IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KITUSI, J.A., And MASHAKA, J.A.)

CIVIL APPLICATION NO. 578/01 OF 2021

FABRICE EZAOVI ..... APPLICANT

VERSUS

KOBIL TANZANIA LIMITED ..... RESPONDENT
(Application for review of the Judgment of the Court of Appeal of Tanzania at Dar es Salaam)

(Mwambegele, Kitusi, And Kairo, JJ.A)

Dated the 16th day of September, 2021

In

Civil Appeal No. 134 of 2017

.....

RULING OF THE COURT

29th March & 5th April, 2023

NDIKA, J.A.:

The applicant, Fabrice Ezaovi, seeks a review of the judgment of the Court dated 16th September, 2017 in Civil Appeal No. 134 of 2017. In essence, he faults the said judgment pursuant to rule 66 (1) (a) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") on the ground that it is based on two manifest errors on the face of the record resulting in miscarriage of justice. To elaborate the said ground, Mr. Stephen Mosha, learned counsel for the applicant, swore an affidavit. Opposing the

application, the respondent lodged an affidavit in reply sworn by Mr. Sylivatus Sylivanus Mayenga, learned counsel.

To appreciate the context in which this matter has arisen, we provide a brief background to the dispute as summarized in the impugned judgment.

The applicant, a French citizen, was the Managing Director of the respondent, Kobil Tanzania Limited, until his resignation on 5th June, 2012. Following the resignation, he instituted a constructive termination dispute before the Commission for Mediation and Arbitration (henceforth "the CMA") claiming that the respondent, through her conduct, forced him to resign. On that basis, he sought the following reliefs: remuneration for thirty-six months as compensation for unfair termination, payment of salaries in lieu of notice, payment for leave earned, severance pay and allowance for transportation to the place of recruitment.

It was the applicant's case before the CMA that his employer raised allegations of fraud against him after he had declined her order to retrench 60% of the staff. Without conducting a proper inquiry into the allegations, the respondent went on to terminate his monthly salary standing at TZS. 23,000,000.00 and changed the management system. According to him, he

could not put up with the respondent's conduct as the working conditions became intolerable. Thus, he had no option but to resign.

Having heard evidence and arguments by the parties, the CMA upheld the claim, holding that the applicant's resignation amounted to constructive dismissal by the respondent. Consequently, the CMA awarded the applicant twelve months' remuneration, which amounted to TZS. 276,000,000.00 as compensation, TZS. 23,000,000.00 being one month's salary in lieu of notice, and TZS. 51,750,000.00 as severance pay for the nine years of service making a total of TZS. 350,750,000.00.

The respondent vainly challenged the CMA's award in the Labour Division of the High Court, hence her further appeal to this Court vide Civil Appeal No. 134 of 2017. In its judgment dated 16th September, 2017 the subject of the present application for review, the Court took the view that the appeal turned on two questions: one, whether the applicant was constructively dismissed; and two, whether the High Court rightly upheld the award.

In determining the first issue, the Court referred to rule 7 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007

(henceforth "the Code of Good Practice") as the first port of call. The said rule encapsulates the concept of constructive dismissal by stating that an employee's resignation amounts to forced resignation or constructive termination where an employer makes employment intolerable.

The Court, then, noted that at the time there was no precedent of its own on the concept but acknowledged that nascent jurisprudence on the issue was developing in the Labour Division of the High Court relying on South African precedents as evidenced by two decisions: **Katavi Resort v. Munirah J. Rashid** [2013] LCCD 161; and **Girango Security Group v. Rajabu Masudi Nzige**, Labour Revision No. 164 of 2013 (unreported). The Court considered the two decisions along with several South African decisions notably **HC Heat Exchangers (Pty) Ltd v. Victor J L De Araujo & 2 Others**, Case No: JR 155/16; **Solid Doors (Pty) Ltd v. Commissioner Theron and Others** (2004) 25 ID 2337 (LAC); and **Solidarity on behalf of Van Tonder v. Armaments Corporation of SA (SSOC) Ltd and Others** (2019) 40 IU 1539 (LAC). Ultimately, it approved the exposition of the law on the matter in **Katavi Resort** (*supra*) and **Girango Security Group** (*supra*), which it expounded as follows:

"... 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?"

Having dealt with the first question above, the Court turned to the second question underlining that the issue must be determined objectively, not subjectively and that the duty to prove the objectivity of intolerability rests on the employee. To buttress that stance, the Court quoted with approval a holding in **HC Heat Exchangers** (*supra*), at para 50, that:

"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."

Briefly, the Court answered questions 2 to 5 in the negative and proceeded to allow the appeal as it found the alleged constructive dismissal unproved. For ease of reference, we excerpt the relevant part of the judgment hereunder:

"... 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."

At the hearing of the matter, the parties were represented by the same learned counsel who appeared at the hearing of the appeal. These were Messrs. Stephen Mosha and Sylivatus Sylivanus Mayenga, for the applicant and respondent respectively.

As hinted earlier, the applicant contends that the judgment sought to be reviewed contains manifest errors that resulted in injustice. The cited errors are as follows:

1. *That, while relying on a foreign decision in **HC Heat Exchangers** (supra), the Court wrongly placed the onus of proving intolerability on the applicant contrary to Tanzania's labour law, which clearly and specifically places the burden on the employer to prove fairness of any termination and that the error resulted in miscarriage of justice.*
2. *That, the Court misapprehended the facts of the case and the law resulting in the shifting of the onus of proof on the shoulders of the applicant contrary to the law.*

Submitting on the above grounds, Mr. Mosha essentially argues that the Court wrongly shifted the onus of proving intolerability to the applicant. He was unwavering that the South African precedents relied upon by the Court on the matter were inapplicable because section 37 (1) and (2) of the Employment and Labour Relations Act (henceforth "the Act") clearly imposes

the burden on the employer to prove substantive and procedural fairness of any termination of employment. To bolster his argument, he refers to **National Microfinance Bank v. Victor Modest Banda**, Civil Appeal No. 29 of 2018; and **National Microfinance Bank v. Leila Mringo & 2 Others**, Civil Appeal No. 30 of 2018 (both unreported) for the proposition that where a local statute is clear on a particular legal standpoint, there is no need to rely upon authorities from foreign jurisdictions offering a contradictory position. Further reference is made to **OTTU on Behalf of P.L. Assenga & 106 Others v. AMI (Tanzania) Limited**, Civil Application No. 20 of 2014 (unreported) for the position that the public interest in finality of litigation will not preclude the exceptional step of reviewing or rehearing an issue when the court has a good reason to consider that in its earlier judgment it proceeded on a misapprehension as to the facts or the law.

Replying, Mr. Mayenga supports the impugned judgement, arguing that the Court rightly held that the applicant had the onus to establish the alleged intolerability. Without much elaboration, he contends that section 37 of the Act is inapplicable to claim of constructive dismissal. In support of his argument, he cites **Interbest Investment Company Limited v.**

Standard Chartered Bank (T) Limited, Civil Application No. 523/01 of 2018; and **Jackson Godwin v. Republic**, Criminal Application No. 68/04 of 2016 (both unreported).

In a very brief rejoinder, Mr. Mosha maintains that section 37 of the Act applies to claims of constructive dismissal and that the foreign precedents relied on in the impugned decision were irrelevant.

It is logical and convenient, as a starting point, to state that the Court is empowered under section 4 (4) of the Appellate Jurisdiction Act, Cap. 141 to review its decisions to correct certain errors. The said power is exercisable only upon any one of the five grounds stipulated by rule 66 (1) of the Rules. The instant case, as stated earlier, is predicated on the contention under rule 66 (1) (a) that the impugned judgment is based on two manifest errors on the face of the record resulting in injustice.

What does the phrase *"a manifest error on the face of record resulting in miscarriage of justice"* entail? It is an issue we have confronted on many occasions. In **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R. 218 at 225, we examined several authorities on the matter and adopted from

Mulla on the Code of Civil Procedure (14 Ed), at pages 2335 – 2336, the following abridged description of that phrase:

> *"An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is,* ***an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivabiy be two opinions:*** *State of Gujarat v. Consumer Education and Research Centre (1981) AIR GUJ 223] ...* ***Where the judgment did not effectively deal with or determine an important issue in the case, it can be reviewed on the ground of error apparent on the face of the record*** *[Basselios v. Athanasius (1955) 1 SCR 520] ... But it is no ground for review that the judgment proceeds on an incorrect exposition of the iaw [Chhajju Ram v. Neki (1922) 3 Lah. 127]. A mere error of law is not a ground for review under this rule. That a decision is erroneous in iaw is no ground for ordering review: Utsaba v. Kandhuni (1973) AIR Ori. 94. It must further be an error apparent on the face of the record. The line of demarcation between an error simpliciter, and an error on the face of the record*

> *may sometimes be thin.* ***It can be said of an error that it is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established*** *[Thungabhadra Industries Ltd v. State of Andhra Pradesh (1964) SC 1372].* [Emphasis added]

See also **Mashaka Henry v. Republic,** Criminal Application No. 2 of 2012; **P.9219 Abdon Edward Rwegasira v. The Judge Advocate General,** Criminal Application No. 5 of 2011; and **Jayantkumar Chandubhai Patel and 3 Others v. The Attorney General and 2 Others**, Civil Application No. 160 of 2016 (all unreported).

Guided by the settled position in **Chandrakant Joshubhai Patel** (*supra*), we ask ourselves, in the beginning, whether the Court was wrong in holding that the applicant, having claimed that he was forced to resign from his employment, had the onus to establish the alleged intolerability. To resolve that issue, we should first address Mr. Mosha's submission that section 37 (1) and (2) of the Act applies to all cases of unfair termination including claims of constructive termination. For ease of reference, we extract the said provision thus:

> ***37.***-*(1) It shall be unlawful for* ***an employer to terminate the employment of an employee unfairly.***
>
> *(2) A termination of employment by an employer* ***is unfair if the employer fails to prove-***
>
> *(a) that the reason for the termination is valid;*
>
> *(b) that the reason is a fair reason-*
>
> *(i)related to the employee's conduct, capacity or compatibility; or*
>
> *(ii) based on the operational requirements of the employer, and*
>
> *(c) that the employment was terminated in accordance with a fair procedure."*

We wish to observe that section 37 (1) and (2) above provides expressly that it regulates *"termination of employment by an employer."* While subsection (1) above forbids unfair termination of employment by an employer, subsection (2) imposes on the employer the burden to prove substantive and procedural fairness of termination of employment. To discharge that burden, the employer must demonstrate that the termination was for a valid and fair reason and that it was arrived at in accordance with a fair procedure. In the present case, the applicant was not dismissed; he

resigned from his employment and later cited intolerability of his employer's conduct as the reason.

We are aware that section 36 (a) (ii) of the Act defines the phrase *"termination of employment"* to include *"a termination by an employee because the employer made continued employment intolerable for the employee".* Nonetheless, in its ordinary and natural meaning section 37 (1) and (2) above does not cover a *"termination by an employee."* What's more, the onus of proof on the employer under the said provisions is clearly issue-specific. As already stated, these provisions require the employer to establish by evidence substantive and procedural fairness of the termination of employment, which are obviously non-issues in any case claiming forced resignation by an employee. Put differently, in any case alleging unfair employer-instigated resignation by the employee, what is required to be proved is intolerability of the conduct by the employer as the key factor and that the onus is not on the employer to establish, in the first place, that he did not create intolerable conditions of work. What the employer is required to prove under section 37 (1) and (2) of the Act in an ordinary unfair dismissal claim is clearly irrelevant to a claim of constructive dismissal.

As already pointed out, constructive dismissal is governed by rule 7 of the Code of Good Practice. For clarity, we extract its provisions in full as follows:

> *"7.-(1)* ***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****.*
> *(2) Subject to sub-rule (1), the following circumstances may be considered as sufficient reasons to justify a forced resignation or constructive termination-*
> *(a) sexual harassment or the failure to protect an employee from sexual harassment; and*
> *(b) if an employee has been unfairly dealt with, provided that the employee has utilized the available mechanisms to deal with grievances unless there are good reasons for not doing so.*
> *(3)* ***Where it is established that the employer made employment intolerable as a result of resignation of employee, it shall be legally regarded as termination of employment by the employer.****"*[Emphasis added]

In our considered view, rule 7 (1) above, read within the purview of section 36 (a) (ii) of the Act, creates the concept of constructive dismissal in the sense that the unjustified conduct of an employer that drives an employer to leave his employment is deemed as a dismissal even though, as a matter of fact, it is the employee who resigns. In **Murray v. Ministry of Defence** [2008] 3 All SA 66, the Supreme Court of Appeal of South Africa aptly observed, at paragraph 8, that:

> *"[8] The term used in English law, 'constructive dismissal' (where 'constructive' signifies something the law deems to exist for reasons of fairness and justice, such as notice, knowledge, trust, desertion), has become well-established in our law. In employment law, constructive dismissal represents victory for substance over form. Its essence is that although the employee resigns, the causal responsibility for the termination is recognised as the employer's unacceptable conduct, and the latter therefore remains responsible for the consequences."*

Sub-rule (2) of rule 7 above stipulates that circumstances that may be considered to justify a forced resignation include sexual harassment or

failure to protect an employee from sexual harassment. Another justifiable circumstance is an employer's unfair dealing with an employee subject to the employee having utilized the available mechanisms to deal with grievances unless there are good reasons for not doing so.

Most significantly, because sub-rule (3) of rule 7 above stipulates that an employee's resignation shall only be legally regarded as termination of employment by the employer *"where it is established that the employer made employment intolerable as a result of resignation of employee",* it implicitly places the burden of proof on the employee, not the employer. It seems to us absurd if the employer in a constructive dismissal claim was to be required, in the first place, to prove the negative that her conduct was not intolerable without having the benefit of hearing the employee's evidence in full on the claim.

We recall that Mr. Mosha bewailed the Court's reliance on the South African precedents and cited our decisions in **Modest Banda** (*supra*) and **Leila Mringo** (*supra*) in which we discouraged such reliance where local statute governing the issue is self-sufficient. We have read the two decisions. With respect, they do not advance Mr. Mosha's submission. In the first place,

the South African precedents were relied upon because the legal regime governing employment and labour relations between our two jurisdictions share common heritage. Certainly, our two jurisdictions have codified the concept of constructive dismissal based upon its common law origin as a repudiatory breach by the employer of the contract of employment. Apart from the fact that citation of foreign decisions would not qualify as being a ground of review, Mr. Mosha's argument on this issue is surprising because he also cited five foreign decisions as shown at pages 12 and 13 of the impugned judgment. Secondly, as we have demonstrated above, the stance in the authorities we relied upon is not inconsistent with any local statutory provision. Finally, we are also aware that the same position on the onus of proof of intolerability applies in Kenya whose labour law regime also shares many commonalities with ours – see the decision of the Court of Appeal of Kenya in **Coca Cola East & Central Africa Limited v. Maria Kagai Ligaga** [2015] eKLR.

To recap, we have found it settled that while under section 37 (1) and (2) of the Act the duty in establishing that termination is substantively and procedurally fair lies on the employer, constructive dismissal imposes on the employee the onus to demonstrate that his resignation was justified.

In conclusion, we hold, as we must, that the applicant has failed to demonstrate that the impugned judgment contains on its face a manifest error. In the event, we dismiss the application. Given the nature of this dispute, we make no order as to costs.

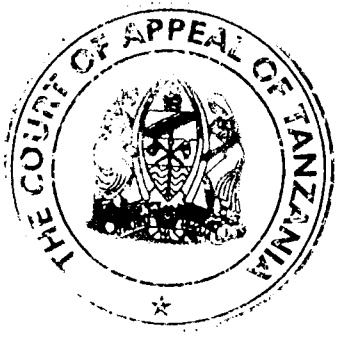
DATED at **DAR ES SALAAM** this 4th day of April, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered this 5th day of April, 2023 in the presence of Mr. Kaizer Msosa for the applicant, also holding brief of Sylivatus Mayenga, learned counsel for the Respondent is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL