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

REVISION NO. 381 OF 2020

BETWEEN

FRANKO NGAJILO.....APPLICANT

AND

TPB BANK PLC.....RESPONDENT

JUDGMENT

Date of Last Order: 23/07/2021
Date of Judgment: 23/08/2021

Z.G.Muruke,J

The applicant herein filed a dispute before Commission of Mediation and arbitration (CMA) claiming to have been constructively terminated by the respondent. CMA after determination of the dispute dismissed his application in labour dispute no. CMA/DSM/KIN/1026/18/1347 for being devoid of merit. The applicant was dissatisfied with the decision he thus filed the present application, seeking for revision of the award on the nine grounds stated at paragraph 20 of the applicant's affidavit filed in support of the application. The application was opposed by the counter affidavit sworn by Emanuel G. Mwakyembe, the respondent's Principal Officer.

It is on record that, the applicant was the employee of Twiga Bancorp Bank from 17th July,2015 as a Marketing officer, with salary of Tshs.1347,362/= together with House allowance of Tshs 250,000/= and

transport allowance to a tune of 300,000/= In 2018 the former applicant's employer Twiga Bancorp, was merged to TPB Bank PLC upon the authorization of the Bank of Tanzania. As a result, all the customers, employees, assets and liabilities were transferred to the respondent (TPB Bank PLC). It was agreed in the merging process that, all the transferred employees will be treated under the same terms and conditions until the respondent draws new terms and conditions. On 3rd August,2018 the applicant was served with a letter of transfer of Employment from Twiga Bancorp to TPB Bank. The applicant refused to sign the same on the reason that, the respondent went contrary to the terms agreed in the former contract by affecting his remunerations and made his employment conditions intorellable as a result he resigned from his employment.

The application was disposed by way of written submission. The applicant was served by Mr. Michael Mgombozi -Personal Representative from TUPSE whereas the respondent was served by Advocate Innocent Mhina.

Submitting insupport of the application the applicant's representative submitted that, the arbitrator erred in law and fact by holding that there was no constructive termination, referring the case of **Girango Security Group v. Rajab Masudi Nzige**, Rev. No.164/2013. The respondent changed the terms and conditions of the employment in the employment contract without consulting the applicant. The arbitrator misdirected herself as she found that the contract terms were not changed.

It was further submitted that, when testifying at the CMA DW1 admitted the changes made in the applicant's remuneration. The said

changes affected the applicant's remunerations on loan repayment, allowances and pensions contributions. The applicant tendered exhibit C8 collectively which was ignored by the arbitrator, the same shows how the applicant's loan repayment installments would be affected. The restructuring proposal affected the 1/3 principal. The loan repayment installment would impose more obligation on the interest and duration of repaying.

Furthermore, it was submitted that the arbitrator misdirected herself for admitting exhibit C12, which shows that the applicant access to the respondent's server system was blocked without any good cause. That deprived the applicant's right to work as provided under article 22 of the Constitution of United Republic of Tanzania and Article 4 of the ILO Convention.

Mr. Mgombozi further contended that, the arbitrator failed to note that the respondent made the applicant's working conditions intolerable due to his conducts for three (3) months. Exhibit C8 (Final Reminder Note) shows that the respondent was forcing the applicant to sign the said contract of employment, but the arbitrator failed to consider the applicant's evidence and relied on the said exhibits to decide.

Lastly, it was submitted that the arbitrator failed to order the respondent to pay the applicant his terminal benefits as she upheld the termination. The applicant also was entitled to general damages for personal injury and mental torture, as claimed before CMA. He thus prayed for the application be granted.

In response, the respondent's counsel contended that the arbitrator properly evaluated the evidence adduced by both parties to arrive to her decision that, the respondent did not create the applicant's employment intolerable in terms of Rule 7(1) of Employment and Labour Relations GN.42/2007. It was the applicant himself who voluntarily decided to terminate the contract. That, the onus of proof in constructive termination rest to an employee to prove that, the resignation was not voluntarily and it was not intended to terminate employment relationship, referring the case of **Murray v. Minister of Defense** (383)206(2008) ZASCA44. He further contended that in merging circumstances it is not strange that, some of the employees terms of contract will be modified basing the prevailing circumstances.

Furthermore, it was argued that in his submission the applicant alleged that the respondent framed unfounded charges against him. The same is not true and it is was neither pleaded by the applicant in his CMA F1.

Counsel submitted that, the applicant's allegation on regard to denied access to computer lacks merit. The applicant failed to prove his claims before CMA. It was DW3's testimony that, the applicant forgot his password and according to the Bank's system if one logs in with invalid password three times, the computer automatically blocks unless your password is reset by IT personnel having been sent a request by a coworker.

As regard to the issue of salaries of August, September and October 2018 it was argued that, the arbitrator's decision based on the evidence of

the parties, referring Exhibit C2 collectively and C11.The applicant through his resignation letter allowed the respondent to deduct his October salary in lieu of notice of termination. It was further submitted that the change of remuneration does not necessarily cause the claim of constructive termination. The respondent only changed the applicant's allowances, his salary was unchanged. That, the allowances can change any time depending on the business of the Company.

Lastly it was submitted that, the arbitrator properly interpreted the merger agreement between TPB Bank PLC and Twiga Bancorp Bank dated 28th March,2020. After the lapse of the transition period the applicant was served with the letter of transfer of employment with the terms and conditions as per the TPB Bank Policy, which was refused by the applicant. It was the applicant himself who denied himself the right to work by deciding to resign. The applicant with other employees were consulted prior the merged process through the trade union. The applicant has to fill the forms and submit to the respondent for his terminal benefit. The same is not an issue need to be ordered by the court. He thus prayed for dismissal of the application.

In rejoinder the, Mr. Mgombozi reiterated his submission in chief.

After reading the submission from both sides, relevant laws and records, the issues to be determined are;

i) Whether the applicant was constructively terminated.

ii) What reliefs entitled to parties?

In determination of the first issue, constructive termination is articulated under Rule 7 of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007 which provides that: -

> *"7 (1) Where an employer makes an employment intolerable which may result in the 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 resignations of the employee, it shall be legally regarded as the termination of employment by the employer."*

Also the term constructive termination has been defined in the case of **MS TCDC v. Elda Mtalo,** Rev. No. 01/2013 HC Labour Division Arusha Sub Registry (Unreported) as : -

> *"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."*

For constructive termination to stand, the employee must 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 solving the issue except for resignation, see the case of **TIB Development Bank Ltd v. Roman Masumbuko**, Rev.No.367/2019.

In the matter at hand, the applicant advanced several reasons for his resignation from his employment. The reasons include; One, the respondent changed the terms and conditions of his contract without consulting him and the same affected his remuneration, two, not being supplied with a job description from the respondent and three, denial of access to his computer from 1st October,2018.

As regard to the change of terms and conditions of the contract, the applicant alleged that the respondent failed to comply with clause 2 of his appointment letter and clause 23 of the Employment contract with Twiga Bancorp Limited (exhibit C1 collectively).

It is undoubted that after the successfully completion of merging of the two companies, all the employees were transferred to TPB Bank including applicant. I have cautiously gone through records and came a cross exhibit C5, the letter dated 17th May,2018 addressed to the applicant titled 'REPORTING AT TPB BANK PLC'. The content of the letter was informing the applicant that, the terms and conditions agreed by the former employer to wit Twiga Bancorp shall only last for three months. After the lapse of that period, the terms of employment will be varied to suit the current employer (TPB Bank) policies.

It is on record that in August, the applicant was served with a letter titled 'TRANFER OF EMPLOYMENT FROM TWIGA BANCORP LTD TO TPB BANK PLC' which stands like an employment contract with the TPB Bank. The applicant denied to sign the said letter on the ground that it was contrary to the former agreement in terms of remuneration. It is apparent that to suit his business requirement and policy, the respondent omitted the two allowances that the applicant was paid by his former employer and the salary remained in status quo. The applicant alleged that he was not consulted about the change of the terms of the contract, it is my view that the claims are unfounded since on 17th May,2018 the applicant through exhibit C5 was notified about the changes in terms of employment so as to suit the respondent's policy. Thereafter, he made several correspondences insisting the respondent to include his allowances as provided under the former contract, he was informed by the respondent that the said allowances will not be paid as the same does not support the TPB Bank policy. Under the circumstances I find that, it was the applicant himself who was dissatisfied with the new terms and conditions of the respondent and decided not to sign the employment contract.

Concerning the job description, the applicant alleged that, the respondent failure to issue the job description affected his performance and resulted to a hard working conditions. It is true that the law requires the employer to supply the employee job description as provided under section 15(1)(c) of the Employment and Labour Relations Act, CAP 366 RE 2019. In my view, if the employer does not fulfil his obligation to give the

employee job description it is the employee's duty to remind his employer on the same. In this matter there is no evidence that from May,2018 after the merging process, the applicant asked for the job description from the applicant. The only evidence is the letter dated 3rd October,2018 (exhibit C 10) which served as a demand note and followed by the termination letter. I thus find the claim as an afterthought as the applicant ought to have demanded the same in cause of his performance after they were transferred to the respondent.

Even on the allegation that the respondent denied his access to the computer, I find the applicant have failed to substantiate his allegation since, there is no evidence that it was a situation which prolonged for a long time or as testified by DW3 who stated that, it just happened once and the IT personnel was consulted and solved the problem.

Regarding the charges against him, there is no any evidence on record which proves that the applicant was charged with any offence and the same is the new claim as it was not pleaded before CMA. I thus find no reason to labour much on the same since parties are bound by their pleading as was discussed in the case of the case of **Yara Tanzania Limited v Charles Aloyce Msemwa t/ a Msemwa Junior Agrovet & 2 Others,** Commercial Case No. 5 of 2013.

By virtue of the above discussion, I am of the firm view that the respondent failed to prove the existence of any intorrelable conditions imposed by the respondent as his employer, in his working environment

which caused him to resign. He deprived himself of a right to work by failure to sign the employment contract and resigned from his employment just on his own accord. I thus find no reason to fault the Arbitrator's finding that there was no constructive termination.

Since the first issue has been answered negatively, then I find no need to discuss the remained issue on reliefs entitled to the parties.

Therefore, I hereby dismiss the application for want of merit. The CMA's award is upheld.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) DIVISHENI YA MAHAKAMA YA KAZI (Labour Division)

Z.G. Muruke

JUDGE

23/08/2021