

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION NO. 367 OF 2019

BETWEEN

TIB DEVELOPMENT BANK LIMITED..... APPLICANT

VERSUS

ROMAN MASUMBUKO RESPONDENT

JUDGMENT

Date of Last Order: 25/06/2020

Date of Judgment: 18/09/2020

About, J.

Aggrieved by the award of the Commission of Mediation and Arbitration [herein to be referred as CMA] in the Labour Dispute No. CMA/DSM/KIN/R.10/15/532 dated 20/03/2019 which was in favour of the respondent **ROMAN MASUMBUKO**, the applicant **TIB DEVELOPMENT BANK LIMITED** filed this application. The applicant moved the Court to revise the award on the following issues:-

- i. Whether it was proper for the Arbitrator to hold that, there was constructive termination basing on the fact that the

working environment was toxic while the respondent have been working for the applicant up and until he left for master's studies abroad.

- ii. Whether it was proper for the Arbitrator to hold that, the applicant's act of not paying salary for the month of January 2015 to the respondent who did not resume back to work after his leave period requested had lapsed since September 2014 amounts to constructive termination.
- iii. Whether it was proper for the Arbitrator to grant reliefs, which were not sought by the respondent at CMA Referral Form No. 1.
- iv. Whether it was lawful to award twenty months' salary to the respondent, Tshs. 96,431,928/= while it was the respondent who terminated the contract of employment and not the applicant.

The respondent vehemently challenged the application through the counter affidavit of Menson Ngahatilwa, applicant's Principal Officer.

The brief background of the dispute is that, on 05th November, 2009 the respondent was employed by the applicant as a Legal Office

and his contract of employment started to run from 01/01/2010. On 15/07/2010 the respondent was confirmed in his employment. He underwent several promotions and salary increments and his last post held on his resignation was Senior Legal Officer. In the course of his employment the respondent requested for study leave and sponsorship from the applicant which was initially refused. However after appeal the study leave was granted to the respondent for the period of 12 months started from September, 2013 and ended on September 2014.

After completion of his studies the respondent per sued the applicant to modify terms of the contract and provide him with conducive working environment. After several follow ups without the applicant's response the respondent decided to resign from his employment on 02/02/2015 (Exhibit TIB2). After his resignation the respondent referred the dispute to CMA claiming for constructive termination. The CMA found that the respondent was constructively terminated and awarded him Tshs. 96, 431,928/= being 24 months salaries as compensation for unfair termination, one month salary in lieu of notice Tshs. 4,017,997/=, salary for the month of January/2015 and general damages of Tshs. 5,000,000/=, the total

being Tshs. 114,876,764.12. Aggrieved by the CMA's award the applicant filed the present application.

The matter proceed by way of written submissions. Both parties were represented by Learned Counsels. Mr. Frank Mwalongo appeared for the applicant while Mr. Simon S. Mrutu was for the respondent.

The Learned Counsel for the applicant submitted on the issues raised. Arguing in support of the first and second issues on record Mr. Frank Mwalongo submitted that, the respondent deliberately refused to resume work on the pretext of intorrelable working environment after being on study leave for one year as evidenced by exhibit TIB 4. He stated that during the said leave the respondent was being paid his salary throughout until his return. Mr. Mwalongo added that the respondent did not declare his working environment as acidic when he was at work and that there is no way the applicant could have paid salary to an employee who declared that he will not work anymore unless different relationship is entered.

Mr. Mwalongo went on to submit that, the respondent did not prove the conditions for constructive termination stipulated under

Rule 7 of the Employment and Labour Relations (Code of Good Practice) Rules (GN 42 of 2007) (herein referred as GN 42 of 2007).

To strengthen his submission the Learned Counsel cited the case of **Executive Director Association of Tanzania Employers vs. Said Mgulambwa**, Rev No. 162 of 2013, Lab. Div. DSM. And the case of **Girango Security Group vs. Rajabu Masudi Nzige**, Rev No. 164 of 2013, Lab. Div. DSM.

As to the second and fourth issue Mr. Mwalongo submitted that, in the referral form No. 1 the respondent prayed for reinstatement or reengagement, compensation amounting to one hundred and twenty month's salary and wages as well as certificate of service. He stated that the Arbitrator awarded him Tshs. 96,431,928/= being 24 months salaries as compensation for unfair termination, one month salary in lieu of notice Tshs. 4,017,997/=, salary for the month of January/2015 and general damages of Tshs. 5,000,000/=, the total being 114,876,764.12 the reliefs not sought in CMA form 1. He therefore prayed for the application to be allowed.

Responding to the application Mr. Fraterine Munale submitted that, the applicant failed to fault the CMA's award on issue of constructive termination. He stated that there is nothing wrong for

the respondent to write the letter for the intention to resume work on the condition that the working environment is improved. Mr. Fraterine Munale further submitted that, the applicant had an obligation to address the respondent's complaints and issues raised after his return from studies. He added that the respondent notified the applicant of the discrimination environment which he wished to settle before he resumes work. To cement his submission he referred to this Court the provision of Rule 37 (2) (b) of GN. 42 of 2007.

Mr. Fraterine Munale further submitted that, Exhibit TIB 4 was not the decision to leave the employment rather it was a notification of intention to resume work. He strongly submitted that the respondent was faced with intorrelable environment before living for his studies, during his studies and when he came back as evidenced by Exhibit RML 16. The Learned Counsel argued that the issue of sexual harassment raised by the applicant is irrelevant and inapplicable. He stated that the cases cited by the applicant's Counsel are distinguishable to the present case.

Regarding the issue of relief Mr. Fraterine Munale submitted that, the Arbitrator properly exercised her jurisdiction and awarded

the respondent. He stated that all relief granted were pleaded in CMA Form 1. He therefore prayed for the application to be dismissed.

In rejoinder the respondent's Counsel reiterated his submission in chief.

Having gone through the submission of both parties, I find this court is called upon to determine the following issues, whether the respondent was constructively terminated and what the reliefs of the parties are.

Starting with the 1st issue of whether there was constructive termination, the term constructive termination has been defined in the case of **MS TCDC vs. Elda Mtalo** Revision No. 01/2013 HC Labour Division Arusha Sub Registry (Unreported) Rweyemamu J, (As she then was) as follows:-

"A situation in the workplace, which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee - to such an extent that the employee has no other option available but to resign."

In our laws the circumstances in which constructive termination may be established are provided under Rule 7(1) of GN 42 of 2007 which clearly provides that:-

“Rule 7(1) - Where the employer makes an employment intolerable which may result to resignation of the employee, that resignation amount to forced resignation or constructive termination.”

In the present application the applicant resigned from his employment on the alleged five reasons namely; he noticed that the bank has unilaterally decided to stop paying him his salaries, toxic environment, his security purposes because he refused to approve some of the customer's loan, that the bank refused to negotiate terms of his employment after he graduated with LLM in International Commercial Law (Oil and Gas) from the university of Birmingham and he was forced to sign a bond/agreement for his study leave. This court will examine the applicant's reasons one after another to test if they constitute any element of constructive termination.

In the first reason the respondent alleged that the applicant unilaterally started to stop paying him his salaries from January 2015.

I have examined the record the respondent was permitted to go for a study leave for a period of 12 months. This is evidenced at page two (2) paragraph three (3) of the Agreement for Officers attending Courses (Exhibit RM6) where it was provided as follows:-

"WHEREAS, ROMAN MASUMBUKO shall be involved in such overseas training for a period of 12 months with effect from September, 2013."

From the quotation above it is apparent that leave to such overseas study was to end on September 2014. In the relevant contract it was further provided that the respondent was supposed to resume work after completion of his study. This is reflected at clause 2(iii) which is to the effect that:-

"Immediately after the completion of the course or at such other time as the bank may direct, to return to his work station from the institution or at such place in Overseas and by such method as the bank may direct;"

Therefore from the clause above the respondent was supposed to resume work soon after completion of his studies. The respondent

testified that he returned to Dar es Salaam on 06/01/2015. On 19/01/2015 the respondent wrote a letter of his intention to resume work and follow up of his demands. The respondent's demands were not fulfilled by the applicant he therefore decided not to attend to work. Under such circumstances it is my view that the applicant was right to stop paying the respondent's salary. The respondent cannot claim for the work he has not done he neglected to resume work thus deprived him the right of his salary.

On the second reason the respondent alleged that he decided to resign because of the toxic environment he had been afforded while working with the Bank. He stated that some people in the management have been orchestrating bad deeds against him. The respondent further stated that he was insulted by a person from the HR department at a family day event however that person who is protected by the Management.

On the basis of the respondent's allegation it is my view that they are based on hearsay evidence and suspicious as rightly submitted by Mr. Mwalongo. The respondent was on study leave therefore it is crystal clear he did not attend such event. However he kept complaining that his family reputation was damaged basing on

the information he received from his fellow workers. There is no evidence tendered to prove the existence of those allegations. The respondent never even mentioned the exactly information he received from his informers or to brought them at the CMA to testify on the same. Under such circumstances it is my view the respondent did not prove the alleged toxic environment.

On the third reason the respondent alleged that he needed a conducive environment. He stated that he was worried of his security because he had strongly refused to approve some transactions even when he was forced to. I also find this reason to be baseless because the respondent failed to prove how his security and his family members were at risk on his failure to approve loan facilities. The record reveals that before going to study leave the respondent worked for the applicant for almost three years. In his three years of service the respondent never complained of any intorrelable condition so that the situation could have been resolved by the applicant.

As to the fourth reason the respondent stated that the applicant refused to negotiate terms of his employment after he graduated with LLM in International Commercial Law (Oil and Gas) from the University of Birmingham. I have careful examined the records the

respondent was not promised at any document that his terms of employment would have changed after he graduated from his studies. In my view the respondent tried to demand the applicant to change the conditions of their employment which they had prior agreed without any justifiable reason.

Turning to the last reason of his resignation the respondent claimed that, he was forced to sign a bond/agreement for his leave absence when he was going to study. I find this reason is baseless because the applicant did not prove any circumstances in which he was force to sig the said agreement. The respondent tendered exhibits which shows that his fellow employees were also required to sign bond/agreement when they were going to study leave.

On the basis of the above discussion it is my view that the respondent failed to prove the existence of any intorrelable conditions imposed by the employer in his working environment which have resulted him to resignation.

For constructive termination to stand, the respondent was supposed to prove that there was no other motive for resignation, save that the employer was responsible for introducing the intolerable

condition and that there was no other way of resolving the issue except for resignation. In the present application what I have observed from the respondent's claims is lack of tolerance and imposition of unreasonable demands to his employer. Most of the respondent's allegations could have been resolved administratively while he was at work but he opted to resign voluntarily from his employment.

It is my view that the purpose of our labour laws is to promote social justice and economic efficiency as rightly submitted by Mr. Mwalongo. Therefore employees should not be allowed to use the provisions of the law as an umbrella for their unjustifiable conducts against their employers. That being said I have no hesitation to say that, in the present application the applicant did not impose any intorrelable condition to the respondent which could have resulted to his resignation. Therefore, there was no constructive termination in this case.

On the last issue as to parties reliefs, the Arbitrator awarded him Tshs. 96, 431,928/= being 24 months salaries as compensation for unfair termination, one month salary in lieu of notice Tshs. 4,017,997/=:, salary for the month of January/2015 and general

damages of Tshs. 5,000,000/=, the total being 114,876,764.12. In view of the above discussion, I find the Arbitrator's finding that the respondent was constructively terminated is unreasonable and unjustified, then I fault his award.

In the result the court found the respondent was not constructively terminated but he voluntarily resigned from his employment. I therefore quash and set aside the arbitrator's award to the respondent. The application is allowed accordingly.

It is so ordered.



I.D. Aboud

JUDGE

18/09/2020