

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO. 538 OF 2016**

**BETWEEN**

**MD NATIONAL BANK OF COMMERCE ..... APPLICANT**

**VERSUS**

**EMMANUEL NTOBI ..... RESPONDENT**

**JUDGMENT**

**Date of Last Order 17/07/2018**

**Date of Judgment 17/08/2018**

**NYERERE, J.**

Applicant/ **MD NATIONAL BANK OF COMMERCE** filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (CMA) which was delivered on 03/11/2016 by Hon. Alfred Massay, Arbitrator in favour of the respondent/ **EMMANUEL NTOBI**.

Facts leading to the present application that; the Complainant applicant was employed by applicant in 2009 as Bank Officer and on 13<sup>th</sup>

January, 2012 he was transferred to the department of Retail Credit. Headquarters, Dar es Salaam. On 8<sup>th</sup> July, 2013 Complainant tendered resignation letter and thereon proceeded to refer a dispute to the CMA.

The CMA entertained the matter and found that there existed intolerable working condition which led the Complainant to resign. In that CMA awarded Complainant twelve month salary compensation, Notice pay and Severance Pay. Such award aggrieved applicant who filed the present application seeking revision of the whole CMA award on nine grounds articulated under paragraph 7 of the supported affidavit for easy of reference I quote them in verbatim;

**a) That the Arbitrator erred by awarding 12 months compensation despite the fact the respondent resigned willfully. Even though the Applicant was taking measures to ensure that the Respondent get alternative new position.**

**b) That the arbitrator erred in law by failing to analyze and scrutinize the evidence brought forward by the applicant.**

- c) That the arbitrator erred in law and in fact in dealing with the matter which was already dismissed for want of prosecution and the respondent had never make an application for restoration. The application made was against a part who was not a part to the case dismissed.**
- d) That the arbitrator erred in law and fact in concluding that the applicant created intolerable working environment to respondent without sufficient evidence to prove that fact.**
- e) That the arbitrator erred in law and fact in concluding that the applicant had right to restructure his business but without affecting employees position**
- f) That the arbitrator erred in law in delivering the award against un existing part and who was not a part at the CMA.**

At the hearing of the application applicant was represented by Mr. Mr. Evod Mushi, Advocate whereas respondent was represented by Mr. Michael Nyambo, Advocate.

Arguing the 1<sup>st</sup> ground for revision Counsel for Applicant submitted that arbitrator erred in law in awarding 12 months salary as compensation despite the fact that the respondent resigned willfully. That there was restructuring within applicants Bank, and the respondent's position was abolished. That there was on going attempts to find respondents alternative position however, respondent frustrated the effort by resigning without giving any reasoning. Further Counsel for Applicant argued respondent admitted when cross examined that, he resigned after getting another job.

Arguing the 2<sup>nd</sup> ground for revision, Counsel for Applicant averred that, it is alleged that there is violation of NBC recruitment Policy, however the policy alleged to have been violated was never produced as evidence by the respondent to prove the violation.

Arguing the 3<sup>rd</sup> ground for revision Counsel for Applicant submitted that arbitrator erred in law in dealing with a matter which was already dismissed for want of prosecution. That the dismissed application was

between Emmanuel Ntobi Vs. The Managing Director NBC LTD. That the dismissal order was set aside on 31<sup>st</sup> March, 2014. However, the restoration order was not proper. Because it was against a party who was not a party to the dismissed case by the CMA. Thus it's the Counsel for Applicant submission that, this application is not proper.

Further Counsel for Applicant argued, arbitrator restored the dismissed application under Section 88(8) of The Employment and Labour Relations Act No. 6/2004, which this Section does not apply at all in such kind of application.

Arguing the 4<sup>th</sup> ground for revision Counsel for Applicant submitted that, the arbitrator erred in law in concluding that the applicant created intolerable working environment without sufficient evidence to prove it. That Rule 7(1) (a) & (b) of GN 42 /2007 is clear on what constitute constructive termination. That it was Counsel for Applicant contention that, respondent ought not to resign and sue the Managing Director but was to refer any grievances he had to the Managing Director.

Arguing the 5<sup>th</sup> ground for revision Counsel for Applicant submitted that, arbitrator erred in law and infact in concluding that the applicant had a right to restructure his business but without affecting employee's positions.

Counsel for Applicant went on to submit, restructuring normally affects employees positions, and that there is evidence in record showing applicant's efforts in finding alternative suitable position for the respondent, further there was no changes to respondents salary and benefits. Counsel for Applicant therefore pray the CMA award to be set aside.

In rebuttal Mr. Michael Nyambo Counsel for respondent on responding to the 1<sup>st</sup> ground argued that respondent resigned due to intolerable working condition caused by the employer/Applicant.

Further arguing that, there is no proof that applicant did restructure his organization. Counsel for respondent proceeded to argue, respondent was threatened with dismissal, after unsuccessful interview, for the position of Retail Credit Officer. That thereafter he was asked to try again in upcoming interviews and job offers, however when the new posts came forth and advertised through Bank Internal Communication, respondent was on his annual leave and could not apply.

That after respondents returned to work, his desk was assigned to another person, and that he was not assigned similar work nor assessed in his performance development.

Submitting in regard to arbitrator erred in dealing with the matter which was dismissed for want of prosecution, Counsel for respondent argues that respondent did file application for restoration in terms of Rule 29(1) (c) of Labour Institutions (Mediation and Arbitration Rules, GN. 64/2007 and that its Ruling was delivered on 6<sup>th</sup> October, 2014. Further the application for restoration had the same parties and CMA records are correct, therefore Counsel for respondent prays this court to up hold the CMA decision.

In rejoinder Mr. Evod Mushi Counsel for Applicant reiterated his submission in Chief, in regard to the restoration of the dismissed application. Further responding to the allegation that there never existed restructuring process in the Bank, and that respondent was forced to apply for the new positions. Counsel for Applicant argued, respondent had to be interviewed to determine alternative suitable position for him.

Further Counsel for Applicant on responding to the argument that respondent was threatened dismissal after failing interview, or when the new posts were advertised respondent was on leave, or respondent's desk was assigned to another person. Counsel for Applicant argued, that there is no evidence to prove any of the allegations. Furthermore he argued that

performance development could not be issued to respondent because the applicant was still looking for alternative position.

In conclusion, Counsel for applicant argued respondent resigned after he got another job, and that respondent was not retrenched when applicant restructured the Bank, therefore prays this application to be allowed and CMA decision to be quashed and set aside.

After careful considered parties lengthy submission, CMA records, Affidavit and Counter affidavit filed in this court, labour laws and practice of this court my decision on the grounds are as hereunder.

It is worth to note that, that the dismissed application was vacated under Rule 28 of Labour Institutions (Mediation and Arbitration Rules, GN. 64/2007 and that Ruling was issued by the CMA. Rule 29 of the Act, provides for condonation, joinder, substitution, variation or setting aside an award, and other applications in terms of these Rules.

In that Ruling it was observed by arbitrator at page 7 of the CMA proceedings that, it was not disputed that the Counsel for the Complainant was attending High Court on the date the dispute was scheduled for hearing, and in that arbitrator was inclined to set aside the dismissal order.



Proceeding with the main application, I find the key issue for determination is whether or not CMA findings that is constructive termination is correct. The law under Rule 7 (1) of the Employment and Labour Relations (Code of Good Practice) Rules GN 42 of 2007 define constructive termination to mean a circumstance:-

“Where an employer makes an employment intolerable which may result to the resignation of the employee that resignation amount to forced or constructive termination.”

The above provision of law was stressed by this Court in the case of **MS TCDC v. Eida Mtalo Labour Revision No. 1/2013 HC Arusha Sub registry** where Hon. Rweyemamu J (As she then was) held that:

“The principle of constructive termination refers to termination by employee because the employer made continued employment intolerable for the employee. The principle cannot be invoked where employee resigns after being charged with misconduct or even to pre-empt the employer misconduct action.”

In order for an Arbitrator or Court to determine the issue of constructive termination the following question are imperatives as held by Hon. Mipawa J. (as he then was) in the case of **Girango Security Group v. Rajabu Masudi Nzige Labour Revision No 164/2013 (Unreported)** that:-

- i) Did the employee intend to bring the employment relationship to an end?
- ii) Had the working relationship become so unbearable, objectively speaking, that the employee could not fulfill his obligation to work?
- iii) Did the employer create the intolerable situation?
- iv) Was the intolerable situation likely to continue for a period that justified termination of the relationship by the employee?
- v) Was the termination of the employment contract the only reasonable option open to the employee?

And one essential element was added in the case of **Murray v. Minister of Defense (383/2006)[2008] ZASCA 44** where South African Supreme Court held that; **the onus rest on employee to prove that the resignation was not voluntary, and that it was not intended to terminate the employment relationship.**

In the present case it was the Arbitrator's observation at page 7 of the CMA award that, applicant conducted restructuring exercise, and the process was not transparent, it did not involve the employees that would be affected by it, further arbitrator observed, the applicant's action of requiring the respondent to apply for a job positions whose deadline had lapsed was not justifiable. In that the arbitrator rejected the applicants

contention that, respondent could still apply for jobs, whose deadline has lapsed, that the applicants conduct made respondent idle and diminishing his professional carrier.

Further the arbitrator observed, he is convinced the working conditions were intolerable, leading to respondent to resign, constituting constructive termination. I likewise, of the view, that respondents reason for resigning was due to the applicant's intention to end the employment relationship with the respondent, and the working relationship become intolerable, respondent was unable to carry on with work obligation, thus creating intolerable situation, and the situation was likely to continue for a period which was unknown, and the only reasonable option open to the employee was to resign.

Having established what the requirements are for a constructive termination, it is necessary to make the observation, whether the employee was constructively terminated.


Now the enquiry is whether the employer, conducted himself in a manner likely to destroy the relationship of employer and employee. The facts adduced and the supported evidence placed before me shows that the Respondent was appointed as a Credit Administrator on 13.01.2012,

position which was advertised via circular No. 426/2011 dated 18.11.2011 Exhibit P1 and on 10. 12. 2012 his position as Credit Administrator was removed, due to the restructuring of Retail Credit Department that took place in June, 2012 so as to align with Barclays Bank Structures Exhibit 3. In that, respondent was interviewed for a position in the Credit department; however the interview was unsuccessful (Exhibit 2).

Further respondent testified he was threatened with termination, after he failed the interview; however there is no evidence to support that allegation.

Considering the above, I am of the view, the applicant ought to have accommodated respondent, by finding suitable alternative work for him within the Organization, thus I am convinced applicant acted in a manner, likely to destroy the employment relationship with the respondent, and in such a way that respondent could not tolerate thus proving constructive termination. Consequently, concurring with the arbitrator's decision that the respondent was constructively terminated, therefore the CMA decision is upheld.

It is so ordered.

  
**A.C. Nyerere**  
**JUDGE**  
**17/08/2018**

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**Date: 17/08/2018**

Coram: Hon. \$. Simfukwe, DR.

Applicant:

For Applicant: Mr. Priscus Richard advocate

Respondent:

For Respondent: Mr. Priscus advocate holding brief for Mr. Nyambo  
advocate

C.C. J. Kalolo

**Court:** Judgement delivered in chamber this 17<sup>th</sup> day of August, 2018  
in the presence of Mr. Priscus Richard learned Counsel for the  
Applicant, who was also holding brief for Mr. Nyambo learned  
Counsel for the Respondent.

  
**S. Simfukwe**  
**DEPUTY REGISTRAR**  
**17/08/2018**