

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

REVISION NO. 321 OF 2019

BETWEEN

POWER CONTROL LIMITED..... APPLICANT

VERSUS

FATUMATA DIANE BERETE RESPONDENT

JUDGEMENT

Date of Last Order: 27/04/2021

Date of Judgement: 07/05/2021

Aboud, J.

The applicant, **POWER CONTROL LIMITED** filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (the CMA) delivered on 30/06/2019 by Hon. Masawe, G. W, Arbitrator in labour dispute No. CMA/DSM/KIN/R.438/15/1070. The application is made under section 91 (1) (a), 94 (1) (b) (i) and section 91 (2) (c) of the Employment and Labour Relations Act [CAP 366 RE. 2019] (henceforth the Act); Rule 24 (1) 24 (2) (a) (b) (c) (d) (e) (f) 24 (3) (a) (b) (c) (d) of the Labour Court Rules GN. No. 106 of 2007 (herein referred as the Labour Court Rules).

Briefly, the respondent was hired by the applicant as a Consultant on 01/05/2015. That, by virtue of the consultancy agreement the respondent was entitled to a gross fee of \$5000 at every calendar month for the services as reflected in the Consultancy Agreement (exhibit A1). On the other hand the respondent was obliged to pay 5% of the earned amount as withholding tax. It is on record that on 28/09/2015 the applicant decided to end the contractual relationship with the respondent where he informed her to handover any company property as her contract to be terminating on 30/09/2015. Aggrieved by the applicant's decision on 26/09/2015 the respondent referred the dispute to the CMA claiming for breach of the contract. On its findings the CMA was of the view that, there was breach of contract and awarded the respondent 10 months salaries as remaining period of the contract. Being dissatisfied by the CMA's award the applicant filed the present application urging the court to determine five grounds or issues as they are reflected in the affidavit in support of the application.

However, at the hearing the applicant's Counsel abandoned other grounds and only remained with two among of them which are

as follows:-

- i. Whether the Commission had jurisdiction to determine the dispute referred before it.
- ii. Whether the Commission exercised its jurisdiction with material irregularity.

The matter was argued orally. Mr. Abdallah Kazungu, Learned Counsel appeared for the applicant while Mr. Godwin Nyaisa, Learned Counsel was for the respondent.

On the first ground it was submitted that, there is no any employer/employee relationship between the parties other than consultancy agreement between them as supported by Exhibit A1 at the CMA. He stated that, the respondent in such agreement was required to issue an invoice and the applicant was obliged to deduct the withholding tax and the rest of the amount was paid to the respondent as testified by Mr. Andrew Sopa at the CMA.

It was further submitted that, the finding of the CMA that there was a contractual relationship was wrong and the test which was used by the CMA to determine who is an employee was inappropriately applied. The Learned Counsel added that, the evidence of Mr. Andrew Sopa was not shaken by the respondent who

claimed to be paid or earning salary however there was no salary slip or bank statement to prove the same. It was also submitted that, to prove that the respondent was paid by invoices the applicant tendered invoices which were rejected by the Arbitrator on the ground that they were not stamped. It was argued that the law of evidence does not require that an invoice must be stamped. Thus, the rejection of the same was not supported by any position of the law.

On the second ground it was submitted that, the CMA exercised its jurisdiction with material irregularities in two senses. On the first limb it was submitted that at page 12 of the CMA proceedings it is clearly shown that the applicant raised objection of the email which was tendered by the respondent. It was stated that the CMA without giving the decision as to whether it upheld the objection or not proceeded to adjourn the matter to 06/09/2016 and gave time to the respondent to bring a certified email.

The Learned Counsel went on to submit that, the finding of the CMA was based on the Electronic Transactions Act of 2015, however, when you read the relevant Act there is no provision stating that a

party can file a certified copy but it allows to file certificate of authenticity to show that the email tendered was correct or incorrect.

It was further stated that another material irregularity is about appointment of the Arbitrator which was not legally done. It was submitted that it is well understood that, the Arbitrators are always appointed by the CMA and once are appointed the parties are informed. It was argued that, the matter at hand was firstly assigned to Hon. Ng'washi and the same was transferred to Hon. Kokushima without assigned any reason for such transfer. The Learned Counsel went on to submit that, Hon Kokushima framed issues and heard the evidence of the applicant and she also conducted examination in chief of the respondent. It was submitted that, thereafter the case was adjourned to 19/10/2016 and on the same day when the parties appeared the file was re-assigned or transferred to Hon. Massawe G. who continued with the hearing and made an award.

It was vehemently submitted that, such transfer of file from one Arbitrator to another without assigning reason was illegal. To support his submission, he referred the Court to the Court of appeal case of **National Insurance Corporation of (T) Limited V. Jackson Mahali**, Civ. Appl. No. 94 of 2011, the case of **Osterbay Villas Ltd.**

V. Kinondoni Municipal Council, Civ. Appl. No. 173 of 2017 and
Inter Consult Ltd. v. Mrs. Nora Kassanga & another, Civ. Appl.
No. 79 of 2015 (all unreported).

On the basis of the submission above the Learned Counsel prayed for the application to be allowed.

Responding to the application Mr. Nyaisa adopted the counter affidavit to form part of his submission. On the first ground he submitted that, he was guided by section 61 (a) to (g) of the Labour Institutions Act, No. 7 of 2004 (herein referred as Act No. 7 of 2004). He stated that, it is the form of contract that determine the relationship and the conduct of parties as stipulated in section 61 (a) to (g) of Act No. 7 of 2004.

It was also submitted that, looking at the proceedings and exhibits tendered, it is clear that the respondent was under pure control and management of the applicant. The Learned Counsel went on to submit that the testimony by the applicant's Managing Director (DW1) at page 8 of the CMA proceedings reflects how the applicant controlled the respondent's work. He further submitted that, again at page 16 of the CMA's proceedings the respondent testified that he was given directives by the Managing Director (DW1) the testimony

which was also cemented by PW2 in accordance with exhibit F3 on record.

It was also submitted that, looking at exhibit F3 it is clear the applicant was in control of the respondent's hours of work. The Learned Counsel went on to submit that, the next test whether the relevant person forms part of the organization, he stated that exhibit 4 contain minutes of the management meeting as the Management Manager. It was further submitted that exhibit F5 contain emails in which the applicant introduced the respondent to the 3rd parties to be part of the organization. That, the respondent was also given business cards reflecting her as part of the organization.

It was further argued that, the next test is whether the respondent worked for an average of 45 hours per month. It was submitted that, the test is answered at paragraph 2 of the CMA proceedings. It was also submitted that the next test is whether the respondent was economically independent, he argued that the gross salary of the respondent was USD 5000 per month so she was economically dependent to the applicant. He also urged the Court to consider exhibit F1 on record. It was also stated that, the last test was the working equipment and tools of trade, he stated that at page

16 of the proceedings the applicant's witness PW1 admitted the respondent was given the office laptop and other equipment and transport allowance whenever she travelled.

It was further submitted that at page 22 of the CMA's proceedings PW2 cements that, the respondent was given an assistant, a loan and medical costs. It was argued that, the circumstances suffice to say the test is proved in affirmative, he added that once there is more than one element of the relationship it has been the position of this Court that the employer/employee relationship is established. To support his position he cited the case of **MIC (T) Ltd. V. Onesmo Emily Kiyengo** where at page 12 to 14 the test was analyzed. He also referred the case of **Ismail Mussa Athman V. Lake Oil Ltd.** at page 6 to 10 where the Court said because there were more than one element proved then there was employer/employee relationship. He therefore submits that, the legal requirements were met to establish the relationship in question.

On the second ground the Learned Counsel conceded to its first limb, however, on the second limb it was submitted that, the CMA is bound to the labour statutes and not other rules of procedures. He therefore prayed for the application to be dismissed.

In rejoinder Mr. Kazungu submitted that, the referred section 61 of Act No. 7 of 2004 is irrelevant. He stated that according to the evidence the respondent tendered only consultancy agreement and therefore what is submitted in this Court is irrefutable. As regards to the Electronic Act it was submitted that, it is just like any other laws applicable in civil matters and it was relevant to be applied in the CMA proceedings. He therefore, prayed for the application to be allowed.

After considering the rival submissions by the parties, Court records and relevant labour laws, I find the Court is called upon to determine the following issues, whether there was proper succession of trial Arbitrators, whether the parties had employer/employee relationship and what reliefs are the parties entitled.

On the first issue as to whether there was proper succession of trial Arbitrators, the applicant's Counsel argued that, appointment of the Arbitrators in this case was not legally done. I have gone through the CMA records and it is revealed that on 01/10/2015 the matter was placed for mediation before Hon. Igogo M. Mediator where on 04/12/2015 the mediation was marked failed. After failure of the mediation on 25/01/2016 the matter was before Hon. Ng'washi for

mention. Again on 23/03/2016 the matter was re-assigned to Hon. Kokusima, Arbitrator who proceeded with hearing of the applicant's case and partly evidence of the respondent herein. For the reasons which are not apparent in the CMA proceedings the matter was thereafter reassigned to Hon. Massawe G. W. who proceeded with hearing of the respondent's case and delivered an award thereto.

As discussed above, it is crystal clear that, the CMA's proceedings in this case were not properly conducted. There were no reasons stated by the successor Arbitrator for taking over a case which was partly heard by his predecessor Arbitrator. The circumstances of this case happened in the cases cited by the applicant's Counsel which I found them to be relevant to the circumstances at hand. In the cited cases the case file was transferred from one Judge to another without assigning reasons thereof.

In the case of **Inter Consult Limited v. Mrs. Nora Kassanga & another** (supra) the Court held that, in situation like this Order XVIII rule 10 (1) of the Civil Procedure Code, [CAP 33 RE

2019] (herein CPC) applies. The relevant provision provides as follows:-

'Rule 10 (1) Where a Judge or Magistrate is prevented by death, transfer or other cause from concluding trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.

(2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 21.'

I am alive of the decisions or holdings that the provisions of the CPC do not apply in labour matters. However, that position applies to the circumstances where the situation is specifically provided in the labour matters. Nonetheless, the manner of transferring cases from one Arbitrator to another is not provided in the labour laws, thus the CPC being the general law which governs civil matters and labour matters being one of the civil cases then the CPC will apply. The

Court in the case of **Inter Consult Limited's (supra)** interpreted the above quoted provision as follows:-

*'Looking at the provision it would seem that it does not specifically provide for reason(s) to be assigned by a successor Judge or magistrate for taking over a matter from a predecessor Judge or Magistrate as Mr. Kalolo appeared to suggest. However, despite that state of affairs, this Court in the case of **Ms. Georges Centre Limited V. The Honourable Attorney and Ms. Tanzania National Road Agency**, Civ. Appl. No. 29 of 2016 (unreported), considered the scope of said rule and at the end it vitiated all the proceedings conducted by the successor judge including the judgement and decree and returned the proceedings for continuation by the High Court in accordance with the law.'*

It was stated that in the case of **Ms. Georges Centre Limited (supra)** the Court held as follows:-

'The general premise that can be gathered from the above provision is that once the trial of a case has begun before one judicial officer, that judicial officer has to bring it to completion unless for some reason he/she is

unable to do that. The provision cited above imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another. There are a number of reasons why it is important that a trial started by one judicial officer be completed by the same Judicial officer unless it is not practicable to do so. For one thing, as suggested by Mr. Maro, the one who sees and hears the witness is in the best position to assess the witness credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised. See also the case of **Kajoka Masanja v. The Attorney and Principal Secretary Establishment**, Civil Appeal No. 153 of 2016; **National Insurance Corporation of (T) Limited v. Jackson Mahali**, Civil Appeal No. 94 of 2011 (both unreported).'

Again, in the case of **Priscus Kimaro v. Republic**, Criminal Appeal No. 301 of 2013 (unreported) it was held as follows:-

'...where it is necessary to reassign a partly heard matter to another magistrate the reason for failure of the first magistrate to complete must be recorded. If that is not done, it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal with it to the detriment of justice. This must not be allowed.'

Also, in the case of **Fahari Bottlers Limited and Another V. Registrar of Companies and Another** [2000] TLR 102 cited in the case of **Osterbay Villas Limited (supra)** it was held that:-

'The individual calendar system requires that once a case is assigned to a Judge or magistrate, it has to continue before that Judge or Magistrate unless there are good reasons for doing otherwise. The system is meant not only to facilitate case management by trial Judges or Magistrates, but also to promote accountability on their part. Failure to follow this procedure was certainly irregular and was amenable to the revisional process.'

Though in the cited cases only Judges and Magistrates were referred but it is well known that the CMA being one of the quasi-judicial body performing judicial activities they are bound by the decisions of the Court in their administration of justice. Therefore, the cited cases are binding to the CMA.

In view of the above cited cases which are binding to this court and CMA, it is my view that the CMA proceedings and award was procured with material irregularity as there were no reasons adduced for the transfer of file from one Arbitrator to another. As stated in the cited cases such an omission is fatal and may lead to chaos in the administration of justice. Thus, the same cannot be ignored by this court regardless of the resources which have been spent in this matter.

In the event, since in the matter at hand there were no reasons advanced as to why the case file was transferred from Hon. Kokusima, Arbitrator to Hon. Massawe, G., Arbitrator, the omission is fatal and vitiates the proceedings and award acquired thereto. Consequently, the CMA's proceedings and award are quashed and set aside, the file is be remitted back to the CMA to restart afresh from the arbitration stage and before another competent arbitrator. Hence

the application has merit. For expeditious dispersion of justice this matter should be given preference for it being an older case.

As the first issue has disposed of the matter, I find no need to belabour on the remaining issues.

It is so ordered.



I.D. Aboud

JUDGE

07/05/2021