IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., KITUSI, J.A., And KAIRO, J.A.)

CIVIL APPEAL NO. 134 OF 2017

KOBIL TANZANIA LIMITED ..... APPELLANT

VERSUS

FABRICE EZAOVI ..... RESPONDENT

[Appeal from the Judgment of the High Court of Tanzania (Labour Division) at Dar es Salaam]

(Mipawa, J.)

dated the 3rd day of March, 2016
in
Revision No. 325 of 2015

.....

JUDGMENT OF THE COURT

30th June & 16th September, 2021

MWAMBEGELE, J.A.:

The respondent Fabrice Ezaovi, a French National, was an employee of the appellant, Kobil Tanzania Limited, working as her Managing Director having been employed since 28.10.2003. He earned Tshs. 23,000,000/= per month up to the time of his resignation on 05.06.2012. After resignation, the respondent instituted a constructive termination dispute before the Commission for Mediation and Arbitration (the CMA) claiming that the appellant, through his conduct, forced him to resign on

05.06.2012. In the CMA, as gleaned from the record of appeal at p.10, the respondent sought the following reliefs; compensation for unfair termination for 36 months' salary, payment in lieu of notice, payment of leave, severance pay and transportation to the area of recruitment.

In the CMA, the respondent averred that the appellant employer had raised allegations of fraud against him after he declined the appellant's order to retrench 60% of the staff and yet she did not follow any procedures after such allegations, instead, she went on to terminate his monthly salary and changed the management system. Such acts by the appellant, he averred, by the appellant made the working conditions very hard for him which he could not stomach and forced him to resign.

Upon hearing the parties, the CMA decided in favour of the respondent by ruling that there was constructive dismissal of the respondent by the appellant and the latter was ordered to pay the former twelve months' salary which amounted to Tshs. 276,000,000/= as compensation, Tshs. 23,000,000/= one month's salary in lieu of notice, severance pay for the nine (9) years the respondent has been working with the appellant company (Tshs. 51,750,000/=), making a total of Tshs. 350,750,000/=. The appellant was aggrieved by the decision of the CMA.

His efforts to challenge it in the Labour Division of the High Court was barren of fruit, for Mipawa J., upheld the decision of the CMA on 03.03.2016. Undaunted, the appellant lodged this appeal to the Court on the following eight grounds:

1. *The Honourable High Court Judge erred in law and in fact by holding that the respondent proved that he was constructively terminated while in actual fact there was no proof of the alleged constructive termination;*

2. *The Honourable High Court Judge erred in law and in fact by his failure to appreciate the evidence on record which clearly shows that the respondent resigned on his own accord after being accused of misconduct and more specifically respondent's acts of insubordination to the appellant;*

3. *The Honourable High Court Judge erred in law and in fact by his failure to rule that, the fact that the respondent admitted to have worked against appellant's policy which did not allow personal interest at the work place, the act by the respondent to resign*

intended to pre-empt the appellant's move to take disciplinary action against the respondent;

4. *The reason for termination as per respondent's CMAF-1 prescribed form being that of misconduct, the honourable High Court Judge erred in law and in fact by confirming the CMA Award awarding the respondent severance payment for nine years equal to Tshs. 51,750,000/=;*

5. *The Honourable High Court Judge failed to rule that the arbitrator committed an error by punishing the appellant under section 40 (1) (c) of the Employment and Labour Relations Act, 2004 for unfair termination and proceeded to order the payment of 12 months' salaries compensation while in actual fact, the respondent failed to prove his allegations as required under rule 7 (2) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007;*

6. *The Honourable High Court Judge failed to rule that the award was improperly procured to the extent of showing that the honourable arbitrator exercised jurisdiction not vested in him by law when he initially mediated and subsequently proceeded to arbitrate the*

dispute between the parties and most importantly by failure to properly refer the matter to Arbitration as required by law;

7. *The Honourable High Court Judge failed to rule that the CMA impugned award plus proceedings at the CMA was problematic for lack of consistencies contrary to the requirements of the Rules and laws of procedure; and*

8. *The Honourable High Court Judge erred in law and in fact by his failure to consider various authorities cited to him and disregarding his own decision which justifiably favoured the employer, the appellant in this appeal without assigning reasons for his departure.*

When the appeal was placed for hearing before us, both parties were represented. While the appellant was represented by Mr. Sylivatus Sylivanus Mayenga, learned advocate, the respondent was represented by Mr. Stephen Mosha, also learned advocate. Both parties had earlier on filed written submissions in support of their respective positions which they sought to adopt as part of their oral submissions.

It was Mr. Mayenga who kicked the ball rolling. At the outset, he abandoned ground 7 of the memorandum of appeal. The learned counsel

contended that grounds 1, 2, 3, 4, 5 and 8 sought to answer the issue whether there was constructive termination. For being intertwined, they were argued together. Ground 6 was argued separately.

Basing on the written submissions earlier filed, the learned counsel submitted in respect of Grounds 1, 2, 3, 4, 5 and 8 that in the respondent's resignation letters addressed to Mr. Segman (Exh. D1A and D1B) appearing at pp.178 – 180 of the record of appeal, the respondent did not say he was forced to resign from his employment. On the contrary, the learned counsel submitted, the respondent thanked the company for opportunities, professional guidance and support offered. He submitted that an employee forced to resign from employment cannot thank his employer for opportunities, professional guidance and support offered to him during his service period. Mr. Mayenga submitted that in constructive termination, an employee must resign quickly after the trigger which is the last straw. The learned counsel referred us to p. 135 of the record of appeal where the respondent admits that the alleged harassment was done in his absence. That he returned on a Sunday and that over the night he prepared his resignation letter following correspondence from the employer that the company would be sold to PUMA Energy.

Mr. Mayenga submitted that the respondent did not prove before the CMA that his salary was terminated, that his payment for bonuses were stopped and that he was forced to terminate his employment because he refused to terminate employment of some of the staff and that the audit report was revealed to junior staff. On this premise, the learned counsel argued that the High Court erred in giving weight to the allegations without according weight to the testimonies before the CMA.

Mr. Mayenga submitted further that the evidence at the CMA bears out that; **one**, the respondent was employed as the managing director of the appellant; **two**, without disclosing to the appellant, the respondent hired his own company to deal with security issues at the appellant's work place; **three**, that was in total contravention of Clause 3 of the respondent's employment contract; **four**, there was total admission that the security company belonged to him and his wife; and, **five**, that there was total admission that hiring a company belonging to him and his wife was contrary to the company's policy which prohibited conflict of interest at workplace.

Mr. Mayenga also submitted that the source of the problem was well known to the respondent. That the appellant was in the process of

retrenching some staff on structural grounds whereby the appellant company would be sold to PUMA Energy. That order was defied by the appellant and, he submitted, the refusal amounted to insubordination. The learned counsel relied on the book by David Lewis, **Essentials of Employment Law**, Institute of Personnel Management (at p. 405 of the record of appeal) and **Tanzania Cigarette Company Limited v. Benedict Ichulangula**, Revision No. 31 of 2010 (HC unreported) to underscore the point that it is a breach of employment terms for an employee to go contrary to what the employer directs.

Given the above, Mr. Mayenga submitted that the respondent's act of resignation was to pre-empt the appellant's intended action for misconduct. He added that the High Court erred in ignoring its unreported decision in **M/S TDC v. Elda Mtaro**, Revision No. 1 of 2013 (at p. 424 of the record of appeal) in which it was held that constructive termination cannot be invoked where the employee resigns after being charged with misconduct or where he intends to pre-empt the employer's intended misconduct action.

Mr. Mayenga also addressed the Court that the High Court confirmed an award by the CMA which was not pleaded contrary to the holding of the

Court in **Juma Jaffer Juma v. Manager PBZ Limited and 2 Others,** Civil Appeal No. 7 of 2002 (unreported). He submitted that had the High Court addressed its mind to the nature of the claim at the CMA as appearing in the form initiating the complaint, it would not have upheld the award on severance allowance of Tshs. 51,750,000/= which was not pleaded. He added that the High Court did not pay visit to section 42 (3) of the Employment and Labour Relations Act, 2004 - Cap. 366 of the Laws (the ELRA) which prohibits the payment of severance allowance to an employee who has been terminated on account of misconduct.

The learned counsel added that the High Court refused to follow its decision in **NBC Mwanza v. Justa Kyaruzi,** Labour Revision No. 79 of 2009 (unreported - at p. 466 of the record of appeal) in which it was observed that allegations of fraud make the award of compensation to cease. In the premises, the learned counsel submitted, the High Court erred in confirming the CMA award on severance pay while in the actual fact, the issue of fraud was apparent.

Mr. Mayenga also submitted that the High Court abrogated the principle laid down in **Ally Linus & 11 Others v. Tanzania Port Authority and the Labour Conciliation of Temeke** [1998] T.L.R. 1 by

lightly departing from its decision in **Katavi Resort v. Munirah J. Rashid** [2013] LCCD 161 in which the principles to be considered in constructive termination in terms of rule 7 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 - GN No. 42 of 2007 (the Code of Good Practice) were articulated. Had the High Court considered these Rules, it would have become apparent that the respondent did not prove that the appellant initiated the termination; it would, instead, have held that termination of the respondent was of his own volition.

Mr. Mayenga, argued ground 6 separately which is a complaint that the High Court erred in upholding the award of the CMA while it was clear that the mediator also arbitrated the dispute which was legally improper. Besides, he contended, the dispute was not properly referred to arbitration in that there is no indication that after failure of mediation, the notice referring the matter to arbitration was filled in by the respondent in terms of section 86 (7) (b) (i) of ELRA and section 15 (1) (e) (iii) of the Labour Institutions Act, 2004. The learned counsel submitted that the notice confers jurisdiction on the arbitrator and shows that the mediator did not both mediate and arbitrate. To buttress the proposition that this procedure ought to have been complied with, the learned counsel cited the

unreported decisions of the High Court in **General Manager, Mufindi Paper Mills Limited v. Masoya Magoti & another**, Revision No. 7 of 2007 and **Destafanos Hotel v. Domina Marusu**, Revision No. 21 of 2007.

Having submitted as above, Mr. Mayenga prayed that the judgment of the High Court be quashed and the attendant decree set aside and the Court allow the appeal with costs in this court and the court below.

In response Mr. Mosha, also combined the six grounds as Mr. Mayenga did. Likewise, ground 6 was also responded to separately.

Responding to the six combined grounds, Mr. Mosha submitted that the respondent was forced to resign because his employer withheld his salary, bonuses and the act of the Chief Executive Officer (the C.E.O.) of the appellant, a Mr. Segman, forcing him to terminate the employment of 60% of its workers including the appellant's lawyer with no justified reasons. He added that the respondent was not ready to break the law and thus he refused to obey the unlawful order. He argued that **Tanzania Cigarette Company**, the case relied upon by the appellant was distinguishable from the case at hand in that there, unlike here, the defied

order was lawful. Mr. Mosha added that the book by David Lewis, **Essentials of Employment Law**, relied upon by the appellant cements the respondent's argument in the sense that it only approves an employee to obey and perform lawful orders.

Mr. Mosha submitted further that sometimes in June 2012, an internal financial audit was conducted and all of a sudden a rumour circulated among the lower-rank employees that the respondent had misappropriated the appellant's funds. That intimidated the respondent and made the working conditions intolerable in terms of rule 7 (1) and (3) of the Code of Good Practice. That is what is referred to as constructive termination, he submitted. To support this argument, the learned counsel cited **Goliath v. Medcheme (Pty)** (1996) 5BLLR 603 (IC), **Isle of Wight Tourist Board v. Coombes** (1996) 564, **Pretoria Society for the Care of Retarded Loots v. Loots** (1997) 18 ILJ 981 at 724E, 984E-F.

The learned counsel termed as unfounded the claim by the appellant that the respondent's resignation was aimed at pre-empting the appellant's intended misconduct action in that no proof was made before the CMA and no audit report was tendered to prove misappropriation of the appellant's funds. He added that no evidence was brought to prove unsatisfactory

work performance, unsatisfactory audit report or overpayment of fees to the appellant's lawyers. There was thus nothing to pre-empt because nothing was served as a charge sheet to accuse the respondent of any misconduct, he argued.

Mr. Mosha added that the respondent's resignation was reasonable and fair as there was no other option. The learned counsel clarified that on the respondent's return from leave when he expected to be in office to justify the allegations against him, he found rumours all over his office where members of staff were discussing about his alleged deeds. That is the sole reason he had no other option than to resign. He relied on **Morrow v. Safeway Store PLC** (2002) IRLR 9 124, 131 and **Courtauds v. Andrew** (1979) 1RLR 84 231 to reinforce this proposition.

The respondent's counsel summarized that proof of constructive termination was in line with rule 7 (1) of the Code of Good Practice and that the respondent proved that; **one**, the employer made the employment intolerable; **two**, the termination was prompted by the conduct of the employer; **three**, there was no voluntary intention for him to resign and; **four**, the CMA looked at the employer's conduct as a whole and

determined its effect, judged reasonably and sensibly such that the employee could not be expected to put up with the harassment.

Regarding ground 6, Mr. Mosha simply termed it as baseless in that the record bears out that the dispute was mediated by Honourable Stanslaus and arbitrated by Honourable Johnson Faraja.

The respondent's counsel had one concern before resting his case; he asked the Court to consider that the respondent is a foreigner and the fact that the judgment of the CMA was delivered in 2014 when the exchange rate of a dollar was Tshs. 1,780/= and now it is Tshs. 2,240/=. In the Circumstances, the respondent's counsel argued that by using the old exchange rate the respondent is at risk of losing the monetary value of the award. He thus implored the Court to consider awarding the interest at commercial rate of 22% per annum and the court rate of 7% per annum to do justice to the respondent.

Having submitted and argued as above, the respondent's counsel implored the Court to dismiss the appeal with costs.

In a short rejoinder, Mr. Mayenga started by countering the last submission of the respondent's counsel on the value for money with regard

to the respondent's award that this was an employment dispute, not a commercial one. As regards the alleged rumour circulating at the appellant's workplace, he submitted that there was no testimony at the CMA to that effect; that the respondent had misappropriated the appellant's funds. He added that, after all, rumours by employees, if they were there, were not rumours by the appellant.

As regards the order of retrenching 60% of the appellant's employees, the appellant's counsel submitted that there was no justification to defy that order.

He also submitted that the respondent was issued with the report for misappropriation of funds and he did not respond to it but resigned. He added that the issue of harassment by the appellant was not proved.

Mr. Mayenga reiterated his prayer for the appeal to be allowed with costs in this Court and below.

Having summarized the background facts to the appeal and the submissions of the learned counsel for both parties, the ball is now in our court to determine the issues of controversy in the appeal before us. In this appeal, we think there are two main issues of controversy. The first

one is whether the respondent was constructively dismissed. The second issue is dependent upon the first one being answered in the affirmative; it is whether the High Court rightly upheld the award. In determining these issues, we respectfully think, the starting point should be to first come to grips with the concept of constructive dismissal. The term is provided for by rule 7 (1) of the Code of Good Practice which, for easy reference, we reproduce hereunder:

> *"Where an employer makes an employment intolerable which may result to the resignation of the employee, that resignation amounts to forced resignation or constructive termination."*

The provision has been a subject of discussion in a number of decisions of the High Court. Unfortunately, we could not lay our hands on any decision of the Court on the point. However, there is more than enough jurisprudence on the point from South Africa from where we have heavily imported our labour laws and which decisions we have domesticated through the decisions of the High Court. The subject had been discussed extensively by the Labour Court of South Africa in **HC Heat Exchangers (Pty) Ltd v. Victor J L De Araujo & 2 Others**, Case No: JR 155/16 (accessed at

http://www.saflii.org/za/cases/ZALCJHB/2019/275.html) tracing its origins from common law and how it was imported into South Africa. The South African Labour Court was discussing, *inter alia*, the provisions of section 186 (1) (e) of the Labour Relations Act, 1995 (as amended from time to time) which is in *pari materia* with rule 7 (1) of the Code of Good Practice. That provision defines dismissal as meaning, *inter alia*:

> *"(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee."*

In **Solid Doors (Pty) Ltd v. Commissioner Theron and Others**, (2004) 25 ILJ 2337 (LAC) at para 28, it was observed:

> *"... there are three requirements for constructive dismissal to be established. The first is that the employee must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment intolerable. All these three requirements must be present for it to be said that*

a constructive dismissal has been established. If one of them is absent, constructive dismissal is not established ...."

What amounts to "intolerability" was discussed in **Solidarity on behalf of Van Tonder v. Armaments Corporation of SA (SOC) Ltd and Others**, (2019) 40 ILJ 1539 (LAC) at para 39 as follows:

"... The word 'intolerable' implies a situation that is more than can be tolerated or endured; or insufferable. It is something which is simply too great to bear, not to be put up with or beyond the limits of tolerance ...."

Here in Tanzania, the position is not different. In **Katavi Resort** (supra) the High Court discussed constructive termination of employment and, relying on South African cases, instructively articulated important questions which must be asked to determine constructive dismissal. At p. 285, the High Court directed arbitrators to:

" ... ask themselves the following questions as put down by the LAC – Labour Appeal Court of the Republic of South Africa (LAC) where our new labour laws are heavily borrowed from ... First, did the employee intend to bring the employment

*relationship to an end? – **Jooste v. Transnet Ltd t/a South African Airways** [1995] 16 ILJ 629 (LAC). Second, had the working relationship become so unbearable, objectively speaking, that the employee could not fulfil his obligation to work? – **Pretoria Society for the Care of the Retarded v. Loots** [1997] 18 ILJ 981 (LAC). Third, did the employer create an intolerable situation? Fourth, was the intolerable situation likely to continue for a period that justified termination of the relationship by the employee? - **Pretoria Society for the Care of the Retarded v. Loots** [1997] 18 ILJ 981 (LAC). Fifth, was the termination of the employment contract the only reasonable option open to the employee?"*

[See also **Girango Security Group v. Rajabu Masudi Nzige**, Labour Revision No. 164/2013 (unreported).]

The High Court went on to observe at the same p. 285 that to prove constructive dismissal in terms of rule 7 (1) of the Code of Good Practice, the foregoing questions must be asked with a view to answering the following:

"The employer should have made the employment intolerable. Termination should have been prompted or caused by the conduct of the employer. The employee must establish there was no voluntary intention by the employee to resign, the employer must have caused the resignation. The Arbitrator or court must look at the employers conduct as a whole and determine whether its effects, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."

We subscribe to the analysis and stance taken by the South African Courts and the High Court in **Katavi Resort** (supra) and **Girango Security Group** (supra) and endorse it as a correct exposition of the law in this jurisdiction.

We shall be guided by the above principles in the determination of the appeal before us.

Reverting to the matter at hand, we respectfully think, in order to answer whether there was constructive dismissal in this matter, we need to answer the questions as posed in **Katavi Resort** (supra) and **Girango Security Group** (supra). These are:

1. *Did the employee intend to bring the employment relationship to an end?*
2. *Had the working relationship become so unbearable objectively speaking that the employee could not fulfil his obligation to work?*
3. *Did the employer create an intolerable situation?*
4. *Was the intolerable situation likely to continue for a period that justified termination of the relationship by the employee?*
5. *Was the termination of the employment contract the only reasonable option open to the employee?*

The first question is not difficult to answer, for the record of appeal bears out clearly that the respondent wrote the appellant intimating to her that he was resigning. The letters of resignation appearing at pp.178 and 180 were addressed to Mr. Segman, the Group Managing Director of the appellant and to the Board of Directors of the appellant. For easy reference, we will let the letters speak for themselves. The first one is dated 04.06.2012 and appears at p. 179 of the record of appeal. It reads:

"Mafuta Road, Kurasini,
P.O. Box 2238, Dar es Salaam, Tanzania

Tel: 2128846/7, 2135470/1, Fax 2128848/9

Email: kobil@kobil.co.tz

Website: www.kenolkobil.com

TIN 100 – 427 – 230

VRN: 10 – 014001 – B

Dar es Salaam,

June, 4, 2012.

To the attention of Mr. Segman

Managing Group Director Kenol Kobil.

Dear Mr. Segman,

Please accept this message as notification that I am leaving my position with Kobil Tanzania Ltd effective June, 2012.

I appreciate the opportunities I have been given at Kobil Tanzania Ltd and your professional guidance and support. I wish you and the company success in the future.

I will hand over all my duties to Mathew Mbugua and Andrew Lindi.

Respectfully yours,

Fabrice Ezavi"

The second one which is handwritten and appears at p. 178 of the record of appeal, was addressed to the Board of Directors of the appellant and dated 05.06.2012. It reads:

> *"From: Fabrice Ezavi*
> *Dar es Salam*
> *5th June, 2012*
> *To the attention of*
> *Board of Directors of Kenol kobil*
> *By this letter I confirm that I have decided to resign*
> *from my position of Director of Kobil Tanzania Ltd.*
> *Done by Fabrice Ezavi (sgd)*
> *5th June, 2012."*

We note the surname of the author of the two letters as Ezavi (not Ezaovi as appearing elsewhere in the record of appeal). As there seem to be no dispute that the two letters were authored by the respondent, we assume it was a mere keyboard mistake in respect of the first letter dated 04.06.2012 and a mere slip of the pen in respect of the second; the handwritten one, dated 05.06.2012. The hallmark of the two letters is clear; that the respondent intended to bring the employment to an end. The appellant stated in no uncertain terms in the first letter that he was leaving his position with Kobil Tanzania Ltd with effect from June, 2012. He

reiterated the same openness in the second letter stating that he was confirming that he decided to resign from his position of Director of Kobil Tanzania Ltd. We thus answer the first question in the affirmative. That is, the respondent employee intended to bring the employment relationship to an end.

We now turn to answer the second question which seeks to answer whether the working relationship had become so unbearable objectively speaking that the employee could not fulfil his obligation to work. The story is told by the respondent in his testimony that the working conditions had become unbearable. We wish to underline here that the test is objective rather than subjective. The duty to prove the objectivity of the intolerability rests on the employee. As was observed in in **HC Heat Exchangers** (supra) at para 50:

> *"The onus to prove the existence of intolerability rests squarely upon the shoulders of the employee party. The subjective view of the employee is of no consequence in discharging this onus, as the enquiry to establish whether intolerability exists is always an objective one."*

The respondent's main complaint at the CMA as gleaned from paras 5, 6 and 7 of the Statement of Complaint available at pp. 15 – 16 of the record of appeal, was that the appellant created intolerable working conditions after he refused to terminate the employment of 60% of the staff. That the refusal created enmity between him and the appellant. He clarified in his testimony at p. 135 that while on leave outside the country he was told to terminate the agreement between the company and its lawyer and when he returned he was told by one Andrew Lindi that he had been directed not to pay him salary. We will let his testimony at p. 135 speak for itself:

> *"I also received a phone [call] from Mr. Andrew Lindi as the Finance Manager, informed me that he got information from Mr. Segman not to pay me any more salary. So based on that I immediately called Mr. Segman and asked him what was the reason behind, he was not very clear rather than demanded me to come back for more discussion."*

From the above, we find difficulty in answering in the affirmative the question whether the reason for termination of the employment was such that continued employment had become intolerable for the respondent. It

is apparent that the appellant, through Mr. Segman, wanted to have the matter discussed further. The working conditions could not have become unbearable just all of a sudden. It should have been, in our view, a process that would take a period of time. We thus answer the second question in the negative. That is, the working relationship had not become so unbearable objectively speaking that the employee could not fulfil his obligation to work.

Having answered the second question in the negative, the third question must be simple to answer for its answer is dependent upon the answer to the second question. The answer to the third question is that the employer did not make continued employment intolerable.

Similarly, the second and third questions having been answered as above, the fourth question does not arise.

The fifth question is what makes the respondent's case really difficult. As seen in the respondent's testimony reproduced above, the appellant was ready to discuss the matter. The respondent did not testify why he would not heed to the appellant's proposal "to come back for more discussion". In order for constructive dismissal to exist, the employee's act

to resign must be one of last resort. An employee must exhaust all available means of dispute resolution at the place of work.

Discussing constructive dismissal, Sharon Sheehan, in an article titled **Constructive Dismissal – A Last Resort Remedy** has this to say:

> *"Unlike all other dismissals, where an employee claims that they have been constructively dismissed the onus/burden of proof is placed upon them to prove that their resignation was justified. In effect, they are required to prove that they have exhausted all other avenues of resolution before they have resigned from their position. This would generally require them to bring their grievance to the attention of their employer, follow all the employer's grievance procedures and industrial relations procedures, as outlined in their contract or the employee handbook. Only where these procedures have not achieved an appropriate outcome or where the employer has refused to comply with or engage in these procedures, then should an employee consider resigning from their position. A failure to invoke these procedures may leave the Court or Tribunal open to rejecting a claim of constructive dismissal."*

[accessed at https://www.cpaireland.ie/CPAIreland/media/Education-Training/Study%20Support%20Resources/P1%20Corp%20Laws%20and%20Governance/Relevant%20Articles/constructive-dismissal-a-last-resort-remedy.pdf]

In the matter before us, we are of the considered view that the respondent acted in a rush. He did not make any attempt to discuss the matter as proposed by the appellant. According to his testimony he arrived on Sunday and drafted the resignation letter over the night and the following day. That course of action was not a last resort remedy. It was not exercised after all other avenues of disputed resolution had been exhausted. That rush, in our view, cannot make the constructive dismissal stand. We thus agree with Mr. Mayenga that the respondent resigned on his own volition. The employer is not to blame for his resignation.

As far as we are aware, for constructive dismissal to stand, an employee must show that the course of action taken by him was a last resort. Constructive dismissal cannot stand where an employee had an

alternative avenue to resolve the problem. As was observed in **HC Heat Exchangers** (supra), at para 54:

> *"... where there is a grievance process in the employer available to the employee which would, if applied, resolve the cause of complaint, the employee must follow it. If the employee does not follow it, the employee cannot as a matter of principle claim constructive dismissal, unless the employee proves that there exist truly exceptional circumstances that may serve to absolve the employee from this obligation. And for the employee to subjectively claim that he or she has no confidence in the grievance outcome or that the employer would not reform, cannot suffice as such exceptional circumstances"*

As was also observed in **Foschini Group v. Commission for Conciliation, Mediation and Arbitration and Others** (2008) 29 ILJ 1515 (LC) at para 22:

> *"Where an employee resigns and claims a constructive dismissal under circumstances where he did not avail himself of an available grievance procedure or the mechanisms for dispute resolution provided for in the Labour Relations Act, he will*

have to show very compelling reasons why he failed or refused to follow these procedures available to him prior to resignation ..."

As if the above was not enough, the respondent tendered his resignation letters without disclosing the reasons why such resignation. No information was disclosed showing that he was resigning at the instance of the appellant's actions which made employment unbearable. In the circumstances constructive termination, again, cannot stand.

To recap, we find that the respondent's act of resignation was not one of last resort. He did not prove any condition that made the employment unbearable. He did not exhaust the dispute resolution mechanism at his disposal. His resignation was out of the blue, so to speak, and did not disclose the reason for taking that course. His employer, through Mr. Segman, was ready to discuss the matter with the respondent but the latter did not give the former the opportunity to remedy the situation. His resignation was thus tendered while there was still room for solving the problem without resignation. Constructive dismissal was not proved.

For the reasons we have endeavoured to assign hereinabove, we find merit in this appeal and allow it. As this is a labour related matter, we make no order as to costs.

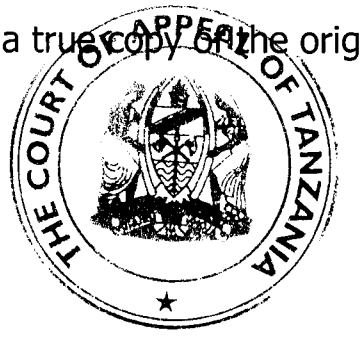
DATED at **DAR ES SALAAM** this 15th day of September, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 16th day of September, 2021 in the presence of Mr. Sylivanus Mayenga, learned counsel for the Appellant and Mr. Nafikile Mwamboma, learned counsel for the Respondent is hereby certified as a true copy of the original.



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DEPUTY REGISTRAR
COURT OF APPEAL