IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR-ES-SALAAM

LABOUR REVISION NO. 408 OF 2020

BETWEEN

EAS TZ LTD T/A BID AIR CARGO ..... APPLICANT

AND

RUBAB SHARIFF ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The applicant has moved this court under the provisions of Section 91(1) (a) Section 91(4)(a) &(b); and Section 91(2)(c) of the Employment and Labour Relations Act, Cap. 366 R.E 2019 ("the ELRA") and Rule 24 (1), (2)(a),(b),(c),(d),(e)&(f), Rule 24(3)(a),(b),(c) &(d); Rule 28(1)(c), (d) &(e) of the Labour Court Rules GN NO. 106 of 2007 ("the Rules"). The applicant was aggrieved by the award of the Commission for Mediation and Arbitration for Kinondoni in Labor Dispute No. CMA/DSM/KIN/R.1206/17 ("the Dispute") and is now moving the Court this Court for the following orders;

1. That the Honourable Court be pleased to call for the records of the proceedings and the award from the Commission for

Mediation and Arbitration in Labour Dispute No. CMA/DSM/KIN/R.1206/17, revise and set aside the award of the Commission for Mediation and Arbitration dated 29th October 2019 delivered by Hon. Mwakisopile I.E Arbitrator.

2. That the Honourable Court be pleased to grant costs of this application
3. That the Honourable Court be pleased to make such any other orders as it may deem fit.

The application was lodged by a notice of application and a Chamber Summons supported by an affidavit deponed by Mr. Aron Bureta; the Principal Officer of the Applicant; on the 9th October 2020, an affidavit which Mr. Raphael Rwezahula, learned advocate representing the applicant, prayed for it to be adopted to form part of his submissions. On her part, the respondent, duly represented by Mr. Kennedy Lyimo, learned advocate, opposed the application via a counter affidavit of the respondent in person dated 19th November, 2020.

On the 17th March 2022, when this matter came for hearing I ordered Parties to dispose the matter by way of written submissions whereby it was ordered that; the Applicant to file their Written Submission in Chief on or

before 23rd March 2022, the Respondent to file her Reply Submission on or before 29th March 2022 and Applicant's Rejoinder if any on or before 4th April 2022. Both parties have adhered to the schedule of submissions, much appreciation to the well-researched submissions. But before I proceed to the determination of the revision, it is fair that a brief background of the matter is narrated from the gathered facts and evidence.

The employer-employee relationship between the applicant (employer) and the respondent (employee) commenced on the 01st August 2012 as Sales Executive. Eventually on the 09th December 2014, the Respondent was promoted to the position of Key Accountants Manager. Sometimes in March 2017, the Applicant and the Respondent engaged in discussions following an alleged economic hardship that the Applicant was encountering. The applicant's intention was that the Respondent agreed on either of the two options, one was a mutual agreement to terminate the contract or two if she continued with employment, she was to work on the enforcement of the new Branch target of bringing 500kg per day for each sales person. It was on the two options that the dispute arose, the parties could not get to agree on either option.

On the 21st March 2017, the Applicant requested the Respondent to work on the second option of bringing 500kg per day. The parties fell out at this point and the Respondent was eventually terminated on the 18th May 2017 following an alleged abscondment (Exhibit AIR-5 & Exhibit AIR-6). Aggrieved by the termination, the respondent successfully lodged a dispute at the CMA who held that the Respondent was constructively terminated, the Commission proceeded to award the Respondent twelve (12) months compensation equal to Tshs. 21,600,000/=, one month in lieu of notice pay which was Tshs. 1,800,000/= and severance at the tune of Tshs. 2,423,000/=. Aggrieved by the award, the applicant then lodged this application raising the following legal issues for determination by this Court:

1. Whether it was proper for the Arbitrator, on the basis of evidence adduced to hold that there was constructive termination.
2. Whether it was lawful to award the sum of TZS 25,823,000/= as Twelve months salary, notice pay, and severance pay to the Respondent whilst there was no evidence to prove the same.

Starting with the first issue whether it was proper for the Arbitrator, on the basis of evidence adduced to hold that there was constructive

termination; Mr. Rwezahula submitted that Constructive termination is provided for under section 36 (a) (ii) of the Act to mean a termination of an employee because the employer made continued employment intolerable for the employee. That the same is also provided under Rule 7(1) of the Employment and Labour Relation (Code of Good Practice) Rules, G.N No. 42 of 2007 ("the Code") which refers to constructive termination as a situation where the employer makes an employment intolerable which may result to the resignation of the employee.

He then pointed out the circumstances that may justify force resignation as provided for under Rule 7(2) of the Code. He then submitted that the Honourable Arbitrator misdirected himself to conclude on mere speculation that there was constructive termination without considering the fact that the act of the Respondent deserting work was not the last resort remedy available to the Respondent. He supported this submission by citing the Court of Appeal decision in the case **Kobil Tanzania Limited V. Fabrice Ezaovi, Civil Appeal No. 134 of 2017**. He then argued that the arbitrator misdirected himself to conclude on mere speculation that there was constructive termination without answering important questions including whether the respondent tendered a resignation letter, or she

express her dissatisfaction on the decision to set new targets, worked on the new targets to conclude that the targets were unrealistic.

Mr. Rwezahula then questioned how, if the respondent and PW2 did not tell the Commission what were the earlier targets before the targets which are claimed to be unrealistic and if the Respondent and PW2 never disclosed the earlier targets; then how did the Honourable Arbitrator come to the conclusion that the targets were unrealistic. Further that the arbitrator would have determined what justified the Respondent's abscondment from work for over 30 days from 22nd March 2017 to 21st April 2017. To that end, he argued that during hearing, the Respondent failed to show how the employer created hardship and made the working condition intolerable and that she did not produce any evidence to show that the Applicant made the working conditions intolerable to the extent of stop working without expressing her grievance or tendering resignation letter. To support his argument he cited several case including **Labour Revision No. 33 of 2018, Yaaqub Ismail Enzron Vs. Mbaraka Bawaziri Filling Station** and the case of **Girango Security Group Vs. Rajabu Masudi Nzige (2014) LCCD 40.**

In reply, Mr. Lyimo submitted that the Applicant had not followed the laid down procedures stipulated under labour Laws. It is Crystal clear that the procedures for termination based on Operation Requirements are laid down in the law and the same must be followed. That the Respondent did not agree on the retrenchment procedures as the Applicant decided to shift gear to newly unrealistic sales against to Respondent (Constrictive Termination) with ill motive to terminate Respondent by any means. He then argued that it is the established principle that for constructive termination among others, it must be proved that the employment was intolerable, citing the case of **Katavi Resort v Munirah J. Rashid, Labour Revision No. 174 of 2018,** whereby Hon. Mipawa, J (as he then was) elaborated the principles for constructive termination on page 18 of his judgment developed four principles to find constructive termination to include that the employer made the employment intolerable. That the other reasons stated were that termination should have been prompted or caused by the conduct of the employer and that the employee must establish there was no voluntary intention by the employee to resign but the employer caused the resignation. The honorable judge also emphasized that the Arbitrator or court must look at the employer's

conduct as a/whole and determine whether its effects, judged reasonably and sensibly, is that the employee cannot be expected to put up with-it.

Mr. Lyimo submitted further that in the instant case, it is apparent that the employer (Applicant) did terminate the Respondent on grounds of abscondment after Respondent instituted claims for unfair termination on the grounds of constructive termination before CMA subject to Rule 7 of the Code. He the submitted that 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. That the Applicant's motive as illuminated by the Respondent's evidence is the one which made them move to CMA as the Applicant made employment of Respondent intolerable as a result of conditions of unrealistic targets issued by country Manager of Applicant with threaten to terminate Respondent employment if she failed to meet the target. He concluded by praying for the dismissal of this application.

In rejoinder, Mr. Rwezahula started with a reply on the respondent's submission that the termination was due to operational requirements. He submitted that the statement is extraneous and misconceived as the Respondent was never terminated under operational requirements but

under misconduct. He then argued that in this dispute, the Applicant observed all procedures for termination whereby the Respondent was terminated under abscondment. That the Respondent absconded from work for more than 5 days from 22nd March 2017 until 21st April 2017 when the Applicant decided to take disciplinary measures against her. That the due procedures for termination were all followed and at this point, he reiterated to his submission in chief on the point.

On the issue of constructive termination, Mr. Rwezahula reiterated to his submission in chief. He added that the Respondent failed to establish how was the setting-up of new targets intolerable to the Respondent to the extent of not turning up for the job for over 30 days referring to the key questions to examine the magnitude of the alleged intolerable environment which were raised in his submissions in chief.

Having considered the parties submissions and the records of this application, I find this to be an interesting dispute to resolve. Although the underlying question is whether the termination of the respondent was fair in both procedure and substance, I see there are two terminations that I am to determine in this case. While at the CMA the respondent successfully established a situation of constructive termination, on the other hand the

applicant herein (the employer) has another story altogether, that the termination of the respondent followed a misconduct of abscondment from work and that the procedures were followed. So I see that I am stuck in a chicken egg, which came first, situation. I will have to determine whether it was the unfavorable and intolerable situation that pushed the respondent away from employment or it was just out of her disagreement of a fair cause of the employer that she absconded from work. The evidence will reveal which came first.

As per the evidence adduced, the parties' fracas started on the 03rd day of March, 2017 when the respondent received an email from the applicant telling all employees that the company was not performing well (EXP2). In the said email, the Country Manager was informing the employees that the company has become insolvent as they were performing below budget. The applicant also informed the employees that they were going to take drastic measures. Article 13 of the **International Labor Organisation's Termination of Employment Convention, 1982 (No. 158)** provides:

"When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment."

The Convention is ratified and legislated in our country under Section 38 of ELRA. At this point, if what was said in EXP2 was true, then this was a clear case for the applicant to proceed with retrenching some of the employee because that should be what the words "drastic measures" meant. However, that is not what the applicant did, instead of proceeding

with retrenchment under Section 38 of the Act, the applicant gave the employees (including respondent) two options, either the respondent agrees to a mutual agreement to terminate the contract or to work on the enforcement of the new increased Branch target of bringing 500kg per day for each sales person instead which was an increase from what was usually brought. Now one may wonder why, if the applicant is allegedly going through economic hardship, how an employee could increase targets under those circumstances. The other question is why the two options would be so hard on the applicant while there was a simple remedy of retrenchment which was lawful under the Act. These questions lead to one conclusion, the acts intimidated the respondent and made the working conditions intolerable as defined under Rule 7 (1) and (3) of the Code. In the case **of Solidarity on behalf of Van Tonder Vs. Armaments Corporation of SA (SOC) Ltd and Others, (2019) 40 ID 1539 (LAC)** the Labor Appeals Court of South Africa held at para 39:

> *"... The word 'intolerable' implies a situation that is more than can be tolerated or endured; or insufferable. It is something which is simply too great to bear, not to be put up with or beyond the limits of tolerance...,"*

As per the EXP2, there is a reply email of the respondent giving an option of retrenchment letter and the applicant's country manager asked for the terms of retrenchment that the respondent would settle for emphasizing that the company could not afford large pay off. Another issue that may be established in the email is the fact that the applicant was avoiding to take the lawful measures to retrench the employees as they could not "afford" large payouts. The respondent bluntly replied the email by informing the applicant that she will not sign the contract and that she was not ready to quit the job (email dated 14th March, 2017). Hence the answer to the question why the applicants imposed options to its employees that were intolerable is so that they can be forced to tender resignation, another clear cut case of constructive termination.

There was also an email of the respondent dated 21st March, 2017 which the respondent was clear to the applicant that she did not sign termination letter because neither the retrenchment nor termination procedures were followed, making the working environment unsuitable for her. In the same exhibit, there is an email by the applicant asking the respondent that if she will not agree to quit the job then it was a good will to bring in sales to grow in the company, this was an imposition on the

respondent because how did not applicant expect her to make a sudden growth in the sales while admittedly were not working?. EXP3 is the agreement that the respondent was required to sign which she did not. Rule 7 (1) of the Employment and Labor Relations (Code of Good Practice) Rules, G.N No. 42/2007 ("the Code") provides:

"That provision defines dismissal as meaning, inter alia:

"(e) An employee terminated a contract of employment ***with or without notice*** *because the employer made continued employment intolerable for the employee."*

In conclusion therefore, I am satisfied that the respondent successfully established the elements of constructive termination by adducing the intolerable conditions set by the employer/applicant hence there was a constructive termination. The subsequent termination on abseentism cannot therefore overrule the fact that the employer made conditions of work intolerable pushing the respondent away from that employment. So the intolerable conditions came first, caused the respondent to abscond from work which made the applicant terminate the respondent on the ground of abseentism. Therefore the constructive

termination having been established, abseentism cannot supersede that fact.

The other issue was whether it was proper for the CMA to order the respondent to be compensated. Having found that there was constructive termination, the respondent was subsequently entitled to compensation as ordered by the CMA, an order which I shall not interfere with.

Having made those findings, I see no reason to fault the findings and the subsequent award of the CMA. The revision lacks merits and it is hereby dismissed in its entirety.

Dated at Dar-es-salaam this 19th day of April, 2022.

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S.M. MAGHIMBI
JUDGE