

TANZANIA / JUDGMENT

SVEIN ERIK MOA V

COURT
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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM LABOUR REVISION
APPLICATION NO. 975 OF 2025 (Arising from Award issued on 12/12/2024 Hon. Igogo, M,
Arbitrator, in Labour Dispute No. CMA/DSM/ILA/10/2024/46/2024 at Ilala) SVEIN ERIK
MOA..... APPLICANT VERSUS ROCK PLANT TANZANIA
LTD.....RESPONDENT

JUDGMENT

Date of Last Order: 14/03/2025 Date of Judgment: 4/04/2025 B. E. K. Mganga, J. Svein Erick Moa, the abovenamed applicant was employed by Rock Plant Tanzania Ltd, the abovenamed respondent for a one-year fixed term contract of employment as country manager. In their contract of employment, the parties agreed that applicant will be paid monthly salary of 4000 USD net after taxes and statutory deductions, they also agreed that he will be paid a commission of 1.5 % of the net sale price (excluding VAT) of any machine he sales in Tanzania and that the said commission was payable subject to applicable taxes and statutory deductions. 1 It is undisputed by the parties that, on 2nd October 2023, respondent served applicant with termination notice dated 2nd October

2023. In the said termination notice, respondent notified applicant that, their contractual agreement will expire on 30th November 2023 and applicants' last working day will be 30th November 2023 as they will be no renewal. The said termination was with effect from 30th October 30th October 2023. On 26th November 2023, applicant wrote a letter to the respondent claiming to be paid inter-alia USD 53,766.06 being 19 commissions that were pending unpaid. On 29th December 2023, applicant filed Labour dispute No. CMA/DSM/ILA/10/2024/46/2024 before the Commission for Mediation and Arbitration henceforth CMA at Ilala indicating that respondent breached the contract. In the referral form (CMA F1) applicant indicated that the dispute arose on 30th November 2023. In the said CMA F1, applicant further indicated that he was claiming to be paid USD 99,414.92 being outstanding commissions for up to more than six (6) months. The said dispute passed mediation stage unsuccessfully as a result it was referred to arbitration stage. At arbitration stage, three issues were drafted and agreed upon by the parties namely, (i) whether the 2 dispute was filed within the prescribed time per the law, (ii) whether there was breach of terms of contract and (iii) to what reliefs are the parties entitled to. On 19th December

2024, Hon. Igogo, M, Arbitrator having heard evidence of the parties issued an award that the dispute was filed out of time without condonation. In short, the arbitrator held that the dispute was time barred consequently, dismissed the dispute for want of jurisdiction.

Applicant was aggrieved with the said award hence this application for revision. In the affidavit in support of the Notice of Application, applicant raised four grounds namely: -

1. That, the arbitrator erred in law and fact by holding that the dispute was time barred on ground that the dispute arose in 2022.
2. That, the arbitrator erred in law and fact by failure to evaluate evidence specifically exhibit A4.
3. That, the arbitrator erred in law and fact by not considering that there was continuous breach by the respondent.
4. That, the arbitrator erred in law and facts by failure to evaluate evidence tendered specifically exhibit A6. At the time of hearing this application, Mr. Jackson Mgonja, learned counsel appeared and argued for and on behalf of the applicant 3 while Mr. Benjamin Mtwanga, learned counsel appeared and argued for and on behalf of the respondent. Arguing the 1st and 3rd grounds, Mr. Mgonja submitted that, on 29th December 2023 applicant filed the dispute at CMA showing that on 30th November 2023, respondent breached the contract. Counsel submitted further that, applicant was claiming to be paid commission from December 2022 to July 2023 and that, in the CMA F1, he indicated that the commission was outstanding for up to more than six months. Mr. Mgonja also submitted that, according to exhibit A6, respondent failed to pay applicant's commission from 27th July 2023. When probed by the court, counsel submitted that, exhibit A6 contains sales starting from 21st December 2022 to 27th July 2023. He also conceded that the dispute relating to breach of contract is supposed to be filed within 60 days. He further conceded that, according to exhibit A6, sixty days expired prior to applicant filing the dispute at CMA. Counsel further submitted that the contract of the applicant expired on 30th November 2023. He also submitted that, from September to November 2023, applicant was demanding to be paid his commission as per exhibit A4 collectively and exhibit A8. He added that breach was continuing and cited the case of *The Registrar of 4 Trustees of Chamanzi Islamic Centre v. Yahaya Mwavurizi*, Revision No. 56 of 2020, HC (unreported) to implore the court to hold that the dispute was not time barred. He added that, in exhibit A8 and A5, respondent promised to pay but she didn't. When further probed, counsel conceded that, promise to pay cannot be a ground for not filing the dispute within time. He went on that; the arbitrator dismissed the dispute based on section 3 of the Law of Limitation Act without considering section 7 of the same Act. To support his submissions that the two sections must be read together, he cited the case of *Lausa Athuman Salum v. Attorney General*, Civil Appeal No. 83 of 2010, CAT(unreported), *Lindi Express Ltd v. Infinite Estate Limited*, Commercial case No. 17 of 2021, HC(unreported) and *Tabeco international Limited v. Attorney General and Another*, Civil case No. 139 of 2019, HC (unreported). He further submitted that, since applicant was making follow up of payment, time of limitation started to run from the last

date he made follow up hence the dispute was filed within time. He added that, applicant made a last follow up on 26th November 2023 as per exhibit A4. 5 Arguing the 2nd and 4th grounds, Mr. Mgonja, submitted that, the arbitrator failed to evaluate evidence especially exhibit A4 and A6 hence ended in wrong decision that caused miscarriage of justice. He cited the case of Leornard Mwanashoka v. The republic, Criminal Appeal No. 226 of 2014, CAT (unreported) and Joseph Athanazi v. Makere Museum, PC. Civil Appeal No. 04 of 2023, HC (unreported) to the position that failure to evaluate evidence leads into wrong decision and miscarriage of justice. He strongly submitted that, in exhibit A4, applicant was reminding respondent to pay the outstanding commission. He further submitted that, arbitrator made a decision based on CMA F1 and failed to consider exhibits A4 and A8 which indicated that breach was continuing and that, the last reminder was 26th November 2023. When further probed on CMA F1, counsel for the applicant conceded that CMA F1 is pleading and that, parties are bound by their pleadings. Counsel was quick to submit that applicant did not depart from his pleadings in CMA F1. With those submissions, counsel for the applicant prayed that the application be allowed. On his part, Mr. Mtwanga, counsel for the respondent opted to argue the application generally. In resisting the application, counsel for 6 the respondent submitted that, in terms of Rule 10(2) of the Employment and labour relations (Code of Good Practice) Rules, GN. No. 64 of 2007, any dispute other than termination of employment must be filed within sixty days. Counsel submitted that, according to exhibit A6, the first claim arose on 21st December 2022 and the last claim was on 27th July 2023. Counsel submitted that, Lausa's case(supra) is applicable on the definition of continuing breach, but the said case is not applicable to the facts of the application at hand. Responding to submissions that applicant was reminding the respondent, Mr. Mtwanga submitted that, that pre-court negotiations has never been a ground of stopping time. To support those submissions, he cited the case of P & O International Limited v. the Trustees of Tanzania National Parks (TANAPA), Civil Appeal 265 of 2020, CAT (unreported). He added that, writing of a reminder by the applicant did not stop time to run against him and that, that did not amount to continuing breach. He also submitted that, CMA applicant did not plead continued breach hence this is a ground that has been raised only before this court. With those submission, counsel for the respondent prayed that the application be dismissed for want of merit. 7 In rejoinder submissions, Mr. Mgonja, counsel for the applicant submitted that, TANAPA's case (supra) does not apply to the facts of this case because the said case relates to extension of time. He strongly submitted that, time limitation was one of the issues that was framed at CMA hence the issue of continuing breach was covered. I have examined evidence of the parties in CMA record and considered respective submission in the application at hand. As pointed hereinabove, one of the issues that were drafted and agreed upon by the parties is whether the dispute was filed within the prescribed time per the law. In my view, that issue is different from the issue whether there was continuing breach or not as counsel for the applicant wants this court to believe. It is my view that, in the 1st issue namely, whether the dispute was filed within time or not, the parties are required to adduce evidence showing as to when the dispute arose for the Court to decide whether it was filed in a prescribed period or not. In other words, that issue

involves evidence and arithmetical. On the other hand, in the 2nd issue namely whether there was continuing breach, a party must adduce evidence as to when the dispute arose and how breach was repeatedly done. In the application at hand, parties did not draft an issue requiring the parties to prove whether the dispute was continuing or not. I therefore find that submissions by counsel for the applicant in relation to continuing breach is new and cannot be raised at this revision stage. It was testified by Svein Erick Moa (AW1) that, in 2021, he got a big client namely Ruvuma Coal who paid approximately 16 million USD. AW1 further testified that, when he prayed to be paid his commission, one Pritpal Roopra, the General manager of the respondent summoned him (AW1) at Nairobi. He stated that the latter told him that he is making too much money, and that respondent should cut his commission to 0.5%. He added that he was given an option to accept and continue to work or leave and go back at home. Applicant (AW1) also testified that, after a thorough thinking, he opted to continue working but even the said 0.5 % was not paid. In his evidence, applicant (AW1) is recorded stating inter-alia that: - "...Last year in July, 2023 it was increasing to be more difficult to communicate with my General Manager and I anticipated to be terminated, during this period I asked several times to come with the suggestions on how to pay the commission. I never got an answer but he kept saying they don't have enough money, I should wait. They expected me to go back home to Norway because they thought the time to bring this case(sic) would have been expired and they would not pay..."⁹ It is my view that, from the quoted evidence, applicant knew that he will not be paid his commission because it was difficult to communicate even with the General Manager since 2023. Again, he knew that in 2023, respondent anticipated to terminate his employment, and that respondent expected, upon termination, he will go back to Norway unpaid. It is my view therefore, that, applicant knew from 2023 that there was no possibility for him to be paid the said commission. Therefore, he was supposed to file the dispute by that time. It was submitted by Mr. Mgonja that applicant reminded respondent to pay commission as evidenced by exhibit A4 hence time started to run from that date. I have read exhibit A4 namely a letter dated 26th November 2023 written by the applicant to the respondent claiming to be paid USD 53,766.06 being 19 outstanding commission. It is my view that, the said exhibit A4 being a letter authored by the applicant, did not make time to run afresh from that date. I am of that view because the said letter was not admission or acknowledgement by the respondent that she has not paid the said 19 outstanding commission. There is promise from the respondent for this court to hold that time started to run from that date. Be as it may, a promise to pay did not stop time to run against the applicant as it was correctly submitted by counsel for the respondent. In fact, in the case of *M/s. P & O International Ltd vs The Trustees of Tanzania National Parks (TANAPA)* (Civil Appeal No. 265 of 2020) [2021] TZCA 248 9 (June 2021) cited by counsel for the respondent, it was held inter-alia that:- "It is trite that pre- court action negotiations have never been a ground for stopping the running of time... statute of limitation is not defeated or its operation retarded by negotiations for a settlement pending between the parties." In TANAPA's Case (supra), the Court of appeal endorsed and approved the holding of this Court (Hon. Kalegeya, J as then was) in the case of *Makamba Kigome & Another v. Ubungo Farm*

Implements Limited & PRSC, Civil Case No. 109 of 2005(unreported) that:- "Negotiations or communications between parties since 1998 did not impact on limitation of time. An intending litigant, however honest and genuine, who allows himself to be lured into futile negotiations by a shrewd wrong doer, plunging him beyond the period provided by law within which to mount an action for the actionable wrong, does so at his own risk and cannot front the situation as defence when it comes to limitation of time." 11 Assuming that there was a promise by the respondent, of which evidence is wanting, the above holding by the Court of Appeal applies also in the application at hand. In addition to exhibit A4, counsel for the applicant further referred to exhibit A8 and submit that breach was continuing. I have examined exhibit A8 and find that there was no promise whatsoever from the respondent to pay commissions. In fact, exhibit A8 is WhatsApp communication between applicant and Pritpal Roopra. In the said exhibit A8, the parties were discussing inter-alia on how to improve their work. In fact, applicant mentioned his previous performance in relation to sale he made to Arab contractors. In the said exhibit A8, the parties also stated that: - "There is no other country in the world with more potential than Tanzania. We're at a crossroads(sic) now with the financials, but this place will rock the next 10 years and they know who to call when they get their money..." As pointed out shortly a while hereinabove, there was no demand of payment of commission in exhibit A8. I should also point out that, in exhibit A8 there is only the name of Pritpal Roopra but there is neither name nor phone number of the other party who he/ she was communicating with. I should also add that it is not certain as to when 12 communications in exhibit A8 were done because there are no dates. It is my considered opinion as I have held hereinabove that, exhibit A8 did not make time to run afresh in favour of the applicant. The arbitrator is being criticized by the applicant that she did not evaluate exhibit A6. According to counsel for the applicant, had the arbitrator evaluated the said exhibit, she could have found that the dispute was filed within time. I have carefully examined exhibit A6 and find that it was written on 6th November 2023 by the applicant directed to the respondent. The said exhibit A6 is debit note and reads in part: - "Debit Note: Heavy Machinery Norway Date. 06. Nov.23 TO: Rock Plant Tanzania Ltd P.O. Box 12031 Dar Es Salaam Tanzania." It is my considered opinion that exhibit A6 did not come from respondent for this court to hold that respondent acknowledged liability for time to run from that date. In fact, in his evidence, applicant (AW1) stated that he is the one who wrote exhibit A6 and further that, he is the owner of Heavy machinery Norway. When applicant (AW1) was testifying in chief, he was recorded stating: - 13 "...I admit that there are time they paid me less with 0.5, but now since they have tend to mistreat(sic), I want them to pay me as per our agreement of 1.5 commission. I have my evidence of calculation for each sales (sic). I pray to tender it before the Commission as part of my evidence... In EXHIBIT A6, its (sic) written Heavy machinery Norway because my commission were paid to my Norway company and I have evidence for that, to proof(sic) that it is my company. I pray to be admitted as part of my evidence..." The 1st prayer in the quoted evidence led exhibit A6 to be admitted without objection and the 2nd prayer led exhibit A9 to be admitted without objection. I should point out that exhibit A9 is information relating to Heavy Machinery Norway the owner thereof being the applicant. I should further

point out that, in exhibit A6 there is no promise whatsoever by the respondent to pay commissions to the applicant because the said exhibit was written by the applicant himself as such, it did not cause time to run afresh in his favour. In addition to that, in exhibit A6 applicant indicated that he was claiming to be paid USD 69,907.50 being outstanding commissions for 19 items he sold to various persons. In my careful examination of evidence of the parties I have noted that applicant was uninterested in filing the dispute of breach of contract against the respondent for unpaid commission. Applicant only formed 14 that opinion after being served with termination notice on 2nd October 2023 notifying him that the contract expires on 30th November 2023 and that his last day of attending at office is the said date as there was no renewal. It seems applicant was dissatisfied with the said information, which is why, on 6th November 2023, he wrote exhibit A6 showing that he was claiming to be paid USD 69,907.50 for outstanding commission in relation to the listed 19 items he sold to various persons. Again, on 8th November 2023, he wrote email and attachment thereof (exhibit A5 collectively) claiming to be paid USD 40,896.28 being commission for 19 items he sold to various persons. I have noted that, the attachment on exhibit A5 bears the same date namely 6th November 2023 and same items save that, the amount claimed is different. My further conclusion that applicant was indifferent in filing the dispute against respondent is fortified by what I have quoted shortly a while hereinabove because, he claimed these amounts after noting that there was no renewal of his employment contract, an act which applicant termed as a mistreatment. In CMA F1 applicant indicated that the dispute arose on 30th November 2023. As it was correctly submitted by both counsel, the said CMA F1 is pleadings. It was not open to the applicant to depart from the said pleading and bring claims that arose prior that period. I am of that 15 view because, it is a settled principle of law in our jurisdiction that parties are bound by their pleadings. See the case of *James Funge Ngwagilo vs the Attorney General* [2004] T.L.R. 161, *Astepro Investment Co. Ltd vs Jawinga Co. Ltd* (Civil Appeal 8 of 2015)

[2018] TZCA 278 -Tanzlii, YARA Tanzania Limited vs Ikuwo General Enterprises Limited (Civil Appeal 309 of 2019) [2022] TZCA 604 -Tanzlii, Ernest Sebastian Mbele vs Sebastian Sebastian Mbele & Others (Civil Appeal 66 of 2019) [2021] TZCA 168-Tanzlii, Salim Said Mtomekela vs Mohamed Abdallah Mohamed (Civil Appeal 149 of 2019) [2023] TZCA 15 -Tanzlii, Charles Richard Kombe T/a Building vs Evarani Mtungi & Others (Civil Appeal 38 of 2012)

[2017] TZCA 153-Tanzlii and Barclays Bank T. Ltd vs Jacob Muro, Civil Appeal No. 357 of 2019 [2020] TZCA 1875-Tanzlii, to mention but a few. In the Mtomekela's case, (supra) the Court of Appeal held that: - "As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he as to meet and cannot be taken by surprise at the trial. The court itself is as well bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate

16 upon the specific matters in dispute which the parties themselves have raised by the pleadings..." (Emphasis is mine). In the application at hand, applicant did not pray to amend CMA F1 so that it can show that the dispute arose prior to 30th November

2023. In fact, there was no order of amendment of the CMA F1. Therefore, it was improper for the applicant to adduce evidence showing that the dispute arose prior to the date he indicated in the CMA F1. For all have discussed hereinabove, I find that the application is not merited because the dispute was time barred as there was no condonation. I therefore uphold the CMA award and dismiss this application for want of merit. Dated at Dar es Salaam on this 4th April 2025 B. E. K. Mganga JUDGE Judgment delivered on this 4th April 2025 in Chambers in the presence of Joycelinda Mndeme, Advocate for the Applicant but in the absence of the Respondent. B. E. K. Mganga JUDGE 17

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