THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE APPEAL NO. 10/2019

ARISING FROM KCCA/CEN/LC/249/2018

EMIN PASHA LTD …… APPELANT

VERSUS

SOEDI B BARIGYE …… RESPONDENT

BEFORE:

1. **THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

PANELISTS

1. MS. HARRIET MUGAMBWA NGANZI

2.MR. FX. MUBUUKE

3.MR. EBYAU FIDEL

AWARD

1.0 GROUNDS OF APPEAL

This appeal was brought against the decision of the Labour Officer, KCCA Central Division, Mr. Emmanuel Mukiza on the following grounds:

1. **The Labour Officer erred in law by holding that the Respondent was an employee of the Appellant.**
2. **The Labour Officer erred in law by holding that the dismissal of the Respondent was unlawful.**
3. **The Labour Officer erred in law when he awarded the Respondent, one month's pay, one month's pay in lieu of notice, payment in lieu of untaken leave, basic compensatory order, additional compensation, severance allowance, penalty for not holding a hearing totaling to Ugx. 47,749,305/-.**

2.0 GROUNDS OF CROSS APPEAL

1. **That the Industrial Court confirms the decisions of the Labour Officer on notice, unpaid April, 2018 salary, leave and NSSF except the relevant computations should commence from the date of engagement i.e from October 2014 until payment in full.**
2. **That the Industrial Court varies the decision of the Labour Officer on the period that the complainant worked as a consultant to be deemed to be a period that he was an employee and therefore that severance pay, leave and NSSF be varied accordingly.**
3. **That having referred the question of general damages and costs to this court, the same be considered, heard and determined.**

3.0. REPRESENTATION

The Respondent was represented by Professor John Barya of Barya, Byamugisha &Co. Advocates, Kampala and the Appellant was represented by Saddam Solomon of Ortus Advocates Kampala.

4.0 ISSUES FOR RESOLUTION

1. **Whether the Labour Officer erred in law by holding that the Respondent was an employee of the Appellant?**
2. **Whether the Labour Officer erred in law by holding that the dismissal of the Respondent was unlawful?**
3. **Whether the Respondent is entitled to the remedies granted by the Labour officer, general damages, interest and costs.**
4. **Whether the decision of the Labour Officer should be upheld?**

5.0 RESOLUTION

1.Whether the Labour Officer erred in law by holding that the Respondent was an employee of the Appellant?

It was submitted for the Appellant that, evidence was led to indicate that the Respondent was engaged as a management consultant from October 2014 to an indefinite period. According to Counsel the Labour Officer misapplied the tests for determining whether the Respondent held a contract of service or a contract for services. He contended that, he did not employ the control test thereby arriving at the wrong decision. He cited **Godfrey Kyamkama vs Makeree niversity Business School LDR N0. 147 of 2019,** in which this court applied the control test to distinguish between an employee and an independent contractor, to the effect that, an independent contract was a person who worked under a contract but controlled the means and manner in which he or she performed his or her work, which was usually for a fixed period and in doing the work was not dependent on the employer, while an employee was subject to the organization's procedures, was part of the regular business of the employer and was expected to perform his or her duties in accordance with the directives of the employer, therefore he or she was dependent on the employer.

He further submitted that evidence was led to show that the Respondent worked for 3 hours a day and approximately 2 days a week, later his wags were increased in order for him to increase the hours of work at the Appellant Hotel and this was proof that the Appellant had no control over him. He further submitted that the labour officer ignored the evidence adduced to show that the Respondent used his own headed paper when submitting reports about the hotel and the fact that he had a consultancy business while he was engaged by the Appellant, was proof that he was an independent consultant.

In reply Counsel for the Respondent insisted that the Labour officer was correct to hold that the Respondent was an employee of the Appellant because the Appellant's witness Maurice Kertho contradicted himself when he testified that the Respondent was required to report between 9.00 to 6.00pm as opposed to

having no particular reporting time and that he worked for less than 3 hours a day for approximately 2 days a week.

Counsel also submitted that the Respondent was holding the position of General manager of the Hotel because there was no other evidence to the contrary. According to him this was confirmed by the accusation that he allowed a guest to stay at the hotel without paying his bills to the tune of Ugx. 80,000,000/- and this could only be done by a General Manager who was authorised to grant such services to a guest. He argued that, the Labour officer's finding that the Respondent was issued with a certificate of service was clear admission by the Appellant that the Respondent was actually an employee and the certificate referred to him as an employee. He argued further that, the fact that the Respondent was required to hand over several items including the General managers stamp when he was terminated was further confirmation that he was terminated as General manager of the Appellant. It was his submission that the Labour Officer's award at page 6-7 indicates that the Respondent served the Appellant as a Consultant, Interim General Manager and General Manager. He relied on the holding in **Godfrey Kyamukama vs Makerere Business School** (supra) which cited **Market Investigations vs Minister of Social security (1969), Ready Mixed concrete vs Minister of Pensions** and **National Insurance(1968) and Charles Lubowa &Anor vs Victoria Seeds LDR No 185 of 2016** for the distinction between an employee and an independent contractor and for the legal proposition that, mere refence to a person as an independent contractor did not necessary make him or her one, unless the terms of his or her contract explicitly provided as such. Counsel argued that, even if the Respondent in the instant case was initially described as a consultant, at all times he was the General Manager of the Appellant. Therefore, from the time he was engaged on 1/10/2014 to the time he was terminated on 30/08/2018 and issued with a

certificate of service on 4/05/2018, he was an employee of the Appellant and not an independent contractor.

DECISION OF COURT

As an appellate court our role is to re-evaluate the evidence on the record and determine whether the labour officer correctly applied the law to the facts. We have carefully re-evaluated the evidence on the record of Appeal we found as follows:

The question to be answered is whether the Respondent was an employee or an independent contractor?

Section 2 of the Employment Act defines "employee" to mean; any person who has entered into a contract of service or an apprenticeship contract, including without limitation, any person who is employed by or for the Government of Uganda, including the Uganda Public Service, a local authority or parastatal organisation but excludes a member of the Uganda Peoples' Defence Forces"

And ***"Employer"*** is defined to mean; "***any person or group of persons including a company or corporation, a public , regional or local authority, a governing body of an unincorporated association, a partnership, parastatal organisation or other institution or organisation whatsoever, for whom an employee works or has worked , or normally worked or sought to work, under a contract of service , and includes the heirs, successors , assignees, and transferors of any person or group of persons for whom an employee works, has worked or normally works."***

Section 2 of the Employment Act, defines a contract of service as ***" any contract whether oral or in writing , whether express or implied , where a person agrees in return for remuneration, to work for an employer and includes a contract of apprenticeship.***

The Employment Act 2006, does not define an independent contractor. However, this Court in Godfrey **Kyamukama vs Makeree University Business School LDR N0. 147 of 2019,** adopted the description between an employee and independent contractor as stated in **Charles Lubowa and Scovia Ayikoru vs Victoria Seeds LDR No. 185/2016,** to the effect that, an independent contractor is a person who works under a contract but who is not in the same state of dependence on the employer as an employee is because, the Independent contractor controls the means and the manner in which work is performed, while the employee on the other hand, is subject to the organizations procedures, is expected to perform part of the regular business of an employer(is an integral part of the business) and he or she must follow specific instructions on how and when to perform the work(master/servant relationship). An independent contractor usually has a fixed task and is paid on completion of the said task, he or she normally has an independent business and is free to delegate work to other workers of his or her choice, without the knowledge or consent of the employer and normally provides the tools, equipment and supplies required to do the job. An independent contractor and an employee both work for pay therefore, whoever gives either of them work, can be referred to as an employer. (**Charles Lubowa** (supra).

After carefully re-evaluating the evidence on the record of Appeal, we established that, it was not disputed that the Respondent was engaged by the Appellant to work as Management Consultant for a period of 6 months. **What was contested was whether after the expiry of the 6 months the consultancy was extended for an indefinite period or he became her employee.** It was his testimony that, he was employed to **"streamline and make the hotel efficient."** We found no evidence of the terms of his consultancy nor was there any evidence of a contract of Employment. Howver, we established that, he issued a report dated 4/10/2014 titled **"Report on investigations on General Manager's management" and it**

was written on his headed paper **"Barigye Soedi Bwisho…"** signed as consultant and another report dated and 9/03/2015 titled **"Report on operations of the Emin Pasha Hotel for period covering October 2014 to February 2015"** also under his headed paper, signed as consultant/interim Manager. as consultant/interim Manager. According to the testimony of Maurice Kertho the Appellant's Chief Operating Officer , the Respondent was engaged as "a hotel Management Consultant", initially for 6 months and later the consultancy was extended for an indefinite period. After analysing the report of 9/03/2015, we established that, his consultancy involved carrying out the additional role of interim Manager because the report in its opening statement stated as follows:

"Following your appointing me the Consultant interim Manager of the Hotel effective October 2014, and the circumstances which lead to the said assignment to me, I immediately took over the spearheading and kept a close look at the operations of the Hotel as well as ensuring that the operational situation at the Hotel becomes normal for the entire management , staff and the Hotel to create value for you- the investor…" This meant that acknowledged and he was aware that he was a consultant carrying out the role of Interim Manager.

We also established that, although he signed the report of 9/3/2015, as consultant/ interim manager, he used his Business headed paper, "BARIGYE SOEDI BWISHO (Business Management, Finance and Administration Consultant) ….". The Chief Operating Officer at the time, Mr. Maurice Kertho testified that, although the General Manager reported directly to the Board char person, the Respondent as consultant reported to him. He also stated that, **"we had a GM who we had hired who was an American citizen, he failed us because of his behaviours. Barigye sent us his CV way back. we reached out to him and invited him … we sought the services of Barigye as a consultant to fit in the gap of the GM… Barigye did not have a normal time for reporting but we**

had stipulated that he comes to work 9am -6pm… we are notpaying tax on his earning he was in charge of his tax…"

We have no doubt in our minds that the Respondent was engaged as a Management consultant to **"streamline and make the hotel efficient."** and his role as consultant involved carrying out the roles of managing the Hotel a fact he acknowledged in the opening statement of his 9/3/2015, report. We also established that he was reporting to Mr. Maurice Kertho, the Chief Operating officer at the time, given the emails exchanged between Kertho and himself and particularly the email dated 6/01/2018, in which Kertho, expressed dissatisfaction about the his failure to implement Management resolutions arising out of a management meeting held on 4/12/2017, regarding the roles of a new Group Financial Controller. He was required to explain how a guest, a one John Haden had fled the Hotel before settling his bills amounting to Ugx. 80,000,000/- and theft of money from an Accounts staff, a one Brian Mwayi and he was directed to prepare a comprehensive report regarding the same. However, in his testimony he stated that: "**No, I did not prepare a report regarding the matter because I was not in charge of that matter…"** In our considered view at this point he was confirming that he was not substantively responsible for the Management of the Hotel but he was managing in a bid to stream line its performance to make it efficient. He further testified at page 7 of the record of proceedings that, **"As a consultant I was not a signatory to the accounts, I was appointed signatory to the accounts about 6 months to the end of my work."** He also said **"I did not sign a single cheque of the hotel as a worker".** It is our Considered Opinion that, ordinarily a substantive General Manager as the overall manager of an institution would be a signatory to the Accounts of the organisation as part of its control mechanism. The fact that the Respondent was not granted the right to be signatory was further confirmation to us that he was carrying out his role as General Manager in the interim and not as a substantive General Manager. Even

if he reported and signed as interim manager and later as General Manager, there was no evidence to indicate that he had ceased to be a consultant. This case is distinguishable with Kyamukama(supra) which was relied on by the Appellants because whereas in kyamukama, the the terms of the Clamant's Contract, "… **showed that in addition to setting out the his job description, and its duration, the contract also detailed the working hours, the number of days to be worked per month, requirement to conform to a given schedule , it described the method to be followed when doing the work, the requirement to work every day, requirement for close supervision, remuneration to be paid on a monthly basis, and most importantly, it provided for the traditional security elements such as annual leave, sick leave and maternity leave, left no room for the Claimant to exercise any form of independence, it rendered him a servant of the Respondent, because there was nothing in the contract which gave him any control over the work to be done, how it was to be done, when it was to be done and with whom it was to be done, to warrant him being referred to as an independent contractor. Therefore, even if the contract referred to him as an independent contractor, the terms of the contract reduced him to an employee, who was completely subject to the Respondent. The title of contract was framed a contract for services where there is an independent contractor/employer relationship, but the terms therein rendered it a contract of where there is an employee/employer relationship…"** The report of the Respondent in the instant case, submitted to the chairman of the Appellant and her management, including the performance reports which he submitted on 21/06/2016 and 8/11/2016 as interim General Manager and General Manager, respectively, indicated that, he had the liberty to review the management and performance of the Appellant and he made recommendations for improvement without any directives from either the Chairman or Management, while undertaking the actual management role as well. As already discussed even when queried about not taking actions on issues

arising out of management meetings, the Respondent confidently refused to be subject to the directives of Management, as he stated in his testimony(supra).

In addition, the terms of his remuneration did not change save for an increase in salary from Ugx. 3,500,000/- to Ugx. 4,500,000/- in June 2016. However, was always paid a monthly pay as consultant and there is nothing on the record to the contrary.

In the circumstances, in the absence of a contract of employment detailing the Respondent's terms of employment, such as the duration of employment, the working hours, the number of days to be worked per month, requirement to conform to a given schedule , the method of work to be followed when doing the work, the requirement to work every day or on Particular days, the requirement to work under close supervision,remuneration to be paid on a monthly basis, and most importantly, the provision of the traditional security elements such as annual leave, sick leave and maternity leave among others or any other evidence to the contrary(see **Kyamukama**(supra), we are convinced that, the Respondent was always engaged as a consultant with the role to carrying out the roles of General Manager in the interim and nothing else.

We respectfully do not agree with the Labour Officer's finding that, the requirement for him to work from 9.00am to 6.00 pm was sufficient to qualify him to be an employee, without evidence to prove that he actually worked from 9.00amm to 6.00pm. We also do not subscribe to the assertion that, because he used both his personal and the Appellants GMs official mail and the fact that the Respondent's advisory work as a consultant was greatly integrated in the day today running of the Appellant rendered him an employee, in the absence of any evidence of the basis of the employment. The onus to prove the existence of the employment relationship lay with the Respondent who alleged so. Therefore, having not adduced evidence to prove his transition from consultant to the

position of employee, moreover given that he was an expert on management of Hotels, the Labour Officer had no basis to hold that he was an employee.

The argument that he did not provide for his NSSF because he did not employ himself cannot hold, given that, a General Manager had the authority to propose the provision of NSSF to the Board for approval but he did not do so. In the circumstances we had no doubt in our minds that, he was aware that as a Consultant he was not entitled to NSSF because at page 9 of the record, he said that **" I put processes to streamline the Hotel. I did not make any request of NSSF for myself in writing but had verbal discussions…. I don't have a written agreement with the hotel.**" Having been at the Centre of putting in place processes to streamline the management of the Hotel, it is unbelievable that, he would treat his own engagement in oral terms. We are not convinced that he had any oral contract of employment or otherwise, with the Hotel and even if he did, for the 3 years he served or even for the period he claims he had transited to an employee he should have adduced evidence to show that, at least as a basic minimum he received **the traditional security elements such as annual leave, sick leave and NSSF** among others. Even if the Appellant's chairman signed a certificate of service indicating that, the Respondent had served the Appellant as consultant, interim General Manager and General Manager, as already discussed he served in his capacity as consultant and not employee.

In the circumstances it is our finding that, in the absence of evidence of an employment contract to state otherwise, the Respondent was always engaged as consultant with a role to carry out the role of General Manager in the interim, therefore the Labour officer was not correct to hold that he had become an employee when took on the roles of General Manager. Therefore, ground 1 succeeds. The Labour Officer's decision that, by the time the Respondent was terminated he was an Employee of the Appellant is set aside.

5.2. Whether the Labour Officer erred in law by holding that the dismissal of the Respondent was unlawful?

Having established that the Respondent was a consultant whose role involved carrying out the roles of General Manager in the interim, the application of Section 69 of the Employment Act which provides that an employer is entitled to summarily terminate an employee where the employee by his or her conduct has fundamentally breached his or her obligation under the contract of service, is not applicable.

Although Counsel for the Appellant submitted that, the Respondent was implicated in allowing a guest a one John Haden to stay and work at the hotel without paying leading to his bill accumulating to Ugx. 80,000,000/- as this was a fundamental breach of the relationship of the Appellant which warranted to dismiss the Respondent.

We found nothing on the record to indicate that, the Respondent was terminated on the grounds of misconduct or fundamental breach of his obligations. The evidence on the record however, indicates that, he was asked to hand over to all tools and instruments after the introduction of a the new General Manager. It is not in dispute that, allegations relating to a guest leaving the hotel before settling his bills and allegations of sexual harassment raised by female employees and that he protected a group of people who had stolen money from the Hotel's accountant which he failed to recover the same were leveled against him but he testified that he refused to respond to the allegations because that was not his role. The Respondents witness also testified that he could not be subjected to disciplinary procedures similar to those of employees, because he was not an employee. There is no evidence that, he was subjected to disciplinary procedures or that he was terminated because any breach on his part. The Respondent in his update to Kennedy Losuk about his hand over, to the new General manager dated

19/03/2018, did not raise an issue about being unfairly terminated. The email stated as follows:

" Dear sir,

This is to update you on the handover process to the new manager at THE EMIN PASHA HOTEL- KAMPALA.

As you earlier advised to have a gradual handover, I planned as per what you told me and the handover process is progressing well with most ot the tools, instruments, information and accessories having been handed over to the new General Manager and he has taken full charge.

as earlier mentioned you and I on two occasions all is going on well and the process shall climax possibly in the 3rd week of April when we shall be concluding the exercise.

Iam doing it ethically and professionally without any interfrernce with the operations of the roles of the new manager.

Thank you.

yours faithfully,

BARIGYE S B

Outgoing General Manager,

THE EMIN PASHA HOTEL, KAMPALA. …"

In the absence, of evidence that the basis of the Claimant's termination was indeed the allegations leveled against him, it is our finding that, the Labour officer had no basis in holding that the Respondent required a hearing in the first place, therefore he was unlawfully and unfairly dismissed without a hearing or verification of the allegations against him.

This ground succeeds. The Labour Officer's declaration that the Respondent's dismissal was not lawful both substantively and procedurally was wrong.

5.3.The Labour Officer erred in law when he awarded the Respondent, one month's pay, one month's pay in lieu of notice, payment in lieu of untaken leave, basic compensatory order, additional compensation, severance allowance, penalty for not holding a hearing totaling to Ugx. 47,749,305/-.

Having already established that the Respondent had always been engaged as a consultant, given lack of evidence to the contrary, therefore he was not entitled to the rights that accrue to employees including security elements as notice before termination, annual leave, maternity leave, NSSF, severance allowance, among other, he had no basis to make these awards. Therefore Ground 3 succeeds. the Labour officers award of one month's pay, one month's pay in lieu of notice, payment in lieu of untaken leave, basic compensatory order, additional compensation, severance allowance, penalty for not holding a hearing totaling to Ugx. 47,749,305/ is set aside.

6.0 RESOLUTION OF GROUNDS OF CROSS APPEAL

1. **That the Industrial Court confirms the decisions of the Labour Officer on notice, unpaid April, 2018 salary, leave and NSSF except the relevant computations should commence from the date of engagement i.e from October 2014 until payment in full.**
2. **That the Industrial Court varies the decision of the Labour Officer on the period that the complainant worked as a consultant to be deemed to be a period that he was an employee and therefore that severance pay, leave and NSSF be varied accordingly.**
3. **That having referred the question of general damages and costs to this court, the same be considered, heard and determined.**

Having allowed the grounds of Appeal and having set aside the decision of the Labour officer in its entirety, the grounds of cross appeal fail.

In conclusion the entire labour officers award is set aside. The Appeal therefore fails. No order as to costs is made. Delivered and signed by:

1.THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA ……...

PANELISTS

1. MS. HARRIET MUGAMBWA NGANZI …….

2.MR. FX. MUBUUKE …….

3.MR. EBYAU FIDEL ……..

DATE: 10/05/2022