IN THE HIGH COURT OF TANZANIA LABOUR DIVISION DAR ES SALAAM

REVISION NO. 804 OF 2018 BETWEEN

JUDGEMENT

Date of Last Order: 10/05/2021

Date of Judgement: 27/05/2021

Aboud, J.

The applicant, filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (herein CMA) delivered on 14/07/2017 by Hon. Kiwelu, L., Arbitrator. The application is made under section 91 (1) (a), 94 (1) (b) (i) and section 91 (2) (b) (c) of the Employment and Labour Relations Act [CAP 366 RE 2019] (herein referred as the Act); Rule 24 (1) 24 (2) (a) (b) (c) (d) (e) (f) 24 (3) (a) (b) (c) (d) of the Labour Court Rules GN. No. 106 of 2007 (herein referred as the Labour Court Rules).

Briefly, in 2007 the respondent was employed as a Central Service Processor (Data Entry) on permanent and pensionable term. In 2009 to 2010 she was promoted to the position of Cashier B2 and in 2011 she was further promoted to Retail Support B2 4 AG and BOTL B3 for three months. That in 2011 to 2012 she was promoted to the position of Service Support B3 and on 2012 to 2014 again promoted to the post of Customer Advisor B3. Later on, she was promoted to another position as a Personal Banker B3. On 2015 the applicant notified all of his employees including the respondent his intention of Branch Optimization Growing for Better in which the applicant merged some of his branches. Upon such an exercise the employees were advised to apply for newly advertised posts. The respondent unsuccessful applied for the available posts. The applicant on his part offered the respondent the post of Customer Service Advisor but she refused the same. Again, the applicant offered the respondent the position of the Acting Personal Banker which she also refused and decided to resign from the employment.

After resignation the respondent referred the dispute at the CMA claiming for constructively termination. The CMA decided the dispute on the respondent's favour and ordered the applicant to pay

her 12 months remuneration as compensation for unfair termination, severance pay for 9 years, one month salary in lieu of notice and leave payment. Being aggrieved by the CMA's decision the applicant filed the present application. The applicant moved the Court to determine the following grounds:-

- (i) That, the Arbitrator erred in law and facts by holding that the wording of the respondent's own letter dated 13/06/2016 (Annexture RE1) which stated in no uncertain terms that she did not resign because she was unhappy with the opportunities which she had been given, but she was resigning because it was a strategic career move.
- (ii) That, it was not proper for the Arbitrator to find that there was no consultation with regard to change of respondent's position while the respondent was informed of what was going on at every stage of the process.
- (iii) That it was not correct for the Arbitrator to take into consideration matters such as principle of redundancy which were not in issue at all.
- (iv) That, it was not correct and contrary to the law for the Arbitrator to award the respondent reliefs such as unutilized leave, notice and 12 months salaries which were not prayed for.

The matter was argued by way of written submission where both parties enjoyed the services of Learned Counsels. Mr. John Ignace Kitauli Laswai was for the applicant where as Mr. Joseph Mafie appeared for the respondent.

On the first issue it was submitted that, the respondent failed to establish that she was constructively terminated by showing that she did not resign voluntarily. It was stated that ignoring the resignation letter which clearly show that the respondent resigned voluntarily is wrong and amounts to condemning the applicant unfairly. He stated that the elements portrayed under section 36 (a) (ii) of the Act read together with Rule 7 (1) of the Employment and Labour Relations (Code of Good Practice) Rule, GN. 42 of 2007 (GN. 42 of 2007) have not been established throughout the determination of this dispute at the CMA. To strengthen his submission the Learned Counsel referred the Court to the case of Girango Security Group V. Rajabu Masudi Nzige, Lab. Rev. No. 164 of 2013 which he strongly submitted that the circumstances of that case are distinguishable to the case at hand. It was also submitted that there was no constructive termination in the matter at hand.

On ground two it was submitted that, throughout the award the Arbitrator was dealing with an issue of redundancy or retrenchment which was not an issue at the CMA. It was stated that the applicant reviewed his business strategy which automatically reduced its branch networks from 22 to 16, it was added that obviously there must be reorganizational of different cadres of employees and all the employees were involved in the process.

Regarding the third ground it was submitted that, it was improper for the Arbitrator to hold that there was no consultation with regard to the change of the respondent's position while she was informed and evidence was produced to that effect as reflected in Annexture RE 2 and 3 on record.

Turning to the fourth ground it was submitted that, it was wrong and contrary to the law and rules of natural justice to award the respondent reliefs not prayed in CMA F1. It was argued that it is a cardinal principle of law that employment disputes are initiated by CMA F1, therefore, claims which are not listed in the relevant form should not be entertained. He therefore prayed for the application to be allowed.

Responding to the application Mr. Joseph Mafie submitted that, the applicant's first ground is immaterial and narrowly construed by the applicant. It was submitted that before the respondent wrote the second letter to the employer for resignation which was exhibit D1 she had already written her first letter through her Advocate complaining about mistreatment, discrimination and her intention to resign (Exhibit A7).

It was strongly submitted that the respondent demonstrated sufficiently on her evidence how her working condition was intolerable. It was stated that at first the respondent was demoted from her senior post of Personal Banker to junior post of Customer Service Provider without her consent. It was further submitted that through the letter which was tendered in court (exhibit A4) the respondent was informed that due to the organizational changes if she fails the interview for the new post advertised by the employer, she will be included in the retrenchment list. It was stated that the respondent failed the interview and instead of being retrenched she was forced to assume the new role as reflected in Annexture RE4. It was argued that, the employer's conduct of forcing the respondent to

work is against the Constitution of the United Republic of Tanzania which prohibits all forms of forced labour.

As to ground two it was submitted that, retrenchment was part and parcel of an issue as the respondent through her first resignation letter (exhibit D1) requested the employer to give her redundancy package.

On the third ground it was submitted that, the only consultation which was vital made to the respondent was through the letter which was tendered and admitted as Exhibit A3 titled Branch Optimization Growing for Better. It was submitted that on contrary to the said letter the respondent was demoted from senior to junior post which she did not agree.

Regarding the last ground it was submitted that the relief awarded were indicated in the CMA F1. He therefore prayed for the application to be dismissed and the compensation be increased from 29 million to 100 million as prayed during trial.

Having gone through the CMA and Court's records as well as submissions by both parties, it is my considered view that the issues

for determination before the Court are; whether the respondent was constructively terminated and what are the reliefs of the parties.

As to the first issue, the term constructive termination has been defined in the case of **MS TCDC v. 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.

(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'.

Also in the case of TUCTA V. Nestory Kilala Ngula, Rev.

No. 172 of 2013 it was held that:-

'There are five guidelines to constructive termination which the Commissioner or Judge may consider when faced with a case of constructive termination as in the case at hand, guidelines in form of questions put by the Labour Appeal Court of South Africa

- [South Africa Labour Laws which are in pari materia with our laws] is helpful:-
- A.Did the employee intend to bring the employment relationship to an end?
- B. Had the working relationship become so unbearable, objectively speaking that the employee could not fulfil his obligation to work?
- C.Did the employer create the intolerable situation?
- D. Was the intolerable situation likely to continue for a period that justified termination on the relationship by the employee?
- E. Was the termination of the employment contract the only reasonable option open to the employee?'

In the matter at hand the respondent in her resignation notice (exhibit D1) stated clearly that she made a decision to resign not because she was unhappy with the opportunities presented to her but it was for strategic career move. Admittedly the resignation notice as it stands does not indicate that the respondent was constructively terminated. However, the record of this case shows that there were some prevailing circumstances which necessitated the respondent to

resign from her work. The circumstances were well elaborated by the respondent in her testimony during arbitration proceedings where she firmly testified that:-

'Hii barua ilieleza changes iliyotokea na walieleza nafasi za kazi zilizokuwa zimetoka tulitakiwa kuomba (apply) ilielezea kwamba kama huja qualify katika nafasi zote zilizotoka basi atastahili kupata redundancy paragraph ya 5 ya kielelezo hiki kinaeleza.

Baada ya kupata hii barua niliomba nafasi nne (4) za kazi moja ni Personal Banker, Prestige Banker, Universal Banker na Banker Operation Manager.

Mnamo mwezi Aprili, 2016 niliiitwa kwenye interview ya Prestige Banker Pamoja na Universal Banker niliweza kufanya Prestige Banker na Universal Bank, baada ya interview kuisha niliwauliza walionifanyia interview ambao ni HR nilimuuliza kuwa niliomba nafasi nne na je wataniita katika post mbili nyingine nilizoomba wakaniambia kama nitakuwa nimefaulu hawataniita kwa zile post nyingine mbili zilizobaki qualification ya kufanya interview ni performance Pamoja na elimu ya mtu.

Tarehe 29/04/2016 nikiwa; katika tawi la Buguruni alikuja mtu kutokaa head office, Irene Msungu ambaye aliniletea majibu ya interview akanieleza nimefeli interview nilizofanya na kusema menejimenti imeamua kunipa nafasi nyingine.

Tarehe 25/05/2016 nilikuwa na majibizano na HR email ya kutoka kwa HR kuja kwangu yalihusiana na redundancy kutokana na nafasi niliyoikataa ambayo ni Customer Service Advisor. Naomba kutoa nakala hiyo ya email inayoonesha majibizano yang una HR.

Tume - kimepokelewa kama kielelezo A5. Baada ya kukataa nafasi ya Customer Service Advisor, HR alisema kwasababu nimekataa alternative post ya mwajiri hawawezi kunilipa redundancy. Naomba kutoa barua ya kupewa post ya chini.

Tume- imepokelewa kama kielelezo A6. Baada ya kupata taarifa ya kufeli interview nilitegemea nitapata redundancy. Nililalamika sana toka tarehe 29/04/2016 nililalamika kwa njia ya email nikisema sipo tayari kuwa Customer Service Advisor sikuwa tayari maana nilikuwa nimeshushwa sana cheo ni kama nilikuwa naanza kazi. Hii nafasi ni tofauti na nafasi ya Cashier ilibadilishwa na kuitwa

Customer Service Advisor. Majukumu ya kazi ya mwisho Personal Banker ilikuwa inahusiana na mauzo ya bank na wakati mwingine nilikuwa naact kama Manager majukumu haya yalikuwa yanatofautiana sana. Customer Service Advisor alikuwa na nafasi ya kupokea wateja na kuwa hapa benk. Nililalamika na nikatafuta wakili ambaye alituma barua ya madai naomba kutoa barua hiyo ya madai (demand notice).

Wakili Pendo - sina pingamizi

Amri: kielelezo hiki kimepokelewa kama A7
Baada ya tarehe 29/04/2016 mahusiano
hayakuwa mazuri nililazimishwa kusaini
appointment ya Customer Service Advisor
ambayo ni nafasi ya chini kubwa na ya
kunidemote.

Mahusiano yang una mwajiri hayakuwa mazuri kwani waliniblock kwenye system kwa muda wa siku tatu (3) nikawa siwezi kutumia chochote. Hii ni mwezi mei katikati.

Waliniumiza sana baada ya kunipa hiyo nafasi tarehe 12/05/2016 niliumia sana nikaamua nikaenda hospitali nilikuwa psychologically affected nilikuwa na msongo wa mawazo. Naomba kutoa kielelezo cha hospitali.

Tume- imepokelewa kama kielezo A8

Hii ni vipimo nilivyofanya baada ya kwenda hospitali kwani sikuwa najiskia vizuri.

Baada ya kugundua uhusiano wangu na mwajiri upo vibaya niliona kuna vitu vingi vinajitokeza, niliona kubaguliwa baada tarehe 29/05/2016 wenzangu baada ya kufeli waliambiwa waende sehemu za kuripoti na waliambiwa wasubiri nafasi nyingine zikitoka na wataomba. Fortunata Ndangalanga alifeli interview na nafasi zilitoka aliomba na akapata.

Kulikuwa kuna ubaguzi si katika upande wa interview wenzangu wa tawi hilohilo kwa waliofanya interview tatu (3) na wengine nne (4).

Baada ya kuona mahusiano yangu na mwajiri nililalamika kuacha kazi kutokana na kubaguliwa niliona baada ya kuwa blocked kwenye system nilikosa vitendea kazi, hapakuwa na fairness katika kazi yaani zoezi zima la kuwa demoted, niliacha kazi na hii ni forced termination'.

From the respondent's testimony quoted above she clearly stated that she applied for the posts as instructed by the applicant in exhibit

A4 at the 5th paragraph, I quote:-

'You are therefore encouraged to review the list of vacancies (attached to this letter) and complete the necessary application requirements. Your application should be submitted to the Resource analyst; Pius Salama via e-mail or by hand in case of hard copy, on or before Saturday, 19th March, 2016. The option of redundancy will be applicable only to employees who will be unfit for available vacancies'.

The respondent further stated that after she failed the interview for the available posts, she urged the applicant to include her in the retrenchment list but he refused to do so. On 26/05/2016 the respondent served the applicant demand notice (exhibit A7) where again she demanded the employer to include her in the retrenchment list but the applicant did not consider the same, instead offered her very junior post. Again on 10/06/2016 the respondent served the applicant with another letter titled termination of employment (exhibit A9) where the respondent's Advocate stated that the respondent was not happy with her appointment because she felt that she was demoted from her senior post of Personal Banker to a very junior post of Customer Service Advisor B3 contrary to what they had

initially agreed in consultation meeting. In the relevant letter it was further stated that the respondent was threatened through email dated 02/05/2016 that if she refused an alternative employment under the prevailing circumstances and reject the offer the employer is not obliged to offer any redundancy package as reflected in exhibit A5. In my view the respondent was not ready to compromise her career progression just because had to work with the respondent.

Therefore, under the above prevailing circumstances it is my view that the employer forced the respondent to resign from the employment as rightly found by the Arbitrator. I do regard that, employment contracts are like any other normal contracts where parties are required to have free consent when entering into it. In any contract there should be an offer from one part and acceptance from the other part. In the application at hand the applicant offered the position of Customer Service Advisor as evidenced by exhibit A5 on her part the respondent rejected the said offer. As the record reveals the respondent willingly requested to be included in the retrenched employees however, for the reasons known to himself the applicant rejected the respondent request. Under such circumstances it is my view that it was wrong for the applicant to compel the

respondent to work in the newly offered position without her consent while she regarded the same as a junior post.

It is also my view that since the parties had an initial agreement that if the employee does not succeed in the newly available posts, then he/she will be retrenched then the respondent was entitled to be included in the retrenchment list because she failed interview for the available posts. I have noted the applicant's submission that the employer is not obliged to find a job acceptable by the employee indeed that is the position of the law. However, the application of that principle of law is where the employee willingly refuses to accept the new offered position at the same time, he/she does not wish to be retrenched. To the contrary in the case at hand as stated above the respondent on her own free will urged the employer to retrench her as they had an initial agreement (exhibit A4).

I have noted the applicant's Counsel submission on the issue of retrenchment discussed by the Arbitrator, with due respect to the Learned Counsel's submission the matter at hand originated from the retrenchment exercise thus, discussing the same was vital in arriving at just and sensible decision. I am also not in disregard of the applicant's Counsel submission on the case of **Girango Security**

Group (supra), in my view the case was properly referred by the Arbitrator as it also cited the questions to be considered in constructive termination as quoted above in the case of **TUCTA** (supra).

On the basis of the above discussion, I have no hesitation to say that the respondent's resignation was motivated by the employer's conduct and not on her own free will. Thus, the circumstance of forced resignation has been established and proved in the application at hand.

On the last issue as to what reliefs are the parties entitled, the applicant's Counsel submitted that the Arbitrator awarded the respondent reliefs not sought in the CMA F1. I had a glance on the respondent's CMA F1 which initiated proceedings at the CMA and she prayed for compensation and terminal benefits. As stated above the Arbitrator awarded her 12 months remuneration as compensation for unfair termination, severance pay for 9 years, one month salary in lieu of notice and leave payment. The applicant's Counsel in his submission did not specify which one among the reliefs were not indicated in the CMA F1. In my view the reliefs awarded by the Arbitrator were part of the terminal benefits entitled to be awarded.

In additional to that, the statutory entitlements of the employee are awarded regardless of whether they have been prayed for or not.

On the basis of the above discussion, as it is found that the respondent was constructively terminated from her employment, I find no need to interfere with the Arbitrator's award as the same was correct and proper.

In result the application has no merit. The applicant did not demonstrate sufficient reasons to fault the Arbitrator's award. Consequently, the Arbitrator's award is hereby upheld and the application is dismissed accordingly.

It is so ordered.

I.D. Aboud

JUDGE

27/05/2021