract, parties are bound by the terms of their contract unless those terms are varied by agreement between the parties (See the cases of **General Tyre EA Ltd vs HSBC Bank PLC [2006] TLR60, Abdallah Yusuph Omar vs People's Bank of Zanzibar & Another [2004] TLR 339, Unilever Tanzania**

Ltd v. Benedict Mkasa trading as BEMA Enterprises, Civil Appeal No. 41 of 2009 CAT unreported); and **Simon Kichele Chacha vs Aveline M. Kilawe, Civil Appeal No.160 of 2018 a [2021] TLCA 43**; just to name a few). Therefore if the terms were clear that the respondent was not to receive any direct payment from the applicant, and there is also a term that no payments shall be remitted to the AMSCO Manager unless and until AMSCO has received from the Client Company the Management Fees, and has deducted therefrom, then it can not be concluded that the relationship between the parties herein remained a simple employer-employee contract. There was another term and a third party involved, AMSCO

The above notwithstanding, I am convinced in this case that if the respondent had any claims against the applicant, it is difficult to prove them in isolation of the said AMSCO especially looking at the clauses that I have cited above. That said, I see that it was not proper for the burden to be thrown on the applicant while there are no provisions in AGC-4 which is another employment contract, to show that the applicant will still be responsible to pay the respondent his remuneration.

The issue No. (iii), (iv) and (v) raised by the applicant are hence answered in favor of the applicant. There was no constructive termination as it was not proved as the respondent was now working as an independent contractor at AMSCO and had left the applicant; the applicant had no liability in isolation of the said AMSCO. The parties were first to see if that fee was ever remitted to AMSCO and he failed to pay the applicant or the applicant did not at all remit the fee. Yet again, this could only be proved by AMSCO during arbitration. AMSCO was therefore a necessary party to the arbitration proceedings.

On those findings, I allow this revision; the proceedings and the subsequent award of the CMA are hereby quashed and set aside.

Dated at Dar es Salaam this 30th day of March, 2022.

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S.M. MAGHIMBI
JUDGE