IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

APPLICATION NO. 26677 OF 2023
CASE REFERENCE NO. 20231202000026677

BETWEEN

EMMANUEL SHANI ..... APPLICANT

VERSUS

BAYPORT FINANCIAL SERVICES ..... RESPONDENT

JUDGEMENT

Date of last Order: *06/03/2024*
Date of Judgement: *15/03/2024*

MLYAMBINA, J.

Briefly, the Applicant filed the present application to challenge the decision of the Commission for Mediation and Arbitration (herein CMA) which was delivered on 19/10/2023 by Hon. Lucia Chacha, Arbitrator in *Labour Dispute No. CMA/DSM/KIN/122/2023/80/2023.* The CMA dismissed the Applicant's claim of unfair termination on the ground that there was no employer/employee relationship. Being aggrieved by the CMA's decision, the Applicant filed the present application based on the following issues:

i. Whether there was an employer/employee relationship between the Applicant and the Respondent.

ii. Whether the procedure for termination was followed.

iii. Whether the reasons for termination was fair.

iv. To what relief(s) are the parties entitled.

The application was argued orally. The Applicant was represented by Mr. Christopher Mbuya, Advocate and Mr. Hassan Mussa, Advocate appeared for the Respondent.

To start with the first issue, Mr. Mbuya was of the opinion that the Arbitrator erred to determine that there was no employer/employee relationship. He said, looking at the decision of the Arbitrator, it is clear that the Arbitrator admitted the evidence, which was brought before the CMA as exhibit P1, P2, P3, P4, P5 and P6 respectively. The Arbitrator in her findings was of the view that the Applicant herein was an intern and not an employee. He submitted that there are a lot of reasons to show the Court that the Applicant herein was an employee and not an intern. When we look at exhibit P1, there are annual sales report of 2021 which clearly elaborates how the employees performs while at work. He added that the name of the Applicant is indicated as among the employees.

Mr. Mbuya went on to submit that; if we look at exhibit P1, there are a lot of documents admitted as exhibit P1 collectively. It included the

annual sales report of 2021, Call Centre deals (KPI) of December 2020 which shows that the Applicant was among the employees. It was clearly that the Applicant was recognised as among the employees. He argued that; according to *Section 61 (1) of the Labour Institutions Act [Cap 300 Revised Edition of 2019] (herein LIA)* indicates that even if there is no written agreement, there are other grounds to look and prove employer/employee relationship. He maintained that the Applicant was under the control of the Respondent, that is why he was given targets to accomplish as per exhibit P1.

He further argued that, *Section 61 (1) (b) of LIA* provides for hours of work. It should be subject to the control of the employer. *Section 61 (1) (c) (supra)* requires a person who works for an organisation should be part of that organisation. Exhibit P1 evidences that the Applicant was the employee. He went on to argue that *Section 61 (1) (e) (supra)* requires the employee to be economically dependant of the employer. Exhibit P5 is the NMB Customer Account Statement. It indicates the Applicant herein was paid remuneration from 1st December 2020 to 30th March 2021. It was a salary. He stated that on 23rd February 2021 the Applicant was paid TZS 867,462,054. This indicates

clearly that the Applicant was dependant economically from the Respondent.

Moreover, the Applicant's Counsel argued that *Section 61 (f) of LIA (supra)* talks of providing tools to the employee. Exhibit P6 is a termination agreement. The last paragraph shows that the Applicant was required to return the company's materials, documents or equipments which he accessed during the period of his contract. On such basis, the Applicant's counsel was of the view that this clearly indicates that the Applicant was provided with tools of work.

Again, Mr. Mbuya submitted that exhibit P6 recognised the Applicant as an employee and required to sign and write the date. He said, his name is indicated at the top of the termination letter. The Applicant was indicated to be at the Position of Call Centre Agent of the Respondent. The Applicant was working for the Respondent alone and no one else as per *Section 61 (g) of LIA*.

Mr. Mbuya went on to submit that; exhibit P3 is the letter of appointment. Thus, the Applicant was required to be under training for three months only from 1st February 2021. By that time, he was paid TZS 150,000/=. Later, the salary increased to TZS 867,462,054. Due to his achievement and great performance, the Applicant managed to be

employed prior the expiry of three months. The Applicant was provided with *Bay Port Financial Services T Ltd Employees Code of Conduct of 2013 (exhibit P4)* issued and approved by the Respondent. This was given to the employees only.

Mr. Mbuya was of the view that the Arbitrator erred in not recognizing the Applicant as the employee. He referred to *National Internship Guidelines of 2017* which clearly indicates that the intern has to work from 6 to 12 months only. This is provided under *paragraph 3(4) and 3.9 (b) (i)-(iv).* He submitted that the Applicant worked with the Respondent beyond 12 months. He worked for two years. He maintained that the Applicant's employment commenced on 27th March 2021 up to 10th February, 2023. Whereas, the internship commenced on 1st of February, 2021 up to when he was supplied with the employment contract on 10th February, 2021.

It was Mr. Mbuya's further argument that the Guidelines indicates that for an Organisation to take an intern it should register in accordance with the Ministry Responsible for Labour and Employment, of which the Respondent never gave evidence that he complied with the same. Also, for a person to qualify as an intern he must come fresh from

the University. The aim was to get experience. But there was no evidence provided to suffice the same in the instant matter.

He added that paragraph 3 of the impugned award admits that the intern should have ended on 30th May, 2021. In support of his submission, he referred the Court to the case of **Everlasting Legal Foundation (E.L.A. F) v. Judith Itatiro**, Revision No. 370 of 2021 High Court Labour Division at Dar es Salaam (unreported), p. 4.

As regards the second ground, it was submitted by Mr. Mbuya that the procedure was not followed because the Applicant was not given any notice. There was no any disciplinary hearing conducted before his termination. There was no any severance pay. Also, the certificate of service was not provided to the Applicant. He stated that looking at the Award, the Arbitrator did not go in detail of the second issue because the first issue was not answered in the affirmative.

Turning to the last ground, Mr. Mbuya argued that the reason for termination was not fair. He said, looking on exhibit P6, the reasons indicated was due to unsatisfactory work performance. However, the Respondent did not provide any proof of unsatisfactory work performance. He argued that, *Section 15 (5) of ELRA* requires the employer to keep record of his employees. Also, *Section 15 (6) of ELRA*

requires the employer to prove the poor performance before the CMA. *Rule 13 of the GN No. 42 of 2007* provides for the procedure of termination.

Coming to the last issue, it was submitted by Mr. Mbuya that the proper relief(s) to the Applicant is compensation for unfair termination, notice and arrears of salaries, and certificate of service and leave which make a tune of TZS 33,770,000/=. He therefore, urged the Court to allow the application.

In response, to the first issue, Mr. Hassan Mussa firmly supported the findings of the Arbitrator that there was no employer/employee relationship between the parties. As correctly found by the Arbitrator, the Applicant produced before the CMA 6 exhibits (P1-P6). He stated that in all those exhibits none referred to the contract of employment. The Applicant produced and relied on exhibit P1 which was annual sales report claiming that it was an employment contract while it was not.

He stated that the Arbitrator correctly found exhibit P1 as a document which provided for annual sales target for the agent working for the Respondent. He added that, at page 303 of the Exhibit P1, it is marked as ES.12 at the top corner. It talks of the commission to be paid to the agent who will qualify for selling at least seven new loans. It was

admitted by the Applicant himself during his testimony that he wants to work with the Respondent as an agent where he was paid commission. He went on to submit that at page 3 of the Award, the Applicant stated that he was paid commission based on the monthly performance. To prove so, he tendered exhibit P5 which is the Bank statement to show the commission which was being paid monthly by the Respondent when he was working as an agent.

Mr. Mussa further argued that the Applicant's Counsel has tried to amplify that under *Section 61 of LIA (supra),* the Applicant was under the Respondent's control. He strongly contested such position. According to Mr. Mussa, Exhibit P3 tendered by the Applicant himself shows that he was an intern. He stated that there is no way the Applicant could be an intern and an employee at the same time. The Applicant himself admitted as captured in last paragraph of page 4 of the Award that he worked with the Respondent as consultant from 2015 and being paid different salary which they called it a promotion. In February, 2022 and March, 2022 he was paid the sum of TZs 867, 462 and the subsequent month he was paid a different amount which is 775,600/=. This difference of payment remuneration/salary proves that it was subject to a certain event, which as stated was based on performance.

Mr. Mussa went on to submit that even exhibit P5 shows a different amount paid in 2022 from February to March, 2022. It proves that it was not a salary because a salary must be uniform. He denied the submission that the Applicant was provided with tools as required by *Section 61 (f) of LIA*. As per exhibit P6, the Applicant was asked to return what he accessed during his presence at the Respondent's place of business, and nothing was tendered during the hearing that the Applicant was given tools of work.

He added that, a Call Centre Agent is an agent as correctively admitted by the Applicant through exhibit P1. Being referred as Call Centre agent does not qualify someone to be an employee unless there is a contract. Also, the termination letter (exhibit P6) which referred the Applicant as employee was stated as a typing or reference error. He stated that the termination was aimed and referring to the internship.

Further, Mr. Mussa stated that the cited **case of Everlasting Legal Aid Foundation** *(supra)* is not applicable in this scenario because the issue therein was for someone volunteering to work and there was proof that he was paid through a payment voucher/salary slip. Also, there was salary mentioned in exhibit P3. While in our case there was an agreement for internship trainee which is mentioned at clause 2.

He added that; the Applicant's payment was stipulated as stipend at TZS 150.000. On the internship, he was of the view that the Guidelines has not provided the time limit for internship.

As regards to the second ground, Mr. Mussa submitted that the Applicant being an internship employee, the procedure was followed. The notice which is seven days was complied with. He called upon the Court not to go through the ELRA procedure because the internships are not governed by such law. Consequently, Mr. Mussa told the Court that; even the issue of disciplinary hearing, severance allowance, certificate of service, notice pay and leave pay does not apply. The Respondent while terminating the intern, he gave reasons that the Applicant had unsatisfactory work performance.

Lastly, Mr. Mussa argued that *Section 15(5) of ELRA (supra)* is not applicable because the grievance was on poor performance. To wind up, he submitted that; the relief(s) though not prayed in the application, are not fit to be awarded as correctly found by the Arbitrator in her Award. He therefore urged the Court to uphold the CMA's decision and dismiss the application with costs.

In rejoinder, Mr. Mbuya clarified that in his submissions, he never submitted on *Section 61 of ELRA*. He was referring to Cap 300. Even the

Arbitrator had such error. He maintained his position that there was employer/employee relationship. *Paragraph 3 (4) of the Guidelines gave the time limit from 6-12 months for internship.*

I have duly considered the rival submissions of the parties, Court records as well as the applicable laws. To start with the first ground, *whether there was employer/employee relationship in this case*. The determinant factors to establish the employer/employee relationship are well explained by Mr. Mbuya as they are quoted under *Section 61 of the LIA (supra).* In his decision, the Arbitrator also considered the relevant provision and concluded that there was no employer/employee relationship in the matter at hand.

The Applicant testified at the CMA that the employment relationship between him and the Respondent commenced way back on 03/12/2020. He backed up his testimony with a job application letter (exhibit P2) which was sent through email on 02/12/2020. In the said letter, the Applicant applied for the position of Customer Care Call Center. The Applicant's application was replied by the letter of appointment for Internship Program dated 01/02/2021 (exhibit P3). In the said letter, the Applicant was appointed as a trainee. The period of training indicated thereat was three months commencing from

01/02/2021. After the stipulated three months lapsed, the record is silent as to what transpired between the parties herein until on 08/02/2023 when the Applicant was served with a termination of agreement letter (exhibit P6).

It was Mr. Mbuya's argument that the Applicant's internship commenced on 01/02/2021 and ended on 10/02/2021 when the Applicant was supplied with the employment contract. As per exhibit P3, the internship program commenced on 01/02/2021 and it was to end after three months. Therefore, Mr. Mbuya's argument is not supported by any evidence on record. It should be noted that parties are bound by the terms of the agreed contract and not otherwise. This is also the Court's position in the case of **Miriam E. Maro vs. Bank of Tanzania, Civil Appeal No. 22 of 2017,** Court of Appeal of Tanzania at Dar es Salaam (unreported) *(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. Daiami 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.

As stated above, in this case, the agreement entered between the parties was for internship and not otherwise. The fact that the Applicant worked for a long period of time does not change the status of contract entered by the parties. Mr. Mbuya was of the strong view that the Applicant was the employee of the Respondent because he was part of the organization, as per exhibit P1 collectively. I have gone through the exhibit in question, it is the annual sales report for 2021. In the said report the Applicant's name is listed in the name of agents engaged by the Respondent. Therefore, such exhibit proves that the Applicant was engaged as an agent and not an employee as claimed.

Even the termination agreement (exhibit P6) stated that the Applicant was terminated in the position of Call center agent. The Applicant also tendered the customer account statement (exhibit P5) to

prove his payments. The mentioned exhibit proves that the Applicant was paid commission according to the work done. In his testimony at the CMA, the Applicant admitted that he was paid commission. All those noted circumstances, disqualifies the Applicant as an employee of the Respondent.

I don't disregard the allegation that the Applicant was provided with tolls of work, and he was also required to sign code of conduct for employees. However, it is my view that signing of code of conduct (exhibit P4) and being given identification card, was only to facilitate his works as an agent. As an agent, he also had the duty to abide to the Respondent's code of conduct so as to suit to the Respondent's working environment.

Mr. Mbuya further argued that; according to the guidelines, the Applicant was not supposed to work as an intern for a very long period of time. Let alone that such argument is not backed up with the provision of the law, the Applicant ought to have complained while the contract still subsisted and not after termination of the said contract. Worse, such argument has been raised at this revision stage. It does not feature anywhere in the CMA records. As such, it is an afterthought argument.

Further to the above, I am of the view that the Applicant's type of contract is not one among the recognised employment contracts provided in labour laws as per *Section 14(1) of the ELRA (supra)*. Therefore, since such contract does not feature in the quoted provision, it was not a contract of employment, and the CMA rightly dismissed the claim in question for not being a labour matter.

Given that the first ground has disposed of the matter, I find no relevance to labour much on the remaining grounds.

In the premises, I find the present application is devoid of any merit and it is dismissed accordingly. The CMA's award is hereby upheld. It is so ordered.

Y.J. MLYAMBINA

JUDGE

15/03/2024

Judgement pronounced and dated 15th March, 2024 in the presence of the Applicant and Geofrey Elia Mombo holding brief of Counsel Hassan Mussa for the Respondent. Right of Appeal explained.

Y.J. MLYAMBINA

JUDGE

15/03/2024