IN THE HIGH COURT OF ZANZIBAR

(INDUSTRIAL DIVISION)

HELD AT VUGA

CIVIL APPLICATION No. 18 OF 2022

(Application for Revision of an Arbitral Award given in the Dispute No. DHU/MM.G/046/2019, Hon. Nemshi A. Abdalla)

ETHIOPIAN (ABYSSINIAN) RESTAURANT ……..... APPLICANT

VERSUS

LIGHTNESS PROJEST FRANCIS …… RESPONDENT

RULING

21st March & 02nd April, 2024

A. I. S. Suwedi, J

The facts of this application in brief are that the respondent filed a dispute before the DHU against the respondent claiming for unfair termination. The respondent stated that on 02/03/2019 at 9:30pm, she was called by the management for taking Feb, 2019 salary. Surprisingly, she was given TZS 100,000/- instead of TZS 300,000/- as per their agreement. Having inquired about the deficiency, she was fired without given anything. Hence, she claimed to be given 7 months' salary, compensation for unfair termination and certificate of services. On 08/06/2020, Arbitrator pronounced a ruling into the respondent's favour. The termination declared unlawful and under

Regulation 57 of the Labour Relations (Arbitration and Mediation) Regulations, 2011, Arbitrator ordered the applicant to pay the respondent 6 months' salary being compensation for unfair termination and 2 months' (January and February) salary which the respondent worked without being paid.

Aggrieved the award given, the applicant is now requesting this Court to revise an Award the given award under section, among others 90 (c) of the Civil Procedure Decree, Cap 8 of the Laws of Zanzibar and the same to be set aside as it contains errors and irregularities on its face.

On the hearing day, the applicant represented by the learned counsel Abdulkhaliq Aley but the respondent was under the service of Mr. Zahor Khamis, Vakil.

When he was invited to submit, counsel Aley adopted the affidavit and stated that the respondent was not terminated as she was not her employee but was a trainee. In case she considered herself an employee, she decided to go by her own will. The respondent was on probation period and the Employment Act, No. 11 of 2005 (the Act) under section 60 (2) recognizes 3 months' probation period and subsection (4) gives direction in case of termination to issue 14 days' notice or wage in lieu of such notice. Hon. Arbitrator awarded 2 months' salary instead of 14 days given by the law.

Besides, Hon. Arbitrator awarded 6 months' while the respondent was under probation and the she failed to prove that she was terminated.

Mr. Zahor replied by adopting the counter affidavit and submitted that counsel for the applicant gave interpretation which is inexistence. Section 60 (2) talks about an employee not a trainee and so counsel admitted that respondent was an employee. The basis of the dispute was that the respondent was paid below minimum wage as trainee and she denied the status of trainee and there the dispute arose.

Mr. Zahor replied further by quoting section 117 (e) of the Act which defines termination following intolerable matters. To be paid under minimum wage is among of the intolerable that is why the respondent decided to leave. Normally, there are trainees in Hotels but they are under specific institution and so to take trainee without institution is a cheap labour. Besides, the right of salary exists even though a person is under probation and the fact that the applicant allowed her to be there, she is their employee and the contract exist following the translation given under section 3 of the Act. Hence, Hon. Arbitrator decided to award the respondent due to the reason that there was no any point to refer her as trainee.

Rejoining, Counsel Aley only touched the interpretation of section 60 (2) that "so employed" does not mean that a person was employed but

recruited. Hence, the translation of employment will be at a time where such person is taken on board and this why subsection (4) gives 14 days payment.

The application heard with the aid of two assessor and after passing them through the records and the law they both blamed Hon. Arbitrator by awarding the respondent who was not an employee but a trainee. Thus they advise me to quash the award to given to the respondent.

At the very outset, I am passing by the records to see what happened and what evidence was brought before the Unit. The evidence shown was that the respondent asserted that she was employed by the applicant on 11/01/2019 without any written contract as waitress with consideration of TZS 300,000/- per month with probation period of one week. She was not paid in February, 2019 salary but on 02/03/2019 she was called for payment and she was given TZS 150,000/- without tips. When she inquired she was informed that the amount was deducted for food, transport and ZSSF. The applicant got angry and the respondent was told to leave if she cannot sign to receive the amount given. The respondent tendered her certificate and internship certificate from Tausi Place.

On the side of the applicant, her evidence was that the respondent came to the applicant to ask for a job. She was informed that she is required to do internship prior as the applicant's services are different to other

restaurant. The respondent accepted that and she started as trainee and the applicant agreed to pay the respondent transport allowance, food allowance, tips and pocket money (The evidence did not reveal the amount agreed to be paid). The respondent was required to attend with uniform and she started on 12/01/2019 as trainee.

The evidence shows further that there is no specific time for internship it is only depends on the smartness of the trainee, when a trainee do good such will be taken under probation period. When the applicant inquired about the improvement of the respondent found that she was not doing well and so she was advised to change position from waitress to making juice. She accepted and then she was asked to bring medical report but she did not do so. An employee will be given contract after passing the training conducted, after submitting medical report and put under probation period.

Hon. Arbitrator in analysing the first issue cited section 60 (1) (2) of the Act which talks about the employment of permanent employee and probation period. He concluded that to position the respondent as employee is to violate the law. He also considered the respondent as an employee and concluded that the procedures were not followed to terminate the respondent and finally he saw the respondent had the right to be paid for two months she worked without being paid.

The applicant requesting this Court to revise as said earlier and the provision used by the applicant empowers this Court with the revisionary powers where there is exercisable of jurisdiction illegally or where there is material irregularity. The provision says:

> 90. The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears –
>
> (a)…….
>
> (b)…….
>
> (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity.

Henceforth, I feel obliged to check the proceedings and the award to determine whether Hon. Arbitrator had acted with illegally or with material irregularity. The affidavit in support of the application which provided for five grounds for revision under paragraph 10: **One**, an error committed by Hon. Arbitrator of holding that there was an employment contract between the parties. **Second**, Hon Arbitrator erred in awarding contractual reliefs without fulfilment of relevant legal requirements. **Third** and **fourth**, the failure to evaluate the evidence adduced. **Fifth** is the failure to consider submissions and authorities in relation to the law of withdrawal of suit.

All of these grounds under my considered view, based on the decision of Hon. Arbitrator that the respondent was an employee of the applicant. As I said earlier that Hon. Arbitrator when answering the first issue whether the respondent was under probation or not, he relied on section 60 (1) (2) of the Act. The essence of connecting the scenario with section 60 (1) (2) under my observation is the evidence adduced by the parties. The respondent claimed to be employed by the applicant and she started to work on 11/01/2019 with one probation period. The applicant admitted that the respondent went to request a job, the piece of evidence by the only witness of the applicant is that:

> Lightness come to my restaurant and ask for the job and I explain to her this is Ethiopian restaurant if she know about the restaurant and she say no and I explain to her what do you doing here is different to other restaurant and I tell her we only accept trainee after sometimes ……..we give them 3 months probation period and then they prepare agreement and she agree to be trained……. After explain to her she agreed to be the trainee and explain what Abyssinian provide for her transport allowances, foods allowance, tips and pockets money and she agreed and started……..

From this evidence Hon. Arbitrator consulted the provision about the probation period which is section 60 (1). The provision says:

> 60.(1) Any employee in a permanent contract of service required to be in writing shall be on a probationary period of six months from the date he or she was so employed.
>
> Provided that a probationary period may be extended for a further period of not more than six months.

The provision allows an employee in permanent contract that required to be in writing to be taken on probation of six months, the period that can be extended to further six months. Again subsection (2) of that section says:

> (2) Any employee who is on temporary service not to be in writing shall be on probationary period of three months from the date he or she was so employed.

The provision is clear that a temporary employee not in writing is also allows to be on probation period of three months. In the instant application, the applicant's evidence never revealed that he intended to employ the respondent under temporary or on permanent basis. However, I put into the scale the part of the piece of evidence I reproduced earlier that: *…..we give them 3 months probation period and then they prepare agreement and she agree to be trained…..*The fact that the applicant offer the respondent a position to work on probation for three 3 months and the respondent accepted, I am hesitating to fault Hon. Arbitrator for treating the respondent as an employee of the applicant. My stance tell me to believe that the applicant infringed the law. To use a person under the umbrella of probation for three months and then to enter into a contract after the expiration of

three months is incorrect and in fact this behaviour must be reprimanded so that employers follow the law. The applicant should have entered into a contract with the respondent before giving her the probation of three months. The applicant could set a term of probation of six months or of three months within the contract depending on the type of contract entered whether written if taken her permanently or temporarily. Hence, I am supporting Hon. Arbitrator's vision, and since Hon. Arbitrator was proper in his decision, he was also right in awarding six months compensation and two months which the respondent worked with the applicant. I am thus, not agreeing with the opinion of the two respected assessors that Hon Arbitrator erred in awarding in the absence of the contract.

Therefore, with the foregoing reason, the application has no merit and I am consequently dismissing the same in its totality.

DATED at TUNGUU ZANZIBAR this 02nd April, 2024

A. I. S. Suwedi

JUDGE - INDUSTRIAL COURT