IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 188 OF 2020

BETWEEN

JAMES GATY MAGABE.....APPLICANT

AND

GUD HOLDINGS (PTY) LIMITED..... RESPONDENT

JUDGMENT

Date of Last Order: 04/05/2021
Date of Judgment: 09/07/2021

A.E MWIPOPO, J.

This is revision application against the Commission for Mediation and Arbitration (CMA) award in Labour Dispute No. CMA/DSM/KIN/506/19/270 which was delivered on 9th April, 2020 by Hon. N. Kiangi, Arbitrator. James Gaty Magabe, the applicant herein, is applying to this Court for an order in the following terms: -

1. That, this Court be pleased to revise and set aside the award of the Commission for Mediation and Arbitration dated 9th April, 2020 in Labour Dispute No. CMA/DSM/KIN/506/19/270 as it has defects in calculation and delivering of award in favour of the Respondent.

2. Any other reliefs this Court may deem fit, just and equitable to grant.

The application is accompanied with Chamber Summons and supported by Affidavit sworn by the Applicant. The Applicant's Affidavit contains six grounds of revision in paragraph 5. The grounds are as follows;

i. Whether it was proper for the trial Arbitrator to rely on the term of the contract while deciding the issue of independent contractor.

ii. Whether the Honourable Arbitrator was right to rule out that the act of the Respondent not deducting statutory deductions such as NSSF, PAYE is the ground of determining that the complainant was an independent contractor.

iii. Whether the Honourable Arbitrator was right to rely on the false statement of DW1 in determining the issue of an independent contractor.

iv. Whether the trial Arbitrator was right to rely on the the clause 2.3 of the Exhibi D1 but still the Complainant was given leave.

v. Whether the Honourable Arbitrator was correct to decide that the Complainant did not meet all the control test of an employee.

vi. Whether the Honourable Arbitrator was correct to decide the case basing on the contract which was governed by South Africa and Common law instead of Tanzania labour laws.

At the hearing of the application, the Applicant was represented by Mr. Joseph C. Mukohi, Advocate, whereas the Respondent was represented by Ms. Leyla Hopkins, Advocate. By parties consent, the hearing of the application proceeded by way of written submission.

In summary, the Applicant's Counsel submitted that the Commission erred to rely on the terms of contract while deciding the issue of independent contract. He was of the view that the Arbitrator failed to interpret section 61 of the Labour Institutions Act, Cap. 300 R.E. 2019 as the Applicant was employee of the Respondent based on the section and not independent contractor. The evidence available shows that the Applicant was subjected to the control of the Respondent by submitting weekly report, he was introduced by a letter written by Respondent to South Africa Authorities as

Respondent's employee, he was offered training and was subjected to assessment by the Respondent. All these proved that he was performing his duty under the control of the Respondent. But, the Arbitrator relied on the false statement of DW1 in determination of the issue of independent contractor. DW1 admitted that VISA letter stated that the Applicant was employee and this was enough to prove that he was employed by the Respondent. To support the position, he cited the case of **Paul Joseph Mnyavano V. Andrew Mkangaa**, Revision No. 281 of 2016, High Court Labour Division, at Dar Es Salaam.

The Counsel submitted further that the Arbitrator erred to hold that the Respondent had valid reason to terminate the Applicant based on failure to deduct statutory contribution. The Respondent was supposed to prove that he had a valid reason to terminate him according to section 37 of the Employment and Labour Relations Act, Cap. 366 R.E. 2019. There is no evidence to prove that the Respondent had valid reason to terminate him.

Furthermore, the Applicant counsel argued that the Arbitrator erred to decide the case basing on the contract which was governed by South Africa law and Common law. The employment relations in

Tanzania is governed by the law of Tanzania. The DW1 admitted that the contract was governed by law of South Africa and there is a difference between the law of Tanzania and the law of South Africa. Thus, it was error for the Arbitrator to base his decision on the contract which was governed by South Africa law and common law.

In opposition, the Respondent's counsel submitted that the terms of contract are what makes the contract. It is agreement between the parties and upon execution of such contract the parties are bound by the terms. The contract between the parties in this matter were for independent service agreement. The Arbitrator properly interpreted section 61 of Cap. 300 and his reasoning was right since there was no any employment between the parties. The Applicant was engaged as a consultant and was receiving monthly retainer of Usd 1,500/= which was not subject to any deductions. The Applicant was not entitled to any employment benefits and he filed a leave form to show that he will not be available for the said period. The Applicant was working independently with no control as the Respondent office is based in South Africa. The Applicant's working hours were flexible and never subjected to the control of the Respondent.

The Counsel went on to submit that the VISA letter introducing the Applicant as an employee to South African Immigration by the Respondent was only to assist him to get VISA smoothly but not to establish employer - employee relationship. The training by the Respondent to the Applicant was part of independent service agreement which was meant to educate and equip the Applicant with skills on specific products of the Respondent. The Respondent was just looking out for welfare of her business by impacting the right standards of their products.

The Counsel further submitted that the Respondent is a company registered and operates in South Africa under the laws of South Africa. The contract between the Applicant and the Respondent was signed both in Tanzania and South Africa but it did not specify a place or mode of dispute settlement thus the dispute can be entertained in courts with jurisdiction in either country. As the independent service agreement between the Applicant and Respondent is purely non employment contract, it is guided by laws of contract and not labour laws. Section 4 of Cap. 366 R.E. 2019 defines employee to mean an individual who has entered into a contract of employment or has entered into any other contract under

which the individual undertakes to work personally for the other party to the contract and the other party is not client or customer of any profession, business or undertaking carried on the individual or is deemed to be employee by the Minister. This definition above does not fit into contractual relationship between the Applicant and Respondent.

From the submissions, the issues for determination are as follows; -

i) Whether there was employer – employee relationship between the Applicant and the Respondent.

ii) If the answer is positive, whether the termination of the Applicant employment was fair.

Commencing with determination of the first issue whether there was employer – employee relationship between the Applicant and the Respondent, the Labour Institution Act, Act No. 7 of 2004, provides for presumption of employment in section 61. The section reads as follows, I quote;

> *"61. For the purposes of a labour law, a person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form*

of the contract, if any one or more of the following factors is present;

(a) the manner in which the person works is subject to the control or direction of another person;

(b) the person's hours of work are subject to the control or direction of another person;

(c) in case of a person who works for an organisation, the person is a part of that organization';

(d) the person has worked for that other person for an average of at least 45 hours per month over the last three months;

(e) the person is economically dependent on the other person for whom that person works or renders services;

(f) the person is provided with tools of trade or work equipment by the other person; or

(g) *the person only works for or renders services to one person."*

The above cited section provides for factors to be considered in presuming existence of employment relationship. The factors includes the manner the person is subjected to the control and direction of another person, the hours the person is working to that other person, economic dependency to the person whom service is rendered, provision of working tool and the person must render the service to one person only.

In the case of **Kinondoni Municipal Council v. Rupia Said and 107 Others**, Revision No. 417 of 2013, High Court Labour Division at Dar Es Salaam, (Unreported), this Court held that;

> *".....among primary facts to be considered in determining existence of employment relationship are economic dependency, remuneration, subordination, discretion, supervision and control of manner service is rendered".*

In the present application it was submitted by the Applicant that the trial arbitrator erred to hold that there was no employment relationship between the Respondent and the Applicant but rather the Applicant was independent contractor. The Applicant relied on the VISA letter written by the Respondent, training provided to him, leave application which was granted by the Respondent, training offered to him and he was subjected to assessment by the Respondent as the proof that there was employer-employees relationship. In contest, the Respondent submitted that the contract between the Applicant and the Respondent was for independent service agreement and there was no employment relationship between them.

Reading the evidence available in record, there is no sufficient evidence to support the Applicant assertion that there was employer – employee between them. The facts that the Respondent did write

the letter to South Africa Immigration Authority informing them that the Applicant was his employee and that the Respondent provided training to the Applicant does not prove that he was Respondent's employee. Looking at all evidence available, it is not sufficient to prove that the Applicant was working under the control or direction of the Respondent. The evidence in record shows that the Respondent office is in South Africa and the Applicant was providing weekly report as means of assessment of his performance. This prove that the Applicant was working independently. Despite the fact that the evidence shows that the Applicant was economically dependent on the Respondent where he was paid monthly retainer, but the same was not deducted any statutory deduction as a result the payment does not qualify to be salary.

The contract entered between the Applicant and the Respondent – Exhibit D1 provides clearly that the Applicant was a consultant and nature of service shows that he was market and research analyst and he is an independent contractor to the Respondent. Section 2.4 of the contract provides that no employer – employee relationship of any nature whatsoever is created by terms of agreement or by consultant's services to the company. The

contract provides further in section 4.2 that any control and supervision by the company in respect of the consultation shall solely be for the purpose of ensuring consultant discharges his duties and not for the purpose of establishing employment relationship. The same is repeated in section 10.2, 10.3 and 10.4 of the contract.

The Applicant admitted to sign the contract and in his testimony he stated that he questioned DW1 as to why the contract reads that it is for the independent contractor but DW1 answered that the contract will be renewable after its expiry and he proceeded to sign it. This means that he signed the contract knowing that it was not employment contract. As the parties to the contract are bound by the respective terms of the contract, I'm of the opinion the Applicant signed the respective contract knowing that it was not employment contract hence he is bound by its terms.

The Applicant also submitted that the Arbitrator erred to rely on the contract which was governed by South Africa law and Common law. Reading the respective contract – Exhibit D1 there is nothing which shows that it is governed by South Africa law and common law. The only term of the contract which mentioned common law is section 6.2 of the contract which provides for the rights of the

company to terminate the agreement on summary without notice where such termination is justified by provisions of common law and rules of the Company. Thus, the Arbitrator was right to consider the contract in his decision as the Law of Tanzania is applicable in dispute settlement since the contract is silent on the applicable Law.

Since Section 61 of Cap. 300 provides for presumption of employer – employee relationship, the Applicant has the burden to prove the assertion that there was employment relationship as he alleges. However, there is insufficient evidence to prove the allegation. In the contrary, the Respondent sufficiently proved that there was no employment relationship between them as it was held by the Commission. Therefore, I'm of the same opinion with the trial Arbitrator that there is no sufficient evidence to prove that there was employer – employee relationship between the applicants' and the respondent. As a result the issue is answered in negative.

Since I find that there was no employer – employee relationship between the applicants and the respondent, then I hereby dismiss the revision application for want of merits. The CMA Award is upheld.

As the first issue have disposed of the matter, I find no need to determine the remaining issue. Each party to bear his own cost of the suit.

A.E MWIPOPO

JUDGE

09/07/2021