IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 131 OF 2021

(From the award of Commission for Mediation & Arbitration in Labour Dispute No. CMA/DSM/KIN/R.249/18 dated 15th February 2021)

BETWEEN

PM GROUP TANZANIA LIMITED.....APPLICANT

VERSUS

JENIFER AKISOFREY MUGENI
(Suing as administratrix of the estates of late
ULRICH RUDOLF RUDOLF ECKRET) .....RESPONDENT

JUDGEMENT

16th June 2022 & 30th June 2022

K. T. R. MTEULE, J.

The applicant filed the present application challenging the decision of the Commission for Mediation and Arbitration (CMA) which was decided in favour of the respondent who is the administratrix of the late **Ulrich Rudolf Eckret**. The dispute arose out of the following context. On 16th March 2017 the applicant entered into a management contract with Mr. Ulrich Rudolf Eckret which was agreed to end on 31st May, 2017. It is alleged by the Applicant that after its expiry, the said contract was renewed until completion of the agreed project. On the other hand, the respondent's representative alluded

that the contract was renewed on unspecified period and on 31st December 2018 the said contract was terminated on unknown reasons. Aggrieved by the termination the respondent referred the matter to the CMA claiming to have been both substantively and procedurally unfairly terminated.

The CMA found that the respondent's termination was unfair both substantively and procedurally hence proceeded to award one (1) month salary in lieu of notice, leave allowance, four (4) months salaries as compensation for the alleged unfair termination and a certificate of service. Thus, the respondent was awarded a total of Tshs. 46,725,000/=.

Aggrieved by the CMA's award the applicant filed the present application praying for the following orders:-

i. That this Honourable court be pleased to revise and set aside the decision of the Commission for Mediation and Arbitration that was improperly procured.

ii. That this Honourable court be pleased to set aside the order that the applicant pays the respondent Tshs. 46,725,000/=.

iii. Any other relief the court deems fit to grant.

The application also had two grounds which are as follows:-

i. That the Commission for Mediation and Arbitration did not evaluate evidence properly.

ii. That the Commission for Mediation and Arbitration erred to award the respondent 46,725,000/= for unfair termination without reasonable justification.

The application was argued by way of written submissions. The applicant was represented by Mr. Nickson Ludovick from a law firm styled as White Law Chambers Advocates whereas Mr. Sammy Katerega, Personal Representative appeared for the Respondent.

Arguing in support of the first ground Mr. Ludovick submitted that the contract entered by the parties herein was for management and not in any way connotes to be a contract of employment. He strongly submitted that the respondent was not an employee of the applicant. He is of the view that since the contract was for management then the parties were bound to honour the same.

Mr. Ludovick submitted further that the CMA was also bound by what was agreed by the parties in the disputed contract. He stated that the contract was for specific period of time but the evidence to that effect

was disregarded by the Arbitrator hence arriving at erroneous decision. To support his submission, Mr. Ludovick cited the Court of Appeal authority in **Miriam E. Maro vs. Bank of Tanzania**, (Civil Appeal 22 of 2017) [2020] TZCA 1789 (30 September 2020).

Regarding the second ground, Mr. Ludovick submitted that the award of TZS 46,725,000/= is material and factual error because the respondent was not an employee of the applicant hence allegations of unfair termination cannot stand. The counsel further argued that there can never be termination when the contract is for specific period of time which came to an end upon the agreed term. To boost his submission, he cited the Court of Appeal case of **Asanterabi Mkonyi vs. TANESCO** (Civil Appeal 53 of 2019) [2022] TZCA 96 (07 March 2022).

Mr. Ludovick further submitted that the proceedings and award is tainted by irregularities such as no proof was tendered to prove that Jenifer Akisofrey Mugeni is the wife of the respondent hence she had no locus stand to prosecute the matter. He therefore urged the court to allow the application and grant the prayers sought.

Responding to the first ground Mr. Katerega submitted that the term Management was used in the disputed contract to hide the status of

the respondent. He maintained that respondent was an employee of the applicant and the duties assigned to him proved such fact. He stated that after expiry of the first contract the parties entered into unspecified contract as rightly found by the Arbitrator. He submitted that the respondent qualified to be the applicant's employee because he was controlled and given directives by the applicant and his hours of work were controlled. He added that the Respondent was economically dependent on the Applicant, he was paid remuneration and provided with working tools.

Mr. Katerega continued to insist that the Respondent was an employee of the Applicant, and he fits in the determinant factors of who is an employee as they are provided under section 60 (1) of the Labour Institutions Act, (Cap 300 RE 2019) ('LIA'). He stated that after expiry of the first contract the respondent continued to work hence the parties entered into unspecified contract. It was the Respondent's personal representative's view that the applicant had a duty to prove the terms of the second contract entered in terms of section 15 (6) of ELRA however she did not do so.

It was further submitted that even the email sent to the respondent (exhibit C3) proves that respondent was an employee of the applicant

the fact which necessitated the applicant to inform the respondent that he had no enough work to sustain the expenses of his employment. As to the cases cited by the applicant's counsel Mr. Katerega firmly submitted that they are irrelevant to the dispute at hand.

Mr. Katerega alluded that respondent was not consulted prior to his termination in accordance with section 38 (1) of ELRA.

Regarding the second ground, Mr. Katerega submitted that the Arbitrator correctly awarded the respondent remedies of unfair termination. He further challenges the Arbitrator's award of less than twelve months which is contrary to Rule 32 (5) of The Labour Institutions (Mediation and Arbitrations Guidelines) Rules, GN 67 of 2007 ('GN 67 of 2007') as well as section 40 (1) (c) of ELRA. He therefore urged the court to dismiss the application for lack of merit and pleaded the court to award appropriate remedies in terms of section 40 (1) (c) of ELRA.

After considering the parties rival submissions, the court records and relevant laws I will determine this application basing on the grounds of revision listed in the applicant's affidavit.

Starting with the first ground as to whether the Arbitrator evaluated the evidence properly; the applicant's argument is based on the failure of the Arbitrator to find the respondent to be not an employee of the applicant. The Applicant contends that the respondent was not her employee because they had a contract of management and not a contract of employment as the respondent would like this court to believe. Mr. Ludovick is of the view that according to section 14 of the Labour Institutions Act ('ILA') the CMA jurisdiction is limited to labour matters. The question to be addressed is whether the matter at hand a labour matter is. It is a trite law that labour matters are all matters arising out of employer-employee relationship**. Section 4 of ELRA** defines employment as follows:-

> *"Employment means the performance of a contract of employment by parties to the contract, under employer-employee relationship."*

In determining whether Mr. **Ulrich Rudolf Eckret was an employee of the Applicant,** a distinction must be drawn between employment contract and management contract. In a book titled **Basson, A C. Christianson M A. Garbers C, Roux P A K, Mischke, EML Strydom, 'Essential Labour Law' Law 2nd Ed,**

Labour Laws Publication, Groenkloof, Ed, Vol 1 2002 at pg 22, the two phrases are distinguished by the terms "contract of services" or a "contract for service". In this book the following factors are mentioned to be considered when one wants to distinguish the two.

i. *'The right to supervision - whether the employer has the right to supervise the other person;*

ii. *The extent of which the worker depends on the employer in the performance of duties;*

iii. *Whether the employee is allowed to work for another*

iv. *Whether a worker is required to devote a specific time to his or her work;*

v. *Whether the worker is obliged to perform his/her duties personally.*

vi. *Whether the worker is paid according to a fixed rate or by commission.*

vii. *Whether the worker provides his own tools or equipment; and,*

viii. *Whether the employer has the right to discipline the worker.*

The existence of this right would normally indicate control, which is the key feature in an employment contract.'

In the case of **Stevenson Jordan & Harrison V. Macdonald & Evans (1952) 1 T.L.R 101,** Lord Denning drew the line of distinction between the contract of service and contract for services, where he stated:-

'...under a contract of service, a man is employed as part of the business unit and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.'

The respondent's contract was for service which is not among the employment contract recognized by our labour laws as quoted above.

The types of employment contracts recognized by ELRA are listed under section 14(1) which provides as follows:-

'Section 14 (1) A contract with an employee shall be of the following types:-

a) A contract for unspecified period of time;

b) A contract for a specific period of time for professionals and

managerial cadre,

c) A contract for a specific task.'

The CMA's jurisdiction is limited to the above types of contracts. Any contract not listed above is regarded as a normal contract and any breach thereto the aggrieved part may sue at normal civil courts and not CMA or labour court. In this application the disputed contract provided as follows; for easy of reference, I hereunder quote part of the disputed contract agreed by the parties:-

"MANAGEMENT CONTRACT

This contract is made on this 15th March 2017 between ***PM GROUP (T) LTD. of P.O. Box 106251, Dar es Salaam, Tanzania*** *(hereinafter called the "Company" which expression shall, where the context so admits includes its successors and assigns) of the one part.*

AND

Ulrich Eckert of P.O. Box 41000, Dar es Salaam, Tanzania *(hereinafter called the "Management" which expression shall, where the context so admits includes its successors or assigns) of the other part.*

The Management is in the business of providing project management services for fee.

The Company desire to engage the Management to render, and the Management desires to render to the Company, project management services, all as set forth."

The wording of the clauses of the contract quoted above are very clear that the contested contract was for management and not otherwise. The respondent was contracted to manage a specific project and his works were limited to such project only. Even the mode of payment indicated above was not salary as normally paid to employees. The agreement was on payment of fees paid on monthly basis. Therefore, the evidence on record proves that the respondent was not an employee of the applicant he only had a contract for service which does not create employer-employee relationship.

In the circumstance I join hands with Mr. Ludovick in the cited case of **Miriam E. Maro vs. Bank of Tanzania** (supra) where it was held that:-

"It is the law that parties are bound by the terms of the agreement they freely enter into. We find solace on this stance

in the position we took in ***Unilever Tanzania Ltd. v. Benedict Mkasa t/a Bema Enterprises****, Civil Appeal No. 41 of 2009 (unreported) in which we relied on a persuasive decision of the supreme court of Nigeria in* ***Osun State Government v. Dalami Nigeria Limited,*** *Sc. 277/2002 to articulate:-*

Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed between themselves, it was up to the parties concerned to negotiate and to freely rectify clauses which find to be onerous. It is not role of the courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute."

In the matter at hand the parties freely agreed their contract to be for management only thus the same should be honoured as agreed. Finding the respondent to be an employee of the applicant is contrary to the agreement in question. In the premises, I find the CMA had no jurisdiction to adjudicate the matter because the parties had no employer-employee relationship. That being the position, I find no relevance to labour on the remaining ground of revision.

In the result, I find this application with merit. Since the CMA acted without jurisdiction the proceedings thereto and award are hereby quashed and set aside. Each party to the suit to take care of their own cost.

It is so ordered.

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

KATARINA REVOCATI MTEULE

JUDGE

30/06/2022