

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

REVISION NO. 662 OF 2019

BETWEEN

ABDALLAH MBUKUZI.....APPLICANT

AND

TPB BANK PLC..... RESPONDENT

JUDGMENT

Date of Last Order: 12/05/2021

Date of Judgment: 09/07/2021

A.E MWIPOPO, J.

This is revision application against the Award of Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/KIN/949/18/261 which was delivered on 26th June, 2019 by Hon. P.M. Chuwa, Arbitrator. Abdallah Mbukuzi, the Applicant herein, is applying to this Court for an order in the following terms: -

1. That, this Court be pleased to order revision of the award by Hon. P.M. Chuwa delivered on 26th June, 2019 in labour dispute no. CMA/DSM/KIN/949/18/261 in the Commission for Mediation and Arbitration at Dar Es Salaam.

2. That, this Court be pleased to call for the record of proceedings in Labour Dispute No. CMA/DSM/KIN/949/18/261 dated 26th June, 2019 in the Commission for Mediation and Arbitration at Dar Es Salaam to revise, quash and set aside the award delivered by Hon. P.M. Chuwa, Arbitrator, for being improperly procured.

3. Any other relief (s) this Court may deems fit and just to grant.

The facts of the case can be briefly stated that the Applicant was employed by Twiga Bancorp Ltd as a credit officer on 2008. The Applicant was promoted to the position of Senior Credit Officer and was later was re categorized as Senior Recovery and Collection Officer. At the time of termination the Applicant was a Senior Marketing Officer. The Twiga Bancorp Ltd was merged with Tanzania Post Bank, the Respondent herein, on 28th March, 2018 as a result all employees of Twiga Bancorp Ltd were transferred to Tanzania Post Bank Ltd. The Applicant was re categorized as Bank Operation Officer on 3rd March, 2018 by the Respondent on the same salary but with less allowances. The Applicant was not satisfied with the re categorization and he wrote a notice of termination on 20th August, 2018 to the Respondent to re categorize him with same terms of

contract otherwise he will be constructively terminated at the initiative of the employer. The Respondent approved his termination on 5th September, 2018 and informed the Applicant that his last day at work is on 18th September, 2018. The Applicant was not satisfied with the Respondent decision and he referred the dispute for unfair termination constructively in the CMA where the CMA decided the matter in Respondent's favors. Dissatisfied with the CMA's award the Applicant filed the present application for revision.

The application is accompanied with Chamber Summons and is supported by the Applicant's Affidavit. The Applicant's Affidavit contains three grounds for revision in paragraph 10. Those grounds of revision are as follows;

- a. That the Arbitrator failed to analyse and properly evaluate the evidence on record henceforth arrived at the wrong decision.
- b. That the Arbitrator confused between notice of constructive termination and resignation letter hence reached a wrong decision.
- c. That the Arbitrator failed to interpret properly the agreement between TPB Bank PLC and Twiga Bancorp

Ltd dated 28th March, 2018 hence reached to deliver a impugned award.

During the hearing of the application, the Applicant was represented by Mr. Khalfan Msumi, Advocate, whereas the Respondent was represented by Mr. Innocent Mhina, Advocate. Hearing of the application proceeded by way of written submission following the prayer by the Applicant which was not objected by the Respondent's Counsel.

In summary, the Applicant Counsel submitted together all grounds of revision. The Counsel averred that the Arbitrator failed to evaluate properly the evidence on record and consequently made a wrong decision by concluding that Applicant's letter dated 20th August, 2018 was terminating his own employment. He argued that the letter was serving the Respondent with notice of constructive termination to notify him that the circumstances created towards the Applicant were unfair if the same is not taken care within the given time then the Respondent will have to terminate the Applicant's employment. To support the position the counsel cited the case of **Marry Mbele V. Akiba Commercial Bank Ltd**, Labour Dispute No. 9 of 2013, High Court Labour Division, at Dar Es Salaam.

The Counsel went on to submit that the Arbitrator erred to hold that the Respondent did not create intolerable circumstances to justify constructive termination. The notice issued by the Applicant aimed to put the termination of the employment on the Respondent. The Respondent's letter dated 5th September, 2018 accepting resignation by the Applicant is controversial and malicious. There was no mutual agreement on termination of Applicant employment and the Arbitrator erred to take the Applicant's notice of constructive termination as resignation letter. There is no proof that the employee agreed with full knowledge the termination of his employment thus the Commission was not supposed to find that there was agreement for the Applicant to resign. The Counsel cited in support of the position the Case of **Mc Alwane V. Boughton Estate Ltd (1973) 2ALL E.R. 299.**

The Applicant counsel was of the opinion that the Arbitrator failed to interpret clause 2 of the agreement between TPB Bank PLC and Twiga Bankcorp Ltd dated 28th March, 2018 which provides that the target bank were to be transferred with the same terms and conditions to the Respondent until such new scheme was to be drawn by the Respondent.

Replying to the Applicant submission, the Respondent Counsel in summary submitted that the Arbitrator properly evaluated the evidence in record and made the right decision. The Applicant decided to terminate his employment voluntarily because the employer did not create intolerable condition to the Applicant and there was no serious breach of contract of employment. In allegation for constructive termination the onus of proof rest to the employee to prove that the resignation was not voluntary and it was not intended to terminate employment relationship. In absence of proof from the Applicant the Arbitrator was justified to reach the decision.

The Respondent Counsel submitted on the issue of change of responsibilities, status and remuneration as reason for justifying constructive termination that the Applicant was credit officer and after merger he was transferred to Banking Operation Officer thus the position was the same but in different department. Following the merger the slight changes in employment contracts were contemplated one and the change in reporting line and transfer to another department does not amount to constructive termination. The first appointment letter – Exhibit D3 stated that the Applicant can be transferred to any branch or department. The merger agreement provides clearly that after lapse of transition period the condition and

terms of employment will be as per Respondent policy. The Applicant refused to accept the same hence the Arbitrator rightly interpreted the merger agreement. The Applicant also did not utilize the available mechanism to deal with grievances contrary to rule 7(2) (b) of the Employment and Labour Relations (Code of Good Practices) Rules, G.N. No. 42 of 2007.

From the rival submissions, I'm going to determine each of the issues as submitted by the parties.

Commencing with determination of the issue whether the Applicant was constructively terminated, the Applicant was of the view that the Arbitrator misconceived the issue. The reason is that the Applicant gave notice to the Respondent – Exhibit A4 that if the terms and conditions will not be taken care his employment will be constructively terminated. The notice was not a resignation letter terminated the employment. In his response, the Respondent was of the view that the Applicant failed to prove that the working condition was intolerable he was forced to resign.

The relevant provision for determination of this issue is Rule 7 of the Employment and Labour Relations (Code of Good Practices) Rules, G.N. No. 42 of 2007. The rule provides as follows, I quote:

"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 deal 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."

This Court in the case of **Girango Security Group V. Rajabu Masudi Nzige**, Revision No 164 of 2013, High Court Labour Division, at Dar Es Salaam, (unreported), held that, I quote:

"Constructive termination takes place where an employee terminates the employment or agrees to terminate but this termination or agreement was prompted or caused by the conduct of the employer. The fact that the employee was caused to terminate his employment as a result of an

employer's actions means that the termination was at the initiative of the employer."

In the application at hand, the evidence available in record shows that Applicant wrote a letter dated 20th August, 2018 – Exhibit A4 to the Managing Director of the Respondent serving as a notice of termination of his employment constructively within 30 days if he is not offered the same position and remuneration he has in the Twiga Bancorp Limited. Prior to the merger, the Applicant was holding a position Senior Marketing Officer and he was entitled apart from the salary, to shillings 250,000/= as house allowance per month, shillings 300,000/= per month as transport allowance and shillings 100,000/= per month as telephone allowance. The letter of transfer of employment from Twiga Bancorp Ltd to TPB Bank PLC shows that his job title was Bank Operation Officer Grade II.

The merger agreement provides in article 2 that all employees of Twiga Bancorp Ltd will be regarded as employee of the Respondent with effects from the merging date and will be treated with the same terms and conditions until such new schemes and terms and conditions of service are drawn up by the Respondent. The letter of transfer of Applicant's employment from Twiga Bancorp Ltd to the Respondent – Exhibit A2 states that the Applicant was

transferred to the Respondent from 17th May, 2018 and his employment is administered by TPB Staff Regulations, scheme of service and labour laws of the country. The Exhibit A2 proves that after the lapse of transition period the condition and terms of Applicant's employment will be as per Respondent policy. Thus, the Arbitrator was right to hold that there is nothing intolerable with the transfer of the Applicant as the merger was inevitable in order to rescue the Twiga Bancorp Ltd from undercapitalization status as the public notice from Bank of Tanzania dated 16th May, 2018 – Exhibit A1 shows. Among the contemplated changes in employment contracts includes the reporting line and transfer to another department. I'm of the opinion that the changes does not amount to constructive termination.

Also, after the Applicant was transferred to the Respondent and became the Respondent's employee, he was supposed to follow the Respondent Staff Regulations in utilizing the available mechanism to deal with grievances. It is in record that the Applicant wrote to Managing Director informing him that he is contesting the offer and he was issuing the notice that after 30 days the Respondent shall have terminated his employment. I'm of the view that if the Applicant decided to utilize the available mechanism in Respondent

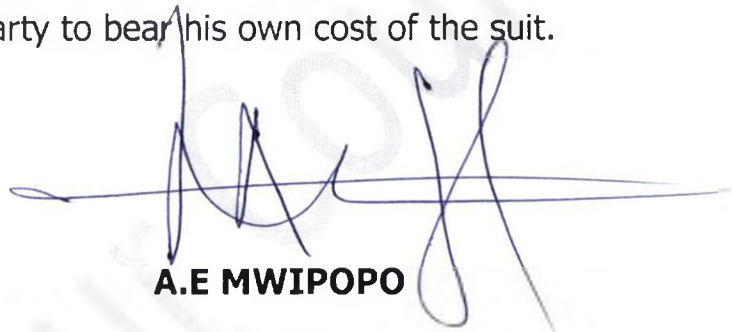
staff Regulations there was possibility of the matter be resolved amicably.

The Applicant submitted that his notice of construction termination was not resignation letter thus it was wrong for the Respondent to accept his resignation as per Exhibit A5. Reading the Exhibit A4 it shows that the Applicant was contesting the transfer to Kariakoo Branch where his position was recategorized to Bank Operation Officer and he issued 30 days' notice to the Respondent that upon its expiry the Respondent shall have terminated his employment. This evidence prove that it was the Applicant who issued the notice of termination that in expiry of the 30 days his employment will come to an end constructively.

Reading the Respondent's letter dated 5th September, 2018 – Exhibit A5 it states the letter of transfer of employment – Exhibit A2 was a compliance to merger of the Banks and it was not anyhow a new offer or breach of the agreement between parties. This means that the Respondent answered by rejecting the Applicant claims and was not offering anything to the Applicant. The Exhibit A2 informed the Applicant his notice of termination was accepted and the last day at work will be on 18th September, 2018. This prove that the Respondent accepted the Applicant's notice of termination as stated

in Exhibit A4. Despite the heading of the letter which reads “resignation from employment with TPB”, the content therein shows that the Respondent accepted the Applicant’s notice of termination. Thus, the Arbitrator rightly held that the Respondent did not terminate the Applicant’s employment and there is no evidence to prove constructive termination.

Therefore, I find no reason at all to revise the Commission arbitral decision and I hereby dismiss the Application. The CMA award is upheld. Each party to bear his own cost of the suit.

A handwritten signature in blue ink, appearing to read 'A.E. Mwiopo', is written over a horizontal line. The signature is stylized and somewhat cursive.

A.E MWIPOPO

JUDGE

09/07/2021