IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

CONSOLIDATED LABOUR REVISIONS NOS. 29 OF 2021 & 31 OF 2021

(Arising from Labour Dispute No. CMA/GTA/63/2019)

GEITA GOLD MINING LIMITED.....APPLICANT

VERSUS

EMMANUEL IHONDE.....RESPONDENT

AND

EMMANUEL IHONDE.....APPLICANT

VERSUS

GEITA GOLD MINING LIMITED.....RESPONDENT

JUDGMENT

19th July, & 27th Sept. 2022

DYANSOBERA, J.:

This judgment is on two consolidated applications in which the parties are litigating under different capacities. According to the record, the applicant in Labour Revision No. 29 of 2021 is Geita Gold Mining Limited and the respondent is Emmanuel Ihonde while in Labour Revision No. 31 of 2021 Emmanuel Ihonde is the applicant and the respondent is Geita Gold Mining Limited.

The two applications have been consolidated because they owe their origin in Labour Dispute No. **CMA/GTA/63/2019.** For clarity and to avoid confusion in this judgment, I will be referring the parties, respectively, as the employee and employer.

The background to the present application is, briefly, the following. The employee was employed by the employer as data specialist system applicant and products in the department of Engineering and Liability on 25th October, 2015. He was elevated to the post of Sap Support Analyst. While at work, he applied for a job for SAP-ERP Administration and was given an offer by ALAF (T) Company at a monthly salary of

6.1m/-, transport allowance of 0.6m/- and meal allowance of 0.1m/- per month. The employee decided to write a resignation letter. It would appear, the employer wanted to retain the employee in the employment and both embarked on negotiations whereby the parties agreed that the employee would be earning 4.5m/- per month and the employer agreed to offer the employee a new post of Sap Support Analyst. However, despite the negotiations and agreement, the employer initiated disciplinary proceedings against the employee which led to the formation of Disciplinary Committee. At the end of the hearing of the disciplinary proceedings, the

Disciplinary Committee found the charges against the employee proved and it recommended a penalty of termination. The employee appealed to the Appellate Body which endorsed the guilty finding of the Disciplinary Committee but vacated the imposed penalty with some conditions. The employee was not satisfied with the decision of the Appellate Authority on the grounds that the imposed conditions were tight and went to the root of the employment.

The employee filed a labour dispute before the Commission for Mediation and Arbitration at Geita claiming that he was unfairly terminated. After the mediation failed, the matter went to the arbitration. In its Award, the CMA found that the termination was not constructive and the procedures were followed. However, it found that there was unfair labour practice by the employer. The latter was ordered to compensate the employee ten months' salary.

This award aggrieved both parties hence these two labour revisions. According to Labour Revision No. 27 of 2021 filed by the employer, it is indicated under paragraph 14 of the employer's affidavit sworn by Neema Josephat, the employer's legal counsel who represented her at the CMA, that the legal issues for determination are the following: -

1. Whether the Award is unlawful, illogical and/or irrational
2. Whether the respondent [employee] is entitled to compensation for the alleged unfair labour practice which was not pleaded.
3. To what reliefs are the parties entitled.

With respect to Revision No. 31 of 2021, according to the affidavit filed by the employee on 16th June, 2021, the legal issues arising from the facts of the case and which are detailed under paragraph 14 of the said affidavit are the following: -

a) Whether the arbitrator was correct to hold that the applicant failed to prove the case on constructive termination.
b) Whether the award of pay of 10 basic salary was legally justifiable. Award is unlawful, illogical and/or irrational.

The hearing of these applications for revision was conducted by way of written submissions. I undertake to start with Labour Revision No. 31 of 2021 filed by the employee. Arguing on the first legal issue, that is whether the Arbitrator was correct to hold that the applicant failed to prove the case on constructive termination, learned Counsel for the

employee invited the court to consider whether it was proper for the CMA to find that the reason leading to the employee terminating the employment was not caused by the employer and that the employee failed to prove his assertion.

According to the learned Counsel for the employee, there was arm-twisting by the employer to force the employee resign as evidenced by the testimonies of DW 1 and DW 2 and supported by exhibit D8 and that this went to the root of the contract and further that even the Arbitrator admitted that there were unfair labour practices. Dilating his argument, Counsel for the employee referred this court to the case of **Mrisho Omary and Juma Shomari v. Raheem Nathoo**, Civil Appeal No. 354 of 2019 where the Court of Appeal detailed the factors necessary to prove constructive termination. It was submitted on part of the employee that the above laid down factors were proved to the required standard and the employee was entitled to compensation as stipulated under Section 40 (1) (c) of the Employment and Labour Relations Act, that is compensation of not less than twelve months' remuneration.

Submitting for the employer in relation to ground number one, Counsel for the employer, adopting the affidavit of Neema Ngodagula,

argued that the Arbitrator erred in ordering reliefs under Section 40 (1) of the ELRA and reg. 32 (5) of the Labour Institutions (Mediation and Arbitration Guidelines), GN No. 67 of 2004, while his reasoning contemplates that there is no unfair termination, he concluded that the procedure was followed and there was no constructive termination as alleged by the respondent in the CMA F. 1. However, he contradicted that finding by holding that the employer was guilty of unfair labour practice which was not part of the issues raised and there is no evidence on record to support that assertion. The issue of unfair labour practice was not raised in the Complaint form or during the hearing. It was raised *suo moto* and this denied the applicant [employer] of an opportunity to defend herself. There was a denial of the right to be heard. Case law: **Kumwandumi Ndemfoo Ndossi v. Mtei Bus Services Ltd**, CAT at Arusha, Civil Appeal No. 257 of 2018

I think the law on this aspect is clear. Section 40 (1) of the Employment and Labour Relations Act provides thus:-

> 40. -(1) Where an arbitrator or Labour Court *finds a termination is unfair*, the arbitrator or Court may order the employer –

(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or

(b) to re-engage the employee on any terms that the arbitrator or Court may decide; or

(c) to pay compensation to the employee of not less than twelve months remuneration.

(2) An order for compensation made under this section shall be in addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement.

(3) Where an order of reinstatement or reengagement is made by an arbitrator or Court and the employer decides not to reinstate or re-engage the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment.

Section 40 (1)(c) of the Act is clear that where the arbitrator or labour court finds that termination is unfair, the arbitrator or court may order the employer to pay compensation to the employee of not less than twelve months remuneration. Here the word used is 'May' which imports discretion (section 53 (1) of the Interpretation of Laws Act, Cap 1 R.E.2019).

Section 88 (8) of the Act empowers the arbitrator to make an appropriate award depending on the circumstances. This implies discretion.

Further, rule 32 (5) (a) of the Mediation and Arbitration Guidelines Rules (Labour Institutions (Mediation and Arbitration Guidelines, Rules, 2007 GN No. 67 of 2007)) provide discretionary powers in awarding compensation based on circumstanes of each case. This means that the Arbitrator may award compensation of more or less than twelve months, depending on the circumstances of the case. Cases on this aspect abound. For instance, this court (Hon. Rweyemamu J.), in the case of **Deus Wambura v. Mtibwa Sugar Estates Limited**, Revision No. 3 of 2014 had the following to observe:-

'Under the law, an arbitrator has discretion to award or not to award any of the remedies provided under section 40 (1) (a) or (b) or (c)

following a finding of unfair termination. It is my view that, with such discretion, an arbitrator can award compensation which is more or less than twelve months, provided that he has justifiable grounds for so doing. Grounds such as enumerated under rule 32 (5) a to f of the GN No. 67 of 2007.

Likewise, the court (Mipawa, J.) in **Michael Kirobe Mwita v. A.A Drilling Manager**, Revision No. 194 of 2013 stated:-

> 'In my opinion, the learned arbitrator trekked in the correct avenue when he ordered the compensation of six months, he had discretion to order compensation of less than twelve months remumeration where appropriate'.

The above legal position leaves no doubt that a proper interpretation of Section 40 (1)(c) of the Emplyoment and Labour Relations Act gives the Arbitrator or the Court discretion to award compensation of more or less than twelve months in an appropriate case. The issue arising for determination is whether the Arbitrator, in the instant case, properly exercised the discretion when it ordered the employee to get compensation of ten months. I think not.

As correctly submitted by learned Counsel for the employer, the Arbitrator had found that the termination was fair. In that case, the award of compensation could not arise. As the law clearly stipulates, the compensation under Section 40 (1)(c) of the Act is awardable to an employee only **where an arbitrator or Labour Court finds a termination is unfair**

(emphasis supplied)

The second ground raised by the employee under paragraph 14 of his affidavit filed on 16th day of June, 2021 in Revision No. 31 of 2021 that is whether the Award of pay of 10 basic salary was legally justifiable is answered in the negative.

This also disposes of ground No. 14.2 of the employer's affidavit filed on 15th June, 2021 on whether the respondent [employer] is entitled compensation for the alleged unfair labour practice.

The remaining issue for determination is the propriety of the Arbitrator's Award, that is whether the Arbitratrator was correct to hold that the applicant failed to prove the case on constructive termination, as alleged by the employee under paragraph 14 (a) of his affidavit and

whether the Award is unlawful, illogical and/or irrational as claimed by the employer under paragraph 14.1 of her affidavit affirmed by Neema Josephat.

Having considered the submissions of learned Advocates on these grounds, the starting point on the Referral of a Dispute to the CMA-CMA F.1 filed by the employee on 19.10.2015. According to nature of dispute-termination of employment, the brief outline of any special features/additional information the commission needed to note, the employee was clear tha:-

> 'the termination letter is out of reality that I am opposing the punishment which was imposed by the employer hence termination is both direct and constructively'.

There is no dispute that the employee's labour dispute was based on constructive termination; the employee's insertion of the words 'direct termination' was, to say the least, unfortunate as there is in law no such thing as direct termination. This is clear under section 36 of the Act and the Arbitrator ought to have been aware of this glaring fact. Likewise, the Arbitrator admitted the presence of constructive termination by the employer where at p. 2 of the Award found as

established that the contract of employment was terminated on 11.10.2019 on the ground of: -

> **'Contract of employment with the company has come to an end at the instance of the employee',** according to what was stated in the letter of termination. Indeed, the employer tendered in evidence the letter of termination and was admitted in the CMA as exhibit D 10. The Arbitrator admitted that what the employee was claiming was constructive termination as, according to the Arbitrator, *'Mlalamikaji hakuridhishwa na sababu za hiyo hivyo aliwasilisha rufaa kudai ameachishwa kazi isivyo halali* ***on ground of constructive termination'***

The finding by the Arbitrator that the employer had failed to prove constructive termination was partly due to his misdirection on what exactly was before him. He treated the issue as if it was on unfair termination rather than being on constructive termination, the matter which was before him for determination. The record is clear that the issues framed for determination was the following:-

1. Iwapo mlalamikiwa alikuwa na sababu halali na msingi katika kusitisha ajira ya mlalamikaji

2. Iwapo mlalamikiwa alifuata utaratibu halali katika kusitisha ajira ya mlalamikaji
3. Nini haki stahiki kwa kila upande.

Clearly, this was a misdirection on part of the Arbitrator as, apart from framing issues which in no way related to constructive termination, a matter which was before him for determination, he embarked on discussing on the matter of unfair termination which was not pleaded by the employee and this resulted into a wrong finding that the employee had failed to prove constructive termination.

Now, the question is whether the employee proved constructive termination.

Constructive termination occurs when an employee resigns as a result of employer creating a hostile work environment. The law clearly spells it under section 36 (a) (ii) of the Employment and Labour Relations Act. It is provided thereunder that:

36. For purposes of this Sub-Part,

(a) "termination of employment" includes-

(ii) a termination by an employee because the employer made continued employment intolerable for the employee;

It would appear that at the centre of the controversy is the employee searching for a new job. If that is the case, it is naked truth that there is nothing to stop an employee from having another job elsewhere. As a matter of fact, the employer was alive to this fact when, speaking through her first witness one Joseph Saguma (DW 1) when cross examined by learned Counsel for the employee, had the following to say, at page 13 of the CMA typed proceedings: -

XXL-Mna sera za kuzuia watu wasiondoke pale?

DW 1: Hatuna hizo sera.

Smart employers, as was Geita Gold Mining Limited, knew that she won't be able to retain his employees forever. An employee searching for another job already has one foot out the door and it is therefore difficult to reel him back in as he has already made his mind. Mindful of this glaring reality, the employer sought to retain the employee by promoting the employer and increasing his monthly salary pay to 4.5m/-. However, without making any investigation (as no investigation report was proffered

before the Disciplinary Committee as well as before the CMA), the employer initiated the disciplinary proceedings against the employee.

In proof of constructive termination, the burden of proof rests on the employee. The said employee is duty bound to prove the factors necessary to establish constructive termination. What are those factors? This court, in the case of **Katavi Resort v. Munirah J. Rashid** [2013] LCCD 161, established 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).

In the case under consideration, it was established in evidence that the employee wrote to the employer intimating to her that he was resigning. This fact is clearly indicated at page 29 of the proceedings before the CMA where the employee is recorded to have stated:

'Niliandika barua ya kure-resign nikampelekea'

As to whether the working relationship became so unbearable that the employee could not fulfil his obligation to work, the employee was clear at pages 32 to 33 of the CMA typed proceedings that:-

'matokeo ya appeal yalirudi kwa kupewa term kwa masharti .moja kurudi kazini kwa masharti mshahara kurudi kuwa ule wa kwanza 3.3m/-,, pili comprehensive final written warning, tatu kurudisha hela zote zilizotokana na ongezeko la mshahara... Niliona sikutendewa haki sikuyakubali kwangu nilichukulia kama constructive termination yalinipa wakati mgumu kwenye mazingira ya kazi lakini pia mzingira ya kiuchumi.... Kiuchumi nilikuwa na mkopo uliotokana na mshahara mpya wa 4.5m/- kurudi maana yake ningerudi kwenye 3.3m/-'.

It was clearly established by the employee that the employer created an intolerable situation in that after the Appeal Body vacated the penalty that had been imposed by the disciplinary committee. This fact has been understandably elaborated by the Arbitrator at page 4 of the Award where it is recorded thus:-

'Baada ya hapo mlalamikaji alikata rufaa Kielelezo D 7 akieleza sababu za kuroridhika na maamuzi ya kikao cha nidhamu, Managing Director (MD) alipopata rufaa ya mlalamikaji na alipoipitia alitoa majibu ambayo ni reply to your appeal ambayo ni kielezo D8, na katika majibu yake alitoa masharti ya mlalamikaji kurejea kazini

hivyo adhabu yake ilipunguzwa na mshahara wake ulilshushwa na mlalamikaji alitakiwa kuamua aidha kukubaliana na majibu ya rufaa yake ama adhabu yake ya kuachishwa kazi ibakie kama hakubaliani na masharti ya D8. Mlalamikaji hakukubalian na masharti ya D8 alisaini kutokubaliana na D8..'

On the employee's failure to prove constructive termination, the Arbitrator reasoned at p. 18 of the Award as follows:-

'ushahidi unaonyesha mchakato wa usikilizaji shauri la nidhamu ulifanyika hadi kwenye hatua ya majibu ya rufaa pamoja na kuwa majibu yalikuwa na mkanganyiko hasa kwenye masharti ya kurejea kazini.'

With respect, the Arbitrator went off tangent. The issue was not, in my view, whether the employer followed the proper procedure but whether the employer created an intolerable situation. Undeniably, the Arbitrator was alive on the employer's creation of intolerable situation when he observed at p. 18 of the Award that:-

'Lakini pamoja na hilo, Tume inaona mlalamikiwa naye hakuwa msafi kwenye kuhitimisha ajira ya mlalamikaji, kuna baadhi ya ya matukio yanoyoonyesha kukiuka msingi wa mahusiano ya kiajira hasa kwenye masuala ya fair labour practice...'

It should be noted that constructive termination is based on contract law principle while unfair termination is based on the statute.

According to the evidence, the intolerable situation was likely to continue for a period that justified termination of the relationship by the employee because, as demonstrated above, the employee was forced to implement the imposed conditions or else the former penalty of termination would ensue. The employee declined to agree to those conditions. This could not in my view, amount to termination by the employer because, the former penalty of employment had already been vacated by the same employer through the Managing Director. The employer could not therefore eat a cake and at the same time have it. The employee's former letter of resignation had not been rescinded or cancelled. In such circumstances, the termination of the employment contract was the only reasonable option the employee had. The employer did not suggest any.

With the above analysis, I am satisfied and hereby find that the employee proved on balance of probabililty that he was constructively termination. In answering the employee's legal issue in paragraph 14 (a) of the applicant's affidavit, I hold that the Arbitrator was not correct to

hold that the applicant (employee) failed to prove the case on constructive termination. This answers also the employer's issue for determination under paragraph 14.1 of the affidavit sworn by Ms Neema Josephat filed on 15. 6.2021 that the Award was illogical.

In summary, as far as the employee's legal issue under paragraph 14 (b) of his affidavit and the employer's legal issue number 14.2 in the affidavit of Neema Josephat are concerned, it is my finding that although the Arbitrator had jurisdiction to award such compensation, the award was, in the circumstances of the case, illegally. Likewise, I find that the employer has proved that he was constructively unfairly terminated.

The upshot of this is that the Award of the Commission of Mediation and Arbitration is revised. The same is set aside to the extent explained, that is the award of payment of ten months salary is set aside and the employee is awarded compensation of 12 months' remuneration and other legal entitlements according to law.

The appeals are determined to that extent.

Order accordingly.

W.P.Dyansobera
Judge
27.9.2022

This judgment is delivered at Mwanza under my hand and the seal of this Court on this 27th day of September, 2022 in the presence of Mr. Gregory Lugaila for the employer and holding brief for Mr. Erick Lutehangwa, learned counsel for the employee.

W.P.Dyansobera
Judge