IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR-ES-SALAAM

LABOUR REVISION NO. 350 OF 2021

BETWEEN

MWAHIJA ISSA SALUM ..... APPLICANT

AND

FAZAL & CO. LTD. ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

By a notice of application and a Chamber Summons lodged under the provisions of Section 91(1) (a) & 91(1)(a) & 91(1)(b), 91(2)(b), 91(2)(c) and Section 94(1), 94(1)(b)(i) of the Employment and Labour Relations Act Cap. 366 R.E 2019 ("the Act") and Rules 24(1), 24(2)(a), 24(2)(b), 24(2)(c), 24(2)(d), 24(2)(e) and 24(2)(f) & 24(3)(a), 24(3)(b), 24(3)(c) & 24(3)(d) and 28(1)(c), 28(1)(d) and (28(1)(e) of the Labour Court Rules, GN. No. 106 of 2007 ("the Rules"); the applicant is applying to the Labour Court for the following orders:

1. This Honourable Court be pleased to revise and set aside the award of the Commission for Mediation and Arbitration delivered on 16the March, 2021 by Honourable Arbitrator William, R in Labour Dispute

with Ref. No. CMA/DSM/ILA/1093/18/470 dated 16th March, 2021 at Dar es salaam.

2. This Honourable Court be pleased to make any other order that may appear to be just and convenient in the circumstances.

The application was supported by an affidavit deponed by the applicant in person on the 08th day of September, 2021. On her part, the respondent, the employer opposed the application by filing a counter affidavit of one Asha Ramadhani Salum, Human Resource Officer of the respondent, a counter affidavit which is dated 12th day of October, 2021. In this Court, Ms. Magreth Kisoka, learned advocate, appeared for the applicant while from the respondent's side, Mr. Towa Hilaal, represented the respondent. The application was disposed by way of written submissions.

Brief background of the dispute before me is that the applicant alleges to have been an employee of the Respondent since 2011 under oral contract as a painter at a monthly salary of Tshs. 100,000/-. As a painter, the Applicant worked on several properties of the Respondent, attended work and signed under the attendance register as any other employee at the place of work where she received instructions on what work was to be

done on that particular day. The employment lasted until May, 2018 when she was allegedly unfairly terminated. Aggrieved by the termination, the applicant unsuccessfully filed a Labour No. CMA/DSM/ILA/1093/18470 ("the Dispute") at the Commission for Mediation and Arbitration for Ilala ("the CMA"). Aggrieved by the award of the CMA, the applicant has lodged the current application on the following grounds:

1. That, the Arbitrator erred in law and fact by holding that the Applicant was hired for specific works.
2. That, the Commission erred in law and fact by dismiss the claim of the Applicant without any justification.

On those grounds, the applicant has raised the following legal issues:

(a) Whether the Applicant employed by the Respondent with specific work only

(b) Whether the arbitrator was correct to dismiss the Applicant claim without justification.

Starting with whether the applicant was employed by the respondent, Mr. Armando Swenya, learned advocate who also represented the applicant, submitted that the cause of action arose on the 15th day of May 2018 whereas the Applicant received a phone call informing her of her

termination of employment. This happened after the Applicant was eight months pregnant and given a maternity leave by the Respondent. Responding to the argument raised by the Respondent that the contract between them was of specific task only, and that the Applicant was not an employee of the Respondent and that the Applicant was only paid after completion of certain tasks given by the employer, Mr. Swenya argued that according to section 14 of the Act, the contract for a specific task is recognized by the law.

Further that from the facts and evidence adduced at the CMA, it is undisputed that the Respondent employed the Applicant; however, what is disputed is the type of contract the two were engaged in from the beginning. That according to Section 15 of the Act, it obliges an employer to keep the Written records of the employees and conditions regarding their employee to ascertain the nature of their employment contract. That the Respondent did not adhere to this requirement as provided under the law.

He submitted further that in the Award, DW2 who is the accountant of the Respondent stated that the Applicant was paid through what he termed 'Petty Cash' for the work performed. That neither the Applicant nor

the Respondent tendered any employment contract since the Respondent did not issue an employment contract to the Applicant to begin with. Citing the case of **Bakari Jabir Nyantbuka v. QCD Supplies & Logisitics, Rev. No. 962 of 2018**, High Court of Tanzania, Labour Division at Dar es Salaam (Unreported) he argued that the case did set a principle that if in any legal proceedings, an employer fails to produce a contract or the particulars prescribed in subsection (1), the burden of proving an alleged term of employment stipulated in subsection (l) shall be on the employer. He then argued that the Respondent failed to adhere to what the law requires by going to contrary Section 15 of the Act. That the petty cash was used in the office to pay incidental expenses and not used to pay salary of employee as testified by DW2.

In reply, Mr. Towa submitted that the applicant was under a contract for specific task and was not an employee of the respondent. That she never attended work daily nor have signed the attendance register and was only availed work when the respondent had a specific task. Further that she was not bound by any condition as to time to come to work or leave work, she was assigned specific work and the manner in which she performed work and time she finished was not subject to control of the

respondent. He submitted further that even the number of payments for specific task performed was not constant; they differed depending on the size of work performed.

On the argument raised by Mr. Swenya that Section 15 of the Act obliges an employer to keep the 'Written records of the employees and conditions regarding their employee to ascertain the nature of their employment contract and the allegation that the respondent failed to produce written contract under Section 15(6) of the Act, Mr. Towa argued that the employer has managed to provide documents which clearly proves the existence of the employment relationship between the parties which was based on specific tasks. That the applicant worked on specific tasks for less than 6 days a month therefore even if the employer failed to bring documents under Section 15(6) of the Act, she was still protected under Section 15(7) which provides that the provisions of Section 15 were not applicable to employees who have worked for less than 6 days in a month.

On the cited case of Bakari Jabir Nyambuka (supra), Mr. Towo distinguished the facts from the current case on the ground that in the cited case the employer did not tender document to show the type of contract that existed while in the current case, the respondent has mas

managed to tender EXD1, 2, 3 and 4 which showed the contract for specific task. He argued that the procedure could only be at issue if the employer wished to terminate the employee before the completion of a specific task but if the task is well completed, the contract automatically ends.

In rejoinder, Mr. Swenya brought many new issues about constitutional rights and other issues neither replied by the respondent nor raised by him in his submissions in chief. On the other issues, he reiterated his submission in chief insisting that the applicant was unfairly terminated.

Having considered the submissions of the parties and the records of this application, the issue for determination is on the type of contract of employment that existed between the parties herein. While the applicant alleges to have been an employee of the Respondent since 2011 under oral contract as a painter at a monthly salary of Tshs. 100,000/-; the respondent denies this fact on the ground that the applicant was employed on specific tasks which came to an end on completion of the task.

I have gone through the evidence adduced during arbitration, the respondent adduced evidence through DW1 and DW2 and exhibited EXD1,

EXD2 and EXD3. EXD1 was petty cash voucher that proved the payments that were done to the applicant for the work done. There was also EXD2 tendered by DW1 which was evidence of remittances of amounts of pay as you earn by the respondent company. The name of the applicant is not on the list and there was no reason to doubt the evidence of the witness as it was unshaken during cross examination.

There was also EXD3 a sample maternity form tendered by the same DW1. I have noted that Mr. Swenya argued that DW2 who is the accountant of the Respondent stated that the Applicant was paid through what he termed 'Petty Cash' for the work performed. That neither the Applicant nor the Respondent tendered any employment contract since the Respondent did not issue an employment contract to the Applicant to begin with. At this point I see no reason to doubt the non-production of employment contract between the two parties as there never existed any. I further agree with Mr. Swenya's argument that according to section 14 of the Act, the contract for a specific task is recognized by the law. However, the same law is clear under Part III sub-part E of the same Act, as to whom can bring a dispute of unfair termination. The law is further clear that the contract to perform a specific task terminates automatically upon

completion of the task no matter how many times the task is repeated at different intervals. Such was the case as proved by the respondent during arbitration.

On the above findings I find that during arbitration, the respondent managed to prove that there was no employment relationship that existed between her and the applicant on permanent basis and that the employment was only for performance of a specific task. This answers the second issue on whether the arbitrator was correct to dismiss the Applicant claim without justification. There was a justification to dismiss the claim as held above, the contract was only for a specific task. The revision before me lacks merits and it is hereby dismissed in its entirety.

Dated at Dar-es-salaam this 19th day of April, 2022.

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S.M. MAGHIMBI
JUDGE