IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR APPLICATION NO. 515 OF 2020

(Arising from Labour Commissioner's Order dated 29th September, 2020)

BETWEEN

TANRUSS INVESTMENT LIMITED T/A
DAR ES SALAAM SERENA HOTEL..... APPELLANT

VERSUS

LABOUR COMMISSIONER ..... RESPONDENT

JUDGMENT

Date of Last Hearing: 18/01/2022

Date of Judgment: 18/02/2022

I. Arufani, J.

This judgment is for the appeal filed in this court by the appellant under Rule 31 of the Labour Court Rules, GN. No. 106 of 2007 (Rules) to challenge the decision of the Labour Commissioner dated 29th September, 2020. The impugned decision of the Labour Commissioner confirmed the compliance order issued against the appellant by the Labour Officer under section 45 of the Labour Institutions Act, Act No. 7 of 2004 (hereinafter referred as LIA). The grounds of appeal the appellant is using to challenge the impugned

decision are as follows:-

1. *That, the Honourable Labour Commissioner erred in law by failure to cancel the Labour Officer's compliance order for reason of lacking jurisdiction in the following terms:-*
   i. *The Honourable Labour Commissioner failed to realize that, the Labour Officer had no jurisdiction to issue compliance order on matters of remuneration and proceed to confirm the same out of jurisdiction.*
   ii. *The Honourable Labour Commissioner failed to realize that, the Labour Officer had no jurisdiction to issue compliance order to the appellant to supply unspecified employment contract.*
   iii. *The Honourable Labour Commissioner failed to realize that, the Labour Officer had no jurisdiction to issue compliance order on introduction of service charge of at least 5% of appellant's monthly returns and he proceed to affirm the same out of jurisdiction.*
2. *The Honourable Labour Commissioner erred in law by failure to realize that, the Labour Officer violated the appellant's right to be heard (audi alteram partem) by entertaining matters that were not in dispute.*
3. *The Honourable Labour Commissioner erred in law and fact to hold that, there was no any legal justification adduced to prove the appellant engage with the employees' representative in the issue of salary reduction.*

During hearing of the appeal, the appellant was represented by Mr. George Ambrose Shayo, Learned Advocate and the respondent was represented by Mr. Albertoz Cornel Igogo, Labour Officer. The counsel for the appellant told the court in relation to the first ground that, section 45 of the LIA which provides for the powers of the Labour Officer and section 46 of the LIA which empowers the Labour Officer to issue compliance orders do not give the Labour Officer jurisdiction to issue compliance order in relation to remuneration matters.

He argued that, the Labour Officers have no jurisdiction to order an employer to pay a certain remuneration to the employees or to issue a certain type of employment contract to his employees. He stated that, the matters of remuneration and contract are matters required to be agreed by the employer and employee. He argued further that, if there is a claim of arrears of the employees or any other dispute, the said claim was supposed to be taken to the CMA under section 14 (1) (a) and (b) (i), (ii) and (iii) of the LIA which provides for the function of the CMA.

He argued that, as section 14 (1) (a), (b) and (c) of the Employment and Labour Relations Act, Cap 366 R.E 2019 (hereinafter

referred as the ELRA) recognizes three types of employment contracts which are contract for unspecified period of time, contract for specific period of time and a contract for specific task, the Labour Officer had no jurisdiction to order the appellant to give his employees only one type of contract which is a contract for unspecified period of time. He submitted that, the employer and employee are at liberty to enter into any form of contract out of the mentioned contracts.

He argued that, sequel to that the Labour Officer ordered the applicant to introduce a service charge package of at least 5% of their monthly returns to their employees as motivation. He submitted that, the said service charge package is discriminatory as there is no provision of the law authorizing the Labour Officer to make such an order. He submitted that the said order was issued erroneously under section 45 of the LIA instead of section 46 of the LIA.

He argued that, the Labour Officer and the Labour Commissioner disregarded the fact that the appellant had a collective agreement with his employees hence if there was any dispute, they were supposed to take the said dispute to the CMA as provided under recital 23 of their agreement. He submitted that the said collective

agreement is recognized by section 95 (1) of the ELRA and if there was any dispute the same was required to be taken to this court pursuant to the proviso of section 95 (3) of the ELRA.

He went on arguing that, the compliance order was issued erroneously because as provided under section 45 (1) (i) of the LIA if the labour officer needed any assistance, he was required to refer the matter to the District Court or to the Resident Magistrate's Court for execution of his decision.

He argued in relation to the second ground of appeal that, the Labour Commissioner violated the principle of natural justice as the appellant was not given right to be heard. He stated that, the appellant was required to develop and maintain a policy of elimination of discrimination of people living with HIV. He said when the compliance order was issued the appellant was in the process of developing the said policy but as he was not heard, the Labour Officer issued the order requiring the appellant to develop the said policy. He submitted that, as the said principle of right to be heard which is also enshrined in our constitution was violated the compliance order was wrongly issued, hence the compliance order is null until when the Labour Officer will hear the appellant.

He argued in relation to the third ground that, it is not true that there was no engagement of employees in the process of reducing their salaries. He stated that CHODAWU who was the sole representative of the employees at the appellant's place of work were consulted and that is supported by the meetings conducted by the appellant and CHODAWU on 03/04/2020, 24/04/2020, 27/05/2020, 03/09/2020, 10/09/2020, 11/09/2020 and 30/09/2020. He added that, the meetings of 03/04/2020, 10/09/2020 and 30/09/2020 discussed the issue of reduction of salaries of the employees and there is a memorandum of agreement signed by the appellant and CHODAWU who is the employees' representative. He submitted that, under that circumstances it was wrong to say the employees were not engaged in the reduction of their salaries.

He further submitted that, if the Labour Officer considered the said consultation, he would have found he had no jurisdiction to issue a compliance order in relation to the reduction of salaries of the employees as he was required to advice the employees to go to the CMA if he found there was a dispute relating to the reduction of their salaries. He went on submitting that, the Labour Officer ignored what is provided under section 59 and 62 (4) (a) and (b) of the ELRA

which deals with representation of employees by the trade union. He based on the above stated reason to pray the court to find the compliance order issued by the Labour Officer and confirmed by the Labour Commissioner is illegal and set it aside.

In his reply the representative for the respondent told the court that, the Labour Commissioner had jurisdiction to issue a compliance order. He referred the court to section 43 (1) of the LIA which appoints the Labour Commissioner and other officers like Labour Officers and section 44 (1) of the LIA which allows the Labour Commissioner to delegate his powers to other officers. He also referred the court to section 45 (1) of the LIA which provides for powers conferred to the Labour Officers together with section 46 (1) of the LIA which empowers the Labour Officer to issue a compliance order to an employer who has not complied with a provision of the labour laws. He also referred the court to section 46 (6) of the same law which states how the compliance order can be enforced through the court.

The respondent's representative went on arguing in relation to the power of the Labour Commissioner to entertain the matter which the employer is in agreement with the employees through their trade

union at the place of work that, section 46 (1) of the LIA states where the Labour Officer discovered an employer has not complied with the requirement provided under the labour laws, he is required to issue a compliance order to require the employer to abide to the requirement of the law.

He argued that, even the agreement between the employer and the employees through their trade union which are governed by sections 59 and 62 (4) of the ELRA, the Labour Officer has power to issue compliance order for anything provided under the law. He argued that, the minutes of the meetings conducted by the appellant do not show anywhere the applicant agreed with the employee to reduce their salaries and that was the source of the complaints of the employees.

He argued in relation to the second ground of appeal that, section 7 (1), (2) and (3) of the ELRA gives directives to the employers to formulate policies which prohibit discrimination of any employee at the place of work. He argued that, although when the compliance order was issued the appellant had not prepared the said policies at their place of work and register the same with the Labour

Commissioner at Dodoma as required by the law but now the appellant has already complied with the said requirement.

In his rejoinder the counsel for the appellant stated that, the issue of the policies to prohibit discrimination at the place of work not being registered with the Labour Commissioner was caused by not hearing the appellant. He argued that, it is true that when the compliance order was issued the policies had not been registered but the same were in the process of being registered. As for the issue of reduction of the salaries of the employees the counsel for the appellant argued that, it was agreed in the meetings held on 10/09/2020 and 11/09/2020 that the employees' salaries should be deducted on the days they were not attending the work.

He argued that, if the Labour Officer found the said agreement was infringing the rights of the employer or employees, he was required to advise them to go to the CMA where the issue of reduction of salaries would have been determined. He said even the issue of Collective Bargaining Agreement the Labour Officer was required to advise the parties to go to the CMA if there was any agreement which had not been complied with. He said they were not told what had not been complied with.

He agreed that the power of the Labour Officer to issue compliance order is provided under section 46 (1) of the LIA and is not provided under section 45 of the LIA. He stated it is their submission that, the compliance order relating to the remuneration of employees, to set aside 5% of the income of the applicant as a motivation to the employees were out of the powers of the Labour Officer. He submitted that the mentioned officer had no such a power. At the end he prayed the appeal be allowed.

Having carefully considered the submission made to the court by both sides and after going through the record of the matter and the law in relation to this appeal the court has found the issues to be determined in this appeal is whether the Labour Officer had power or jurisdiction to issue the compliance order issued to the appellant. Another issue is whether in entertaining the dispute the Labour Officer violated the appellant's right to be heard (*audi alteram partem*) and whether the Labour Commissioner erred in holding there was no legal justification to prove the appellant engaged with the employees' representative in the issue of salary reduction.

Starting with the first issue the court has found that, as rightly argued by both sides, powers of the Labour officers for the purposes

of administration of labour laws are provided under section 45 of the LIA. Generally, the powers of the labour officers as provided under the cited provision of the law includes inspection of any premises or working places for the purposes of seeing compliance of the provisions of the labour laws. For the purpose of this appeal the labour officers are empowered under section 45 (1) (j) of the LIA to educate, advise and oversee compliance of the labour laws. The Labour Officers are also empowered by section 46 (1) of the LIA to issue a compliance order where he has found there is non-compliance with a provision of the labour laws. The said section 46 (1) of the LIA states as follows:-

> *"A labour officer who has reasonable grounds to believe that an employer has not complied with a provision of the labour laws may issue a compliance order in the prescribed form."*

From the wording of the above cited provision of the law it is crystal clear that, labour officers are empowered by section 46 (1) of the LIA to issue a compliance order to an employer who has been found he has not complied with a provision of the labour laws. That being the position of the law the question to answer here is whether the labour officer had powers to issue the orders issued against the

appellant as stipulated in the impugned compliance order and confirmed by the Labour Commissioner.

I will start with the first order which required the appellant to supply unspecified employment contracts to all of their employees. The court has found it is true as argued by the counsel for the appellant that, as provided under section 14 (1) of the ELRA there are three types of employment contracts which are contract for unspecified period of time, contract for specified period of time and contract for specific task. The court is also in agreement with the counsel for the appellant that parties are free to enter into any of the mentioned types of employment contracts.

That being the position of the law it is my view that, it cannot be said a person is in employment relationship with another person as his employer if they have not entered into any of the above stated type of employment contracts or any other lawful contract. Failure by an employer to enter into any of the mentioned types of the employment contract is violation of the provision of section 14 (1) of the ELRA and the Labour Officer is empowered by section 46 (1) of the LIA to issue a compliance order to the employer to compel him or her to comply with the violated provision of the law.

The court has found it is true as argued by the counsel for the appellant and as appearing in the first order of the compliance order that the Labour Officer ordered the appellant to supply to their employees unspecified contract of employment. However, the court has found the order to supply unspecified employment contracts to all employees of the appellant was made pursuant to Annexure "A" which is not attached in the compliance order attached to the memorandum of appeal filed in this court by the appellant.

To the view of this court there must be something contained in the afore mentioned annexure which caused the Labour Officer to order the appellant to supply unspecified employment contracts to all employees and not any other type of the contract of employment. As the counsel for the appellant has not stated the appellant had any other type of the employment contract with their employees the court has failed to see anything which can make it to find the Labour Officer erred in issuing the stated order to the appellant.

If the appellant had any other type of employment contract with their employees or they had an intention of entering into any other type of employment contract than the one ordered by the Labour Officer, it is the view of this court that it would have been

stated to the Labour Officer or to the court at the hearing of this appeal. As it was not stated the appellant had any other type of employment contract with their employees the court has found the Labour Officer had jurisdiction to issue the stated order and the Labour Commissioner was right in confirming the same as the appellant had not complied with the provision of section 14 (1) of the ELRA.

Coming to the second order relating to payment of unpaid remuneration (arrears) the court has found that as it was for the first order, the second order was made pursuant to annexure "B" which is omitted from the compliance order attached to the memorandum of appeal filed in this court by the appellant. The stated order required the appellant to pay their employees the unpaid remuneration as prescribed in the said annexure "B".

The court has found it is true as argued by the counsel for the appellant that the Labour Officer is not empowered to order an employer to pay a certain remuneration to his or her employees. The court is also in agreement with the counsel for the appellant that the amount of a remuneration to be paid is agreement between an

employer and an employee and none of them can be forced to pay or be paid remuneration which is not ready to pay or be paid.

However, it is the view of this court that, once the parties have agreed on a certain remuneration to be paid the employer is bound to pay the agreed remuneration until when the parties will agreed to change the same. Failure to pay the agreed remuneration or where the remuneration is provided under the law to pay the required remuneration to an employee is violation of the provision of section 27 (1) of the ELRA which states the employer is required to pay an employee the remuneration which is entitled.

Under the stated circumstances it is the view of this court that, if there is violation of the requirement provided in the cited provision of the law the Labour Officer was empowered by section 46 (1) of the LIA to issue a compliance order to compel the appellant to pay to their employees the remuneration they were entitled. Therefore, the court is not in agreement with the counsel for the appellant that the Labour Officer had no jurisdiction to order the appellant to pay their employees the unpaid remunerations which were their entitlement. It is under the same thinking the court has found the Labour Commissioner was right in confirming the order made by the Labour

Officer in relation to the payment of the unpaid remuneration or arrears of their salaries as required by the law.

With regards to the argument that there was collective agreement which was entered between the appellant and the employees through CHODAWU as the representative of the employees in relation to the deduction of the salaries of the employees the court has found it is true as provided under sections 59 and 62 (4 (a) of the ELRA that, an employer may enter into a collective agreement with their employees through their trade union.

However, the court has gone through all the minutes of the meetings conducted by the appellant and the employees' representative and carefully read the minutes of the meeting conducted on 03/04/2020, 10/09/2020, 11/09/2020 and 30/09/2020 which the counsel for the appellant said the parties used to agreed about deduction of the salaries of the employees but failed to see anywhere stated the appellant and the representative of the employees agreed about deduction of the salaries of the employees. Therefore, any deduction done without the agreement of the parties was violation of section 27 (1) of the ELRA and its result is that the

Labour Officer had power under section 46 (1) of the LIA to issue a compliance order.

As for the order relating to the introduction of service charge package of at least 5% of the monthly returns to the employees as motivation the court is in agreement with the counsel for the appellant that the Labour Officer had no jurisdiction to make such an order as is not provided in any provision of the labour laws. That motivation would have been enforced by the Labour Officer by issuing a compliance order if there was agreement entered between the appellant and the employees for the same. As there was no such an agreement and as the representative of the respondent in the present appeal did not say anything in relation to the said order the court has found the said order was made ultra vires as it was not stated which provision of the labour laws was violated.

Coming to the ground relating to the development and maintenance of policies that promote equal opportunity and elimination of discrimination at the working place which the counsel for the appellant said the appellant was denied right to be heard the court has found that, the counsel for the appellant admitted himself that when the appellant was inspected by the Labour Officer they had

not developed and registered the said policies to the Labour Commissioner as required by the law. The counsel for the appellant said the appellant was in the process of developing the said policies and as he was not heard by the Labour Officer the order was issued erroneously.

The court has found that, as when the inspection was made the policies had not been made and registered to the Labour Commissioner as required by the law it cannot be said the Labour Officer erred in issuing the compliance order in relation to them. However, as both parties told the court the said policies have now already been developed and registered to the Labour Commissioner as required by the law the court has found the compliance orders relating to the said violation have already been complied with and the argument relating to the said grounds have already been overtaken by event.

In the strength of all what I have stated hereinabove the court has found that, with exception of the ground relating to the introduction of a service charge package of at least 5% of the appellant's monthly return to the employees as motivation which the court has found the Labour Officer had no jurisdiction to make the

same which is hereby upheld, the court has found the rest of the grounds of appeal and the arguments fronted before this court by the counsel for the appellant cannot be upheld.

Consequently, the appeal of the appellant is partly allowed and partly dismissed to the extent stated hereinabove. It is so ordered.

Dated at Dar es Salaam this 18th day of February, 2022.

I. Arufani

JUDGE

18/02/2022

Court: Judgment delivered today 18th day of February, 2022 in the absence of the appellant and their counsel but in the presence of Mr. Albertus Cornel Igogo, Labour Officer for the Respondent. Right of appeal to the Court of Appeal is fully explained.

I. Arufani

JUDGE

18/02/2022