IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 366 OF 2022

(Arising from the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Kinondoni dated 16th Day of September 2022 in Labour Dispute No. CMA/DSM/KIN/380/2020/178/20 by William, Arbitrator)

BEVCO LIMITED..... APPLICANT

VERSUS

MELANIE PHILIPPE.....RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J.

06th March 2023 & 21st March 2023

This is an application for revision seeking for this court to call for the record of Labour Dispute No. CMA/DSM/KIN/380/2020/178/20/20 from the Commission for Mediation and Arbitration of Dar Es Salaam (CMA). The Applicant's prayers in the Chamber Summons as reproduced hereunder:

1. This Honourable Court be pleased to call for records, inspect, examine such records therein and its proceedings to satisfy itself as to the correctness, rationality, propriety and **legality of the Award of the Labour Dispute No.** CMA/DSM/KIN/380/2020/178/20 delivered by Hon. William, R. (Arbitrator).

2. This Honourable Court be pleased to allow the application for revision, set aside the whole proceedings and subsequent Award of the Labour Dispute No. CMA/DSM/KIN/380/2020/178/20 delivered by Hon. William, R. (Arbitrator).

3. This Honourable Court be pleased to re-appraise the evidence and arrive at its own findings.

4. This Honourable Court be pleased to issue a declaratory order that the Respondent did not have an Employment Contract with the Applicant and she ceased to be an employee of the Applicant after the 26th day of March 2020.

5. This Honourable Court be pleased to hold and declare that the Respondent could not benefit from employment in the absence of a valid employment contract, work and resident permit.

6. This Honourable Court be pleased to hold that the Arbitrator lacked jurisdiction to hear, determine and enter a finding on matters relating to suspension of employment when the CMA Form No. 1 was limited only to breach of employment contract.

7. That, in the alternative, this Honourable Court be pleased to hold and declare that, the letter of suspension with full benefits issued to the Respondent was ineffectual as the said Rwegasira was not mandated to issue the same on the company's behalf.

8. That, in the alternative, that this Honourable Court be pleased to allow the application for revision and set aside the reliefs of 30 months' salary granted in the Award of the Labour Dispute No. CMA/DSM/KIN/380/2020/178/20 delivered by Hon. William, R. (Arbitrator) for being manifestly excessive and counter to the agreed remuneration.

9. That, in the alternative, this Honourable Court declare that the Arbitrator having found that the Respondent was suspended pending investigation, she erred in awarding the compensation prematurely while the criminal investigation was still pending by the relevant authorities and the disciplinary process was yet to be finalized.

10. That this Honourable Court be pleased to hold and declare that, failure by the Arbitrator to take into account the Applicants' concern regarding the Respondent's work permit

amounted to a breach of the fundamental right to be heard and resulted into an illegal award.

11. Any other reliefs may this Court deems fit, just and equitable to grant.

From what I gather from the CMA record, and parties sworn statements, the applicant is the former employer of the respondent who had a permanent employment contract **(See Exhibit P-1)** which commenced on **1st October 2017**. Sometimes in **April 2020**, the two encountered a misunderstanding which went through a series of events which culminated to the **Labour Dispute No. CMA/DSM/KIN/380/2020/178/20.** The dispute was lodged by the Respondent who complained about the Applicant's breach of employment contract coupled with a claim for damages. The CMA confirmed the breach of employment contract and decided the matter against the applicant by awarding the respondent a compensation of 29 months from the day she was suspended till the date when the CMA award was issued.

Aggrieved by the decision of the CMA, the applicant preferred this application for revision advancing in her affidavit the following grounds: -

1. That the arbitrator erred in law by failing to consider and act upon the point of law raised by the applicant regarding the nonexistence of a valid work permit of the respondent at the time of instituting the complaint.
2. That the arbitrator erred in law by entertaining, determining and entering a finding on matters regarding suspension of employment whereas per CMA Form No.1 the matter before the Commission was breach of contract for failure to pay April Salary.
3. That with regard with the issue No.1, the complainant failed to adduce evidence in proof of a valid written employment contract and valid work permit.
4. That in determining issue No. 1 the arbitrator failed to consider and analyse the evidence adduced by the applicant, particularly the end of contract letter, special lamp sum claim Form and NSSF member statement, and thus arrived at wrong finding as to whether there was a breach of employment contract.
5. That the arbitrator erred in law by admitting photocopies of pay in slips and suspension letter, being secondary evidence, without following proper procedure laid out in the law.

6. That the arbitrator erred in in law for refusing the Applicant an opportunity to file a list of additional documents to be relied upon by the Applicant (The Respondent in the CMA)
7. That the arbitrator erred in in law by failing to cause the proceedings of the matter to be signed by the parties and witnesses as required by the law.
8. That in determining issue No. 2, That the arbitrator erred in in fact in holding that the respondent's salary is **TZS 29,000,000** and is thus entitled to be paid **TZS 870,000,000.00.**
9. That in determining issue No. 2, That the arbitrator erred in in fact in holding that the respondent is entitled to salaries from April 2020 to September 2022. Without considering that the Respondent was incarcerated from November 2020 for criminal charges related to money loundering, tax evasion and occasioning loss to Tanzania Revenue Authority.

Along with the Chamber summons, the applicant filed an affidavit sworn by Mr. Nicole Verjus, the applicant's Principal Officer, in which after illustrating the chronological events leading to this application, alleged that there was no valid contract to be breached because the Respondent's work permit expired at the time when the respondent was instituting the matter at the CMA. The deponent stated that the

arbitrator misdirected herself in his findings by not considering the respondent's employment to have been fairly terminated after the expiry of the work permit.

The Application is contested by a counter affidavit sworn by the Respondent. Through the counter affidavit, the Respondent alluded that her work and resident permit used to be renewed and extended by the applicant as shown in the applicant's final submission filed in the Commission. She denied to have ever exited from the employment but she was serving her duties as a Director until she was suspended on **27th May 2020**. She further deponed that from the day she was suspended pending investigation, she has never been called for disciplinary action and she was never terminated. For that reason, she is of the view that the arbitrator was right in awarding the respondent salary arrears for the entire period she had been waiting for the final decision.

The Application was heard by a way of written submissions. The applicant is represented by Ms. Doreen Chiwanga, Advocate while the Respondent by Mr. Peter Ngowi, Advocate. I appreciate their rival submissions which will be keenly considered in determining this application.

Having gone through the parties' submissions and their sworn statements together with the record of the CMA, I am inclined to address one issues as to **whether the applicant has adduced sufficient grounds for this Court to revise the CMA award** issued in Labour Dispute No. **CMA/DSM/KIN/380/2020/178/20**.

In addressing the 9 grounds, the applicant's counsel, Advocate Doreen Chiwanga combined issues No. 1 and 3. The two grounds concern nonexistence of work permit and lack of evidence of the valid employment contract. The applicant asserted that the complainant failed to adduce evidence to proof existence of a valid work permit which is prerequisites for existence of a valid contract. She blamed the Arbitrator for having failed to consider and act upon the point of law raised by the Applicant regarding the non-existence of a valid work permit of the Respondent at the time of instituting the complaint. Advocate Chiwanga averred that the respondent failed to tender work permit as evidence to the Commission to establish employment relationship. According to her, nonexistence of such work permit was a determinant of whether the Commission had jurisdiction to entertain the matter and therefore the arbitrator erred in law in disregarding the issue of work permit even though it was raised at the stage of closing submission. She submitted that CMA

Form No 1 was lodged at the CMA on **18th May 2020** while the work permit **(Exhibit D2)** had already expired since **26th March 2022** without any renewal application.

She cited several cases including: - **Rock City Tours Limited vs Anndy Nurray, Revision No. 69 of 2013, At the High Court of Tanzania – Labour Division, at Mwanza (Unreported); Dube vs Classique Panel Beaters (1997), BLLR 868 (IC); Serengeti Breweries Limited vs Sequeiraa, Civil Application No 373/18/2018, in the Court of Appeal of Tanzania, at Dar es Salaam (Unreported).** According to Ms. Chiwanga, in **Rock City** cited supra, the court came with opinion that allowing CMA to condone a relationship based on an invalid employment agreement would mean allowing it to condone an illegal act.

It is the submission of Advocate Chimwanga that nonexistence of work permit affects the jurisdiction of the CMA, and in that case, it could be considered at any stage of proceedings. She questioned the arbitrator's refusal to consider the issue during the final submissions. She cited the case of **R.S.A limited v. Hanspaul Automechs Limited Govinderajana Senthil Kumal,** Civil Appeal No. 179 of 2016, Court of Appeal of Tanzania, at Dar es salaam (unreported)

quoting the words of the court at page 12 which insisted that an objection on a point of law can be raised at any stage of proceedings.

According to Advocate Chiwanga, **Section 9 (1) (a) and Section 9 (2) (a) of the Non-citizens (Employment Regulations) Act, 2015** read together with **Regulation 3 (1) and 3 (2) of the Non-Citizens (Employment Regulation) Regulations 2016** requires all non-citizens to apply for and acquire a valid work permit. She submitted that, employment of a foreigner is contingent upon securing valid work permit and residence permit, short of which such a relationship becomes void.

On the other hand, in response to the issue of work permit and validity of the employment contract, Advocate Peter Paul Ngowi, the respondent's Counsel challenged the raising of a new issue of validity of work permit during final submission while it was not an issue during the hearing. Advocate Ngowi questioned how the Applicant suspended the Applicant pending investigation if there was no valid contract. He referred to the Applicant's open statement in the CMA and submitted that the Applicant admitted that the respondent was suspended from her duties and therefore she is estopped from denying the fact that the respondent had valid employment contract.

According to him the raising of a new issue during final submission contravenes **Rule 26 (1) and (3) of the Labour Institution (Mediation and Arbitration) Guidelines, G.N. No. 67 of 2007** which precludes parties in their closing submission to bring/argue on fact which was not an issue in the dispute. He cited several cases including **Happy Watoto Homes and Schools versus Edward Mwalolo, Rev. Application No. 98 of 2018, High Court Labour Division, Arusha**; **Mbeya Rukwa Auto Parts & Transport Limited versus Abdul Fazalboy, Civil Application No. 33 of 2002**;

Mr. Ngowi challenged the relevance of the cases cited by the Applicant and submitted that all the cases are distinguishable from the instant case.

Mr. Ngowi disputed existence of any undetermined preliminary objection in the CMA. According to him, the issue of work permit was in the final or closing submissions and it was denied by the arbitrator on reasonable grounds of wanting evidence.

Mr. Ngowi argued that raising a new issue at the stage of final submissions is as equal as denying justice to the other party to proof the fact. According to him, this contravenes the principle in **Sriyanjit**

Perera versus Research Triangle Institute Tanzania, Revision No. 344 of 2001, HC Labour Div. page 12.

He alerted that, the Respondent attached a new work permit in their closing submissions to respond to the preliminary objection in the CMA which was issued to the Respondent to cover a period from July 2020 to 2nd July 2022, but it was not considered.

From the rival submissions made concerning the first and the third grounds, the issue is whether the arbitrator mishandled the determination of the existence of work permit which rendered invalid or illegal the applicant's contract of employment. According to the CMA record, the issue of work permits was raised by the Applicant on **29th October 2021**. It was addressed by the arbitrator who overruled it on the reason that it was not pure point of law as it needed more evidence to be ascertained. The arbitrator's finding was based on the case of **Mukisa Buiscuit Manufacturing Co. Ltd v. West End Distributors Ltd** (1969) 1 EA 696 (CAN) which insisted that preliminary objections must be on pure point of law.

The issue resurfaced in the closing submissions of the Applicant. Although the arbitrator had already decided on it, yet he commented once again on the issue by stating that it was not appropriate to have it raised at the stage of closing submissions because it was a matter

which needed to be addressed during the hearing for each party to adduce evidence to prove whether there was a valid work permit or not. The arbitrator remarked that the respondent produced a copy of a new work permit which he disregarded because of the same reason that it was not an issue in opening statements.

In the award, the arbitrator addressed the issue of work permit once again with the same opinion as previously found while addressing the preliminary objection. The arbitrator having seen no purity of being point of law in the issue, stated at page 11 of the CMA award that the issue of work permit is an afterthought and that it should have been raised in the opening statement for both parties to be availed with an opportunity to bring evidence before commencement of the hearing. Although it was wrong for the arbitrator to address it for the second time, it did not occasion injustice because he maintained the same opinion. Actually, bringing it once again during final submission was a misleading act.

In my view, it is apparent that work permit involves documentation. Whether someone has it or not, is an issue to be proved by evidence. The Applicant's allegation that the Respondent did not have a work permit was a fact which needed to be proved and countered by evidence. It cannot be raised as a point of preliminary objection or as

point of law. It can be treated as a point of law after it has been established by evidence that it is in existence or not.

The arbitrator was right to treat the issue of residence permit and validity of contract as points of facts which ought to have been raised in the opening statements for both parties to get opportunity to adduce evidence to prove it. No issue relating to work permit was pleaded by either of the parties. This lost a quality of being determined after the conclusion of hearing. It should have been presumed to be an undisputed fact as parties are bound by their own pleadings.

In the case of **Astepro Investment Co Limited v. Jawinga Company Limited, Civil Appeal No. 08 of 2015 (CAT) DSM (Unreported).** it was held thus: -

> *"...parties are bound by their own pleadings...the function of the pleading is to give notice of the case to a party must therefore, so state his case that his opponent will not be taken by surprise. It is also to define with precision the matters on which the parties differ and the points on which they agree, thereby to identify with clarity the issues on which the court will be called upon to adjudicate and determine the matter in dispute."*

From the above authority, it is clear that issues requiring evidence need to be established in parties' pleadings. It is undisputed that in

the CMA there were two issues which were framed as indicated at page 4 of the CMA proceedings and award and the issue of work permit was not among those issues.

For that reason, the cases cited by the Applicant are irrelevant in this matter on the reason that in this case there was no pure point of law and that the issue of work permit needed evidence.

Basing on the above said, I find unfounded the applicant's assertion regarding work permit and the invalidity of the contract.

The next issue argued by the Applicant after the 1st and 3rd was the 4th issue as to **whether the arbitrator failed to consider and analyse the evidence** adduced by the applicant, particularly the end of contract letter, special lamp sum claims form and NSSF member statement, and thus arrived at a wrong finding as to **whether there was a breach of employment contract.** Ms. Chiwanga argued that the respondent proved in the CMA that the employment contract ended on **26th March 2020** after her working permit having expired. She referred to **Exhibit D1** which is NSSF form filled by the Applicant to finalize the employment relationship, **Exhibit D2** which is the end of Contract letter which stated that the contract expired automatically after the expiry of the work permit, **Exhibit D4** which is the NSSF Member statement indicating that the

Respondent was paid all NSSF dues to the tune of **TZS 73,364,700.00.** According to her, the arbitrator erred in law in his finding that there was a breach of employment contract without considering the above evidence adduced by applicant. He challenged the Arbitrator's reasoning which was based on **Exhibit P3** which is the letter of suspension. According to Advocate Chiwanga, the expiry of the Applicant's permit on **26th March 2022** rendered the employment contract automatically expired.

On the other side Advocate Ngowi sustained that the CMA records revealed that one of the reasons which led to the Respondent's suspension on **27th May 2020** was an allegation of fraud and withdrawal of her fringe benefit from NSSF while she was an active employee. He further added that in **April 2020** the Applicant was not paid her salary and after suspension no any further legal action was taken against her. He submitted that being on that status, there was a breach of employment contract, and the arbitrator was right in his findings.

Advocate Ngowi continued to protest the lack of disciplinary action against the Respondent's alleged action of presenting a forged end of contract letter which facilitated withdrawal of her NSSF contributions. Advocate Ngowi recalled paragraph 3 of page 2 of the open

statement where the applicant claimed to have reacted by withholding the Respondent's salary. According to him, the CMA was right to ignore the documents which according to the evidence of PW1 were issued to her to facilitate her to withdraw some of her pension for her survival after her salary was withheld.

In a bid to establish that the Respondent was an active employee under the employment contract, Advocate Ngowi drew the attention of the Court to the documents tendered by PW1. The documents include**:-** **Exhibit BV -8** particularly the letter appended thereto dated 16th June 2020 from the Applicant to NSSF Manager Ilala zone. According to him, the majority shareholder Regis Voegel admitted that the Respondent was an active employee as of the date of such letter; and admitted having suspended the Applicant pending investigation following her act of withdrawing her pension contributions from NSSF. Advocate Ngowi commended the CMA for disregarding the assumption that the Respondent terminated herself from the employment. It is the submission of Mr. Ngowi that the Applicant assisted the Respondent in getting NSSF contribution to help her survive after withholding of her April salary.

From the preceding rival submission, the main contention is on **whether the arbitrator properly evaluated the evidence**

before the CMA. Each party produced a bundle of evidence, the applicant trying to establish that the contract expired with the expiration of the work permit while the Respondent trying to establish that their contract of employment was never terminated and never expired. The Applicant is relying on the documents tendered in the CMA such as NSSF Form **(Exhibit D1)**, end of contract letter **(Exhibit D2),** which was written to NSSF and the special lamp sum claims form and NSSF member statement **(Exhibit D4).** On the other hand, the Respondent is relying on the suspension letter which suspended her in May 2020 pending investigation of an alleged fraud. Further it is on Respondent's testimony and submissions that the NSSF deal with all the related documents was an understanding carried out to help her to get some pension contribution for her survival due to non payment of her monthly salary. She denied any retirement related to NSSF pension withdrawal.

In the submissions Advocate Chiwanga stated that the Respondent's employment ended on **16th March 2020** by virtue of the NSSF Form, end of employment letter and the NSSF member statement. The letter of suspension suspended the Applicant with effect from **27th May 2020** pending investigation of the fraud. The arbitrator questioned how could the employer suspend a person who was not

an employee. It was this question which led the arbitrator to conclude that until **May 2020** after the conclusion of the NSSF deal, the Respondent was still an employee of the Applicant.

I have contemplated on the evidence of DW1 who stated that she was assisted by the Applicant to get the NSSF payment to support her when her salary was withheld. Whether this was a fraud or not, it is a matter to be dealt with by another forum. But it suffices to say that the NSSF payment did not retire the Applicant from employment because there was still employment relationship which survived even after such NSSF payment 16th March when NSSF pension was withdrawn. It was after such withdrawal when the employment came to be suspended on **27/5/2020**. In my view, it is upon the employer to prove the nature of this employment relationship which was suspended by the Applicant vide **Exhibit P3** which was the suspension letter. It is on this reason I share view with the arbitrators answer to the question as to how an employer suspends from work a person who is not an employee. It remains that the pension withdrawal did not retire or end the respondent's employment.

It remains further that according to **Exhibit P-1,** which is the employment contract, it is apparent that the respondent is a non-citizen who was employed under permanent basis. She was

suspended on **27th May 2020** for an alleged misconduct of fraud as per **Exhibit P-3** which is a suspension letter. The Applicant has not disputed the fact that no legal action taken against the respondent during the period under which she was on suspension. The Respondent was therefore the employee of the Applicant at the time of insisting the Labour Dispute in the CMA.

These facts, bring a scenario where one can say that the Applicant's allegation regarding non-renewal of work permit lacks legal stance since it was not proved that such permit actually expired and never renewed. As well, the payment of NSSF Benefits did not end the Respondent's employment because she continued to work even after the NSSF payment and the Applicant has not explained the kind of relationship she had with the Respondent which caused the suspension letter if not employment. In my view, the sletter of suspension is a more direct response to the Applicant's employment than the NSSF documentation. This is because the suspension, directly affected the Respondent's employment while NSSF documents did not directly address the Applicant's employment contract.

It is on the above reason, I agree with the Arbitrator in her conclusion on this issue that the Respondent was the Applicant's

employee as at 27th May 2020 when her employment contract was officially suspended.

In ground 2 of the revision as per the affidavit, the Applicant challenged the arbitrator in making findings on a matter concerning suspension while as per the CMA Form No 1, the claim was a breach of contract for failure to pay the April salary. Mindful of the principle that Courts are bound to determine only matters pleaded by the parties, Advocate Chiwanga blamed the Arbitrator for directing herself to matters of suspension of employment and arguments arising therefrom while the dispute was on breach of contract. She cited the case of **Uranex (T) Limited vs Godwin M. Nyelo, Revision No. 159 of 2020, HC of Tanzania, Labour Division** where the Court cemented the position by holding that what moves the Commission to determine a dispute is CMA Form No 1.

According to Advocate Chiwanga, not all breaches of contracts lead to termination of contract. She submitted that the respondent had a choice of ticking multiple options in the CMA Form No. 1 but choosing one and suggesting it to lead to another as a breach of the principle in the cited case law. He urged the court not to be persuaded by the claim of unfair labour practice which was not listed in the CMA Form No.1.

Advocate Ngowi denied the assertion that suspension was among the issues determined in the CMA. He mentioned two issues which were determined which are **whether there was a breach of contract of employment** and **to what reliefs are the parties entitled to**. He submitted that the arbitrator considered clause 4 of the contract **(Exhibit P1)** which required salary payment and found that the same was not paid for a period from the time of suspension. He distinguished the case of **Uranex (T) Limited** from the instant situation.

It is true that there were only two issues which were considered by the Arbitrator in the CMA as rightly submitted by Advocate Ngowi. Suspension of employment came in through the evidence adduced by the parties while nonpayment of salary, which is the basis of breach of contract. Since it featured in between, I see nothing wrong for the Arbitrator to address it. The Applicant's assertion on this ground is unfounded.

Underground **No. 5** in the Affidavit, the Applicant challenged the arbitrator's admission of photocopies of pay in slips and the suspension letter as exhibits. According to Advocate Chiwanga, the said documents were admitted without following the procedure under **Section 66 of the Evidence Act, Cap 6 R.E 2019**.

In response Advocate Ngowi, submitted that the Arbitrator was right not to be bound by legal technicalities since the original documents were in the custody of the employer who had a duty to keep the record under **Section 15 (1) (5) and (6) of the Employment and Labour Relations Act, Cap 366 of 2019 R.E.**

According to the CMA Proceedings, the Applicant's counsel raised an objection to the admissibility of the photocopies. The arbitrator overruled the objection on the reason that the CMA should not have been detained by technicalities because the admission of the copies did not cause any injustice.

It is true as submitted by Advocate Chiwanga that **section 66 of the Evidence Act** prohibits admission of secondary evidence without compliance with the procedure for doing so. Mr. Ngowi is as well right in his submission that **section 15 (1) (5) and (6) of the Employment and Labour Relations Act Cap 366 R.E 2019** imposes a duty to an employer to keep record of employee's particulars. This means, the Applicant had the custody of the original documents. Further to that, as rightly found by the arbitrator, the Applicant did not dispute the contents of the documents. In this situation, I agree with the Arbitrator that since the admission of the said documents did not occasion injustice, there was no harm to

consider them as evidence. I would add that, determination of labour dispute in the CMA is guided by among other laws, **Section 88 (4) (b) of the ELRA Cap 366, R.E 2019** which requires CMA to administer dispute with minimal legal formalities. I see no reason to differ with the arbitrator since he assigned good reasons to overrule the objection against the admissibility of secondary evidence. Application of **Section 66 of the Evidence Act** should be applied in the CMA with the notion of equity in Labour dispute in mind. This ground is not having a strength to fault the arbitrator's view. It is therefore unfounded.

In ground 6 the Applicant is challenging the arbitrator's refusal to allow filing of additional documents in the proceedings of 12 May 2022. According to Advocate Chiwanga, the refused document was an audit report. According to the proceedings, the arbitrator found no good reason assigned by the Applicant to have the said documents filed outside the requirements of **Rule 24 (6) of the Labour Institutions (Mediation and Arbitration) Guidelines, G.N. 67 of 2007**. The Rule requires parties to prove at the opening statement and narrowing of issues, all the documents intended to be used as evidence during hearing.

I agree with the Arbitrator's decision because as rightly submitted by Advocate Ngowi, the Applicant had a duty to assign reasons of having her failure to file the documents timely. It was due to that lack of reason which made the arbitrator to refuse their production and I see no reason to differ.

In **ground 7** of the Revision Application, the Applicant raised another point of law that the proceedings are not signed by the parties at the conclusion of the evidence and therefore, they are fatally defective. Advocate Chiwanga cited the case of **Green Waste Pro Limited vs Mwajuma Ally, Civil Appeal No 370 of 2020, CAT, pages 7 -8.** I have examined the part quoted by the Applicant from the cited decision of the Court of Appeal, but I could not find a holding that failure of witnesses to have their signature appended at the end of their testimonies to constitute fatal irregularity. I agree with the Respondent's counsel that this ground is unfounded.

Grounds 8 and 9 were jointly argued by the Applicant. Advocate Chiwanga challenged the awarding of an amount of **TZS 29,000,000** as the respondent's monthly salary which resulted to payment of Tanzanian Shillings Eight Hundred Seventy Million (**TZS 870,000,000**) in total. She further challenged the duration of payment of salaries from **2020 to September 2022**, without

considering that the Respondent was incarcerated from **November 2020** for criminal charges related to money laundering, tax evasion and occasioning loss to Tanzania Revenue Authority. According to Advocate Chiwanga, during the incarceration from **November 2020**, the Respondent could not and was not working.

She is of the view that the Arbitrator misdirected herself in including the calculation for compensation all salaries for the months when the Respondent could not have physically been able to work for the Respondent. In her opinion, these months should be accordingly deducted/removed from the calculations.

She cited a South African case of **Kitishi Job Maile v. Department of Correctional Services, Case No. IS 33/13**, the Labour court of South Africa, Johannesburg (unreported), pages 4-5, where it was held that "imprisonment suspends the obligation of an employer to pay the employee a salary..... Equally, an employer cannot in law or logic be expected to pay an employee who is serving time in jail..." In her view, since the Respondent had been in custody from **November 2020** and thus unable to carry out her employment, she should not have been paid the salaries. She lamented that an Applicant should not be penalized to pay an employee who was unable to work for the employer due to her incarceration.

Regarding the quantum, Advocate Chiwanga challenged the amount of **TZS 29,000,000.00,** being one month's salary, which is contrary to the evidence the Respondent adduced before the CMA, which is the Employment agreement, **(Exhibit P1)** which states that the Respondent is to be paid a monthly net salary of **EURO 4000.00**, with an exchange rate of **TZS 2700=1 EURO**.

She added that, from the evidence provided by the Respondent herself, it is clear that the monthly salary, if any entitled to the Respondent is **TZS 10,800,000** per month and not **TZS 29,000,000**.

Mr. Ngowi countered the applicant's submission by citing **Section 37 of the Employment and Labour Relations Act, Cap 366 R.E 2019** which prohibits employers to impose any sanctions in form of penalty or termination to an employee who has been charged with criminal offence until final determination by the Court and any appeal thereto.

I have considered the Applicant's submissions, firstly on the number of months the arbitrator awarded to the Respondent. It makes sense that a person gets paid for the work he/she has done and not otherwise. It is not logical to pay a prisoner although the Respondent was not a prisoner. Further to this, it needs a detailed discussion to

be able to assess the circumstances which surrounded the detainment of the Respondent. The Applicant has not even specified which period did the incarceration lasted. I don't think that this revisional stage is the appropriate forum to address this. It ought to have been brought to the attention of the CMA to form part of disputed issue so that the arbitrator could have decided whether the Respondent was entitled to be paid for the period she was in custody upon consideration of evidence. Since this was not an issue in the CMA, it cannot be addressed at this stage of revision for the first time.

Regarding the second aspect of submission on the amount of monthly salary, I agree with the Applicant that it is not very clear how **Exhibit P2** is justified to be the basis of computation. Salary is a contractual matter. Allowances are payable upon some conditions met. Inclusion of allowances in a salary does not mean changes in the contractual terms. More worse, there is no breakdown of allowances. Although the contract provides for allowances such as overtime, housing, school fees their actual amounts are not specified anywhere to convince someone that they constitute **exhibit P2**. How could overtime be paid to a person who is on suspension? Was there a school fees to be paid? These are questions which makes

allowances to be not a certain determinant of payable amount without a further proof. Since it is not known how **Exhibit P2** arrived at **TZS 29,000,000.00** as awarded by the arbitrator or **30,500,000.00** as per **Exhibit P2**, I fault the arbitrator in basing his assessment on the salary slip which is not part of the contract instead of the amount specified in the contract.

From the above findings I am of the view that the applicant has succeeded to establish a ground to warrant this court to revise the CMA Award on the amount awarded.

Consequently, I revise the CMA award by varying the amount awarded as a monthly salary from **29,000,000** to **Euro 4000**. The number of the months to be paid shall remain **30**. Therefore, the Respondent will be paid **Euro 4,000** times **30** months counted from the date of suspension to the date of the delivery of the decision in the CMA, which brings a Total of **Euro 120,000.00**.

The application is therefore partly allowed to the extent discussed herein above. Each party to take care of its own cost.

It is so ordered.

Dated at Dar es Salaam this 21st day of March 2023

KATARINA REVOCATI MTEULE
JUDGE
21/03/2023