IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 132 OF 2022

(Arising from an Award issued on 6th April 2022 by Hon. G.M. Gerald, Arbitrator in Labour dispute No. CMA/DSM/ILA/413/2020 at Ilala)

SPENN TANZANIA LIMITED ..... APPLICANT

VERSUS

IBRAHIM ABDALLAH KIONGOZI ..... RESPONDENT

JUDGMENT

Date of last Order:24/8/2022
Date of Judgment: 12/9/2022

B. E. K. Mganga, J.

Respondent filed Labour dispute No. CMA/DSM/ILA/413/2020 before the Commission for Mediation and Arbitration (CMA) claiming to be paid (i) TZS. 22,918,750 being six months' remuneration contractually payable by the employer to the employee, (ii) TZS. 96,000,000/= being 24 months' salary compensation for unfair termination, (iii) TZS 82,600,000/= being financial loss because of breach of contract that originated from unfair termination, and (iv) TZS 100,000,000/= being general damages for loss of reputation, physical and mental torture suffered all amounting to TZS 302,418,750/=. In the

referral form (CMA F1), respondent claimed also to be issued with a Certificate of service. At CMA, it was argued by the applicant that she had consultancy agreement with the respondent and that the latter was not an employee hence there was no termination of employment. But the respondent argued that he was an employee of the applicant and that his employment was unfairly terminated six months prior to expiry of the contractual period.

On 6th April 2022, Hon. G.M, Gerald, Arbitrator, having heard evidence of both sides, issued an award that respondent was an employee of the applicant and further that employment of the respondent was unfairly terminated. Based on those findings, the arbitrator awarded the respondent to be paid TZS 51,000,000/= being 12 months' salary compensation for unfair termination and TZS 25,500,000/= being salaries for the remaining 6 months' contract period.

Applicant was aggrieved with the said award hence this application for revision. In the affidavit in support of the Notice of Application, applicant raised four issues namely: -

1. *Whether the Commission for Mediation and Arbitration directed itself properly to decide that the respondent was an employee and not the*

consultant of the applicant despite the fact that all evidence and exhibits of the applicant showed that respondent was a consultant.

2. *Whether it was proper for the Commission for Mediation and Arbitration to rule out that termination of the contract of the respondent amounted to termination of contract of employment while in fat all evidence presented by the respondent pointed out that respondent was engaged by the applicant as consultant.*
3. *Whether it was proper for the Commission for Mediation and Arbitration to order the applicant to pay the respondent 12 months' salary as compensation for unfair termination and at the same time ordering compensation of 6 months' of the remaining contract period while knowing that the relationship between the applicant and the respondent was specifically limited to 12 months' period and the remaining period which could have been served by the respondent had it not been terminated was limited to 6 months' only.*
4. *Whether the Commission for Mediation and Arbitration directed itself properly to proceed to give an order on relief(s) which was not sought by the respondent.*

The application was argued by way of written submissions. In compliance of the court order in filing written submissions, applicant enjoyed the service of Gratian B. Mali, learned Advocate, while respondent enjoyed the service of John James, learned advocate.

In his written submissions, counsel for the applicant dropped the 4th issue and argued the remaining 1st, 2nd, and 3rd issues.

Submitting in relation to the 1st issue, counsel for the applicant argued that the arbitrator failed to examine and consider evidence

adduced by the applicant specifically, the consultancy agreement (exhibit P1) signed between the applicant and the respondent, and invoices (exhibit P2) for payments prepared and submitted by the respondent, a letter terminating service (exhibit P3) all showing that respondent was employed as consultant. Counsel for the applicant submitted further that, in concluding that respondent was an employee of the applicant, the arbitrator relied on the provisions of section 61 of the Employment and Labour Relations Act [Cap 366 R.E. 2019]. Counsel argued further that, that presumption operates in situations where there is no evidence relating to relationship of the parties and cited the case of ***Soshi Transport v. State of U.P*** AIR 1986 SC1099 and section 5 of the Evidence Act [Cap.6 R.E. 2019]. He added that, respondent is estopped to deny what he agreed and signed showing his relationship with the applicant to be of consultancy in nature.

On the second issue, counsel for the applicant submitted that respondent had a 12 months' contract of consultancy and that, it was improper for the respondent, who had a fixed term contract to file a dispute for unfair termination, rather, he was supposed to file the dispute based on breach of contract. To bolster his arguments, he cited the case of ***Jordan University College v. Flavian Joseph***, Revision

No. 23 of 2019[2020] TZHCLD 3822 and ***Precision Air Service PLC v. David Jibo***, Consolidated Revision No.866 of 2019[2021] TZHCL 237. Counsel submitted further that, the arbitrator awarded the respondent the relief of both unfair termination and breach of contract. He argued that respondent was served with one month notice as provided in the contract hence there was no breach of contract and that there was compliance of Rule 4(2) of Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 20007.

Submitting on the 3rd issue, counsel for the applicant argued that there was no unfair termination of the contract and that the arbitrator erred in awarding the respondent to be paid TZS 51,000,000/= being 12 months' salary compensation. He argued further that, in CMA F1, respondent indicated that the dispute was on unfair termination and there was no evidence proving breach of contract. He concluded that arbitrator erred to award respondent to be paid TZS 25,500,000/= as salary for the remaining 6 months of the contract based on breach of contract. He maintained that there was no breach of contract and that the arbitrator erred to award both the relief for termination and breach of contract. Counsel concluded by inviting the court to allow the application.

On the other hand, resisting the application, Mr. James submitted on the 1st issue by relying on the provisions of section 61 of Cap. 366 R.E. 2019 (supra) that respondent was an employee of the applicant and that, the arbitrator did not error in his findings. It was argued on behalf of the respondent that it doesn't matter the form of the contract the parties had, rather, that conditions of section 61 of cap. 366 R.E 2019(supra). Counsel argued further that ***Soshi's case*** (supra) and the provisions of the Evidence Act [Cap. 6 R.E. 2019] relied on by the applicant does not apply in the circumstances of this application. Counsel concluded that evidence of the parties was properly analysed by the arbitrator and supported the findings thereof that respondent was an employee of the applicant.

On the 2nd issue, Counsel for the respondent submitted that it is undisputed that in CMA F1 respondent filed the dispute based on unfair termination and further that on 14th October 2019 parties entered a fixed term contract with an automatic renewal clause. He argued further that, respondent had a legitimate expectation of renewal of the said contract and relied on the provisions of Rule 4(3) and (4) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007. He argued in alternative that, in filing that the dispute

was based on unfair termination made CMA F1 to be defective and prayed that the court should grant leave and extend time to the respondent to file the dispute based on breach of contract.

On the 3rd issue, counsel for the respondent submitted that since there was legitimate expectation to renew the contract, respondent was properly awarded 12 months' salary compensation. He relied on the provisions of section 40(2) of Cap. 366 R.E. 2019 (supra) and submit that the award of 6 months' period and 12 months' salary compensation was proper in law since it is in addition to the relief provided for under section 40 of Cap. 366 R.E. 2019(supra). Counsel wound up his submissions by praying that the application be dismissed.

In rejoinder, counsel for the applicant submitted that reasonable expectation arises only when the contract is not renewed after it comes to an end and that respondent was supposed to demonstrate reasons for that expectation. Counsel cited the case of ***Juma James Lutome & Others v. Bollore Transport & Logistics Tanzania Ltd***, Revision NO. 347 of 2019 [2021] TZHLC to support his arguments. Counsel argued further that, legitimate expectation is created by the employer through conducts or statements which gives an employee an impression

of prospective renewal of the contract and that the same did not exist in the application at hand.

I have examined the CMA record and submissions made on behalf of the parties in this application and find that it is undisputed that on 14th October 2019 the parties signed a one-year contract (exhibit SP1). The said contract was a subject of the dispute at CMA and is the centre of arguments by the parties before this court. Applicant argues that the said contract did not establish employer and employee relationship, rather, it established client and consultant relationship but respondent argues that it established employer and employee relationship. Based on that contention, it was submitted on behalf of the applicant that arbitrator did not properly analyse evidence of the parties. That argument has made me to scrutinize evidence adduced by the parties at CMA to see whether the complaint by the applicant is justifiable or not.

In my scrutiny of evidence of the parties, I have found, with due respect to counsel for the respondent, that evidence adduced at CMA does not lead to the conclusion that the contract (exh. SP1) entered by the parties created employer and employee relationship, rather, it was a consultancy agreement that created client and consultant relationship. In his evidence, Edson Ndanguzi (DW1) testified that Ibrahim Kiongozi,

the respondent was employed as a consultant and that he was paid monthly after raising invoice (exh. Sp2). According to DW1, the contract was for consultancy service and was terminated on 22nd April 2020 as per termination letter (exh. SP3).

On the other hand, Ibrahim Kiongozi (PW1), respondent testified while under cross examination as hereunder: -

"…Mimi wakati najiunga na Spenn sikunegotiate kuwa consultant ingawa ***mkataba wangu ni wa consultant****.* ***Mkataba wangu wa ajira unasema "consultant" na kwamba hakuna mkataba mwingine wowote niliowahi kuusaini na Speen TZ…Consultant anatakiwa afanye kazi kwa masharti na makubaliano maalum.*** *Mimi nililipwa kama Consultant…consultation fee ilipwa baada ya invoice kutoka… sikuwahi kukatwa P.A.Y.E kwenye mshahara…"*

From the evidence of the parties, I safely conclude that there was no employer and employee relationship between the parties, rather, it was client and consultant agreement. In other words, exhibit SP1 created client and consultant relationship and not employer and employee relationship. It was therefore an error on part of the arbitrator to invoke the provisions of section 61 of Cap. 366 R.E. 2019 (supra) and hold that respondent was an employee of the applicant.

My afore conclusion is cemented by the wording of the said contract (exhibit SP1) that reads in part: -

"2.1 …the Consultant shall devote on average a minimum of 45 hours per week…to carry out the following services/deliverables for the client, as set out in Clause 2.5.

2.2 The service provider agrees to perform duties as set out in clause 2.5 hereunder, under the title of Business Development Manager (hereinafter "Consultant")

2.3 The CONSULTANT will report all activities directly to their line manager/country Manager of SPENN Tanzania, (CM-SPENN Tanzania), Edson Ndaguzi, (hereinafter "CM")

2.4 ***The CONSULTANT will not constitute an employee of the Company and at no time will there rise any obligations between the parties other than what is described in this Agreement,*** *nothing in this Agreement is imposing any restrictions should the Consultant providing services in this Agreement would like to take further employment with the company, as defined in the respective agreement between the parties.*

4.1 In order to provide service as described herein, the CONSULTANT is required to be available during scheduled project working hours…

5.1 The company will provide remuneration for the project specific consultancy services provided, on a monthly basis…

7.1 ***The parties agree that this Agreement creates an independent contractor relationship, not an employment relationship****.* ***The CONSULTANT acknowledges and agrees that the Company will not provide the CONSULTANT with any employee benefits****, including without limitation any employee stock purchase plan, social security, unemployment, medical, or pension payment, and that income tax withholding is the CONSULTANT's sole responsibility…" (*Emphasis is mine)

It is a trite law that parties are bound by their own contracts and court have consistently held that contracts should be interpreted to give effect the intention of the parties, unless, that interpretation leads to absurdity. The Court of Appeal had an advantage of discussing enforcement of contracts and sanctity of contracts in the case of ***Simon Kichele Chacha v. Aveline M. Kilawe***, Civil Appeal No. 160 of 2018, CAT (unreported) and held that:-

> *"It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be a sanctity of the contract as lucidly stated in* ***Abualy Alibhai Azizi v. Bhatia Brothers Ltd*** *[2000] T.L.R 288 at page 289 thus:-*
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> *'The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement"*

I have read the contract between the parties in this application and find that, in interpretating the said contract to give effect what they intended, does not lead to absurdity. I therefore interpret it that they meant and intended to enter into client and consultant relationship and not employer and employee relationship.

From the quoted evidence, there was no employee and employer relationship. That was a contractual arrangement that was supposed to

be enforced like any other contract not relating to employment. The arbitrator therefore erred to hold that employment of the respondent was unfairly terminated by the applicant. That said, I find that respondent was wrongly awarded to be paid TZS. 51,000,000/= being 12 months' salary compensation for unfair termination of employment. Assuming that the said contract created employer and employee relationship between the parties, of which it is not, again, it was an error for the arbitrator to award the said amount while only 6 months' months were remaining. It was argued by counsel for the respondent that the said amount was awarded because there was legitimate expectation for renewal of the contract. With due respect to counsel for the applicant, that is not the correct position of the law. Legitimate expectation to renew can only exist after the contract has expired and the employer has failed to renew as it is provided for under the provisions of Rule 4(4) of GN. No. 42 of 2007 (supra). In the application at hand, the contract was terminated before its expiry hence legitimate expectation to renew cannot be said existed. More so, there is no evidence adduced by the respondent that there was legitimate expectation, rather, it is submissions from the bar by the learned counsel which is not evidence. It can be recalled that, legitimate expectation was not an issue at CMA

hence it cannot be raised and entertained at revision stage before this court.

Counsel for the respondent relied on the provisions of section 40(2) of Cap. 366 R.E. 2019(supra) to support the award of 12 months' salary compensation and 6 months' salary for the remaining period of the contract. With due respect, the two reliefs cannot be awarded together. It is my view that the nature of the contract always governs the type of the relief to be awarded and not as the arbitrator assumed. It was an error for the arbitrator to award 12 months' compensation for the fixed term contract that was expected to expire within 6 months' later and again award 6 months' salary for the remaining period.

It was submitted by counsel for the respondent that CMA F1 was defective and that the court should grant leave to the respondent and extend time so that he can file a proper application at CMA based on breach of contract. With due respect to counsel for the applicant, what is before the court is an application for revision filed by the applicant and there is no application by the respondent for extension of time. This court cannot at this time jump and grant extension of time while the same was not a subject of adjudication at CMA. Again, to entertain that argument, is an invitation to the court to step into shoes of the parties

and advise them what they should have filed while on their part they thought that the dispute was different altogether. In so doing, the court will abandon its adjudication role and became an advisor, the role that it does not have. That invitation is hereby rejected.

For all said hereinabove, I quash and set aside the CMA award and allow the application.

Dated at Dar es Salaam this 12th September 2022

B. E. K. Mganga
JUDGE

Judgment delivered on this 12th September 2022 in chambers in the presence of Gratian Mali and Hassan Salum, Advocates for the applicant and John James, Advocate for the respondent.

B. E. K. Mganga
JUDGE