THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 257 OF 2021

BETWEEN

HJF MEDICAL RESEARCH INTERNATIONAL, INC..... APPLICANT

AND

MERGITU EBBA..... .....RESPONDENT

JUDGMENT

Date of the last order: 7/02/2022
Date of judgment: 11/3/2022

B.E.K. Mganga, J

On 27th June 2019, HJF Medical Research International, Inc, the applicant, signed employment contract with Mergitu Ebba, the respondent for two years fixed term contract of employment with effect from 1st July 2019 to 30th June 2021. In the said fixed term contract of employment, it was shown that the respondent was employed as **Outreach and Prevention Advisor** and that her place of work was Dar es salaam. It was also shown that, place of recruitment of the respondent was USA. The respondent being a foreigner in Tanzania, on 17th September 2019, was issued with **Residence Permit No. 118086** (**exh. D1**) valid for

two years up to 23rd August 2021 and allowed to stay in Dar es Salaam, Dodoma, Iringa, Lindi, Mbeya, Mtwara, Rukwa, Ruvuma, Njombe and Songwe. In the residence permit, it was stipulated that the respondent shall not engage in any employment, trade, business, or profession other than Outreach & Prevention Advisor and that her place of work shall be in Dar es Salaam, Dodoma, Iringa, Lindi, Mbeya, Mtwara, Rukwa, Ruvuma, Njombe and Songwe. On 23rd August 2019, the Labour Commissioner issued **work permit No. WPC/12656/16 (exh. D1)** in favour of the respondent to work with the applicant as ***Outreach Program Consultant*** in Tanzania Mainland for two years from 23rd August 2019 to 22nd August 2021. After being issued with both work permit and residence permit, respondent continued to work with the applicant from 1st July 2019 up to early January 2021, when the relation between the two became bad. Due to unhealthy relationship between the two, on 8th January 2021, respondent filed Labour Dispute No. CMA/DSM/KIN/013/2021/22/21 to the Commission for Mediation and Arbitration henceforth CMA showing that there was Constructive termination of her employment. In CMA F1, respondent showed that the employer(applicant) constructively breached material terms of

employment by varying fundamental aspects often without mutual consent. In the said CMA F1, respondent claimed to be paid terminal benefits as follows; USD 31,000 being payment for remaining 7 months of the contract, USD 124,000 being compensation of 24 months on expectation of renewal of contract, USD 5,166.7 being payment of accrued annual leave, USD 5,166.7 being payment of one month salary in lieu of notice, USD 800,000 being payment for general damages, USD 10,000 being payment for cost of living allowances (COLA) for eight months, USD 12,720 being payment for house allowances for eight months, USD 51,158 being payment for school fees for two dependents, USD 10,000 being payment for health insurance for eight months (1+3 dependents), 7,000 being payment for home security, USD 10,000 being payment for home leave (1+3) air ticket, USD 1,190 being payment for home leave five days, USD 3,000 being payment for financial year 2020 (FY20) one-time bonus, USD 12,720 being payment for post differential allowances for eight months, USD 184.525 being substance allowances per day accruing from 7th January 2021, USD 5,166.7 being severance payment, USD 10,000 being repatriation costs (air ticket for complainant and three dependents), from Dar es salaam to Canada, USD 3,000 being

payment for on transit allowance meal and accommodation for four persons, USD 25,000 being payment for transport and costs of packing and handling 3.5 tones of personal effects from Dar es Salaam to Canada all amounting to USD 1,121,658.1.

On 14th June 2021, Hon. William, R, Arbitrator, having heard evidence of both parties, issued an award in favour of the respondent ordering the applicant to pay USD 31,000 being salaries for the seven months remaining period of the contract, USD 5,166.7 being accrued payment for leave, USD 5,166.7 being payment of one month salary in lieu of notice, USD 180,000 being payment for general damages, USD 5,370 being payment for living costs, USD 12,720 being payment for house allowances, USD 51,158 being payment for school fees for two dependents, USD 10,000 being payment for health insurance, USD 7,000 being payment for home security, USD 10,000 being payment for air tickets, USD 2,782.06 being severance pay and USD 36,800 being transportation costs all amounting to USD 357,163.46. Applicant was also ordered to pay substance allowances accruing from the date of the award to the date of repatriation of the respondent and issue a certificate of service to the respondent.

Applicant was aggrieved by the said award hence this application for revision. The application is supported by the affidavit sworn by Jovither Mirumbe, senior administration and logistics Manager of the applicant. In the affidavit in support of the application, applicant raised eight (8) grounds of revision namely:-

1. *That, the arbitrator erred in law and fact in holding that there was constructive termination of contract of the respondent while there was no resignation from work before institution of the dispute at CMA.*
2. *That, the arbitrator granted an award of general damages while the same was not prayed for or pleaded or testified to establish general damages.*
3. *The arbitrator erred in awarding costs of living allowances while there was no evidence to establish that the employee was entitled to that allowance.*
4. *The arbitrator erred in law and fact in determining the dispute on issues that were not relevant as the respondent was never terminated.*
5. *The arbitrator erred in law and fact in analyzing both documentary and oral evidence tendered by the applicant's witnesses and arrived at a wrong conclusion that the witness did not speak the truth.*
6. *That the arbitrator erred in law and fact in failing to appreciate that the error in the work permit had material on the respondent's employment contract.*
7. *That the arbitrator erred in law and fact in awarding the respondent reliefs including among others salaries, accrued payment for leave, general damages, repatriation fees and severance pay irrespective*

of the fact that the respondent was paid her salaries up to the expiry of the employment contract.

8. *The arbitrator erred in fact and law in failing to appreciate that the Employment Contract between the applicant and the respondent was a fixed term contract.*

Respondent filed both the notice of opposition and a count affidavit opposing the application.

The application was disposed by way of written submissions. The applicant enjoyed the service of Juvenalis Ngowi, advocate from while the respondent enjoyed the service of Isaya Zebedayo Mwanri, advocate.

Submitting on the first ground, namely; that the arbitrator erred in law and fact in holding that there was constructive termination of contract of the respondent while there was no resignation from work before institution of the dispute at CMA, Mr. Ngowi, learned counsel for the applicant, submitted that the finding of the arbitrator was wrong both factually and legally. Counsel for the applicant relied on section 36(a)(ii) of the Employment and Labour Relations [Cap. 366 R. E 2019] and submitted that for constructive termination to exist, an employee must have resigned after the employer has made employment

intolerable. Counsel went on that, there was no resignation on part of the respondent hence no constructive termination. Counsel for the applicant submitted further that, there has to be compliance with the provisions of Rule 7(2)(a) of the Employment and Labour Relations (code of Good Practice) GN. No. 42 of 2007, for constructive termination to exist. Counsel argued that, for constructive termination to exist, it must be proved that the employer made employment intolerable and due to that intolerability, the employee resigns. Counsel for applicant cited this court's decision in case of ***David Msangi and Another v. National Oil (T) Limited, Labour Revision No. 397 of 2016*** (unreported) and ***Victoria Jonathan v. Statoil Tanzania, Labour Revision No. 401 of 2019*** (unreported) to cement on his arguments. Counsel for the applicant submitted further that, respondent did not resign as admitted while under cross examination and did not explore other options of resolving work permit before filing the dispute to CMA. Counsel submitted that the arbitrator erred in law to treat a letter dated 4th January 2021 (exhibit A8) written by counsel for the respondent demanding respondent to be paid USD 1,121,658.1 within 24 hours as notice of resignation or "*constructive termination notice*". It was also

submitted on behalf of the applicant that, exhibit A8 cannot be regarded as resignation as it does not say that the respondent resigned. It was further submitted that, the said exhibit was written by counsel for the respondent while resignation has to be done by an employee and not by her lawyer. More so, Mr. Ngowi, counsel for the applicant insisted that the said letter is not "constructive termination notice" as that is unknown creature in our jurisprudence.

Counsel for the applicant submitted further that, there was no proof that applicant made employment of the respondent intolerable. Counsel submitted that, there was an error in the work permit of the respondent as the position or job title of the respondent in the work permit did not tally with the contract of employment (Exh.D1). That, due to this error, there were discussions between applicant and Labour officers on how to resolve the situation but before conclusion, respondent filed the dispute at CMA. Counsel submitted that it is illegal for someone to work without valid permit, which is why, applicant put the respondent in administrative leave pending determination of work permit to be issued by relevant authorities. Counsel for the applicant went on that, at all time, respondent was in possession of her work

permit, residence permit and contract of employment, as such she was aware of the contents thereon. Counsel for the applicant concluded that complying with the law and ensuring that respondent had valid permit, cannot be construed to be an act of creating employment intolerable and that, arbitrator erred in concluding that failure of the applicant to allow the respondent to attend at workplace made employment intolerable. Mr. Ngowi, counsel for the applicant submitted that, all claims in exhibit A8 including but not limited to claim of 2020 Financial year (FY20) bonus and payment of expatriate allowance claims, in order to be paid, they were supposed to be included in the employment contract, but they were not. Counsel for the applicant submitted that, respondent was given an option of being paid the remaining period of her contract, but she refused.

Mr. Ngowi, learned counsel for the applicant submitted further that, respondent was paid up to the end of her contract but the arbitrator disregarded salary slips (exhibit D3) which shows that respondent was paid for the whole period she was under administrative leave until expiration of her contract of employment. It was submitted that, reasons assigned by the arbitrator in not giving weight to exhibit

D3 is that, the same does not show the full bank account number of the respondent. Counsel for the applicant submitted that non-disclosure of the bank account number of the respondent did not invalidate the said salary slip and that the same was for confidentiality purposes. Counsel for the applicant submitted that, validity of exhibit D3 was not challenged by the respondent but by the arbitrator at the time of composing the award. Counsel for the applicant submitted that the arbitrator had no full knowledge of how the said salary slips were. Counsel submitted that, the arbitrator erred in holding that payment in exhibit D3 was not salary but only administrative leave pay, while DW1 testified that respondent was put on administrative leave for purposes of complying with the law as respondent could not work without valid work permit. In conclusion, counsel for the applicant submitted that as respondent was paid for the remaining period, it cannot be said that there was constructive termination.

Mr. Mwanri, learned counsel for the respondent submitted that, the fixed term contract between the applicant and the respondent was breached by the applicant's conducts which made employment intolerable for the respondent to continue performing her obligations.

Counsel for the respondent submitted that, intolerable situation started in July 2020 as the respondent reported to the applicant incidences that constitutes intolerability but no action was taken. Counsel mentioned the intolerable incidences as (i) denial of expatriate status and benefits that were granted to foreign staffs hence discrimination, (ii) unexplained redundancy process that was later on withdrawn contrary to the law, (iii) denial of financial year staff bonus which was granted to all staffs including local staffs hence discrimination, (iv) false and illegal work permit, (v) falsified information about Labour Officer and Immigration Department inquiry, and (vi) endless "hiding at home order" and approach to buy respondent's employment.

Mr. Mwanri, counsel for the respondent submitted that, the dispute between the parties was not unfair termination but breach of contract and that applicant has missed a point by basing her submission on constructive termination. Counsel submitted that, in CMA F1, respondent indicated that the dispute relates to breach of contract and did not fill part B of the said CMA F1. Counsel for the respondent submitted further that, the contract between the parties was not executable due to unfair Labour practice of applying and obtaining illegal

work permit that was negligently done by the applicant. Counsel for the respondent went on that, it was constructive breach of the contract when the applicant told the respondent to hide and not to go at work due to illegal permit without proof that there was inquiry of her work permit from government officials. Counsel for respondent concluded that, impliedly, applicant breached covenant imposed by the law, which is a breach of contract.

On the other limb of his submission, counsel for the respondent submitted that respondent testified at CMA that, she was constructively terminated from employment. Counsel cited the case of ***Kobil Tanzania Ltd v. Fabrice Ezaovi, Civil Appeal No. 134 of 2017***, CAT (unreported) and argued that all conditions set by the Court of Appeal to prove constructive termination were proved by the respondent based on intolerable incidences mentioned hereinabove. Responding to submission by counsel for the applicant that exhibit A8 was written by a lawyer and not the respondent, Mr. Mwanri, submitted that, the said exhibit was written by a lawyer after being instructed by the respondent and therefore, it is good as if it was written by the respondent herself.

Mr. Mwanri strongly submitted that the relationship between the applicant and the respondent became unbearable as it was proven by the document that was received at CMA for identification as **ID1** because respondent was not paid expatriate allowances and bonus as she was discriminated.

Having carefully examined the CMA record and submissions made on behalf of the parties, I have opted to put clear some few issues that have consumed time of the parties in their submissions. It is undisputed that in the CMA F1, respondent showed that the dispute relates to breach of contract and did not fill part B that relates to termination of employment.

It is also undisputed that in the said CMA F1 respondent showed that she was claiming to be paid **terminal benefits** amounting to USD 1,121,658.1. During trial, applicant raised an objection when the respondent attempted to tender various email correspondences relating to expert Allowances, Fy20- above and beyond hard work: Employee Shout Out, Permit Query by Immigration, reference meetings with Zelma and pay out as a result the arbitrator received them for identification purposes and marked them as **ID1** promising to make a decision on

their admissibility at the time of considering the entire evidence as per Rule 23(9) of the Labour Institutions (Mediation and Arbitrations Guideline) Rules, GN. No. 67 of 2007. In the award, the arbitrator said nothing on admissibility or otherwise of these emails but went ahead to consider and use them. On the other hand, counsel for the respondent has over relied on these documents to oppose the application. With due respect to both the arbitrator and counsel for the respondent, documents that has not been admitted in evidence, cannot be used as such. The arbitrator was supposed to make a ruling on admissibility or otherwise of the said documents during trial and not otherwise. His failure made the respondent to believe that the documents were evidence but the applicant believing it was not. The documents that were admitted for identification has no evidential value. This is position of the law as it was propounded in the case of ***Rashid Amir Jaba and Another v. Republic,*** Criminal Appeal No. 204 of 2008 (unreported) wherein the Court of Appeal held:-

> "***The law is settled that any physical or documentary evidence marked for identification only and not produced as an exhibit does not form part of the evidence hence have no evidential value.*** *(see* ***Samson Elias @ Michael Vs. Republic,*** *Criminal Appeal No. 283 of 2012,*

and ***Udaghwenga Bayay and 16 Others Vs. Halmashauri ya Kijiji cha Vilima Vitatu and Another,*** *Civil Appeal No. 77 of 2012 (both unreported)"*

The arbitrator relied on Rule 23(9) of GN. No. 67 of 2007, supra, that empowers the arbitrator to decide the preliminary point before going ahead with the matter or continue with hearing of the dispute and decide the preliminary point at the time of considering all evidence in the matter. As pointed hereinabove, the arbitrator did not decide on the preliminary point at the time of considering evidence of the parties. This is an error. IDI was therefore wrongly relied upon by the arbitrator as the same was admitted as evidence for it to be regarded and relied upon as evidence. More so, reliance on IDI by counsel by the respondent to support the arbitrator's decision cannot be accepted as the said IDI is not evidence. Even if these documents could have been admitted as evidence, would have been not proper to rely upon them for reasons that they were not part of what the parties agreed in the fixed term contract of employment as I will explain hereinbelow when discussing sanctity of the contract of employment between the applicant and the respondent.

The heart of argument between counsel for the parties has been whether; respondent's employment was constructively terminated by the applicant or not. Initially counsel for the respondent bashed counsel for the applicant that he has missed a point as the dispute did not related to constructive termination because respondent did not fill part B of CMA F1 as the same was based on breach of contract. But later on; in the same submission, counsel for the respondent submitted that respondent was constructively terminated.

It is clear in CMA F1, respondent showed that the dispute was based on breach of contract, but her prayers were based on termination, which is why, she showed that she was claiming terminal benefits. The CMA record shows that on 18th March 2021, the parties drafted two issues namely (i) whether there was constructive breach of contract and (ii) to what reliefs are the parties entitled. Therefore, the matter went ahead based on these two issues.

It was submitted by counsel for the respondent that, there was ***constructive breach of contract of employment*** by the applicant while counsel for the applicant submitted that, there was no ***constructive termination***. In my view, these are two different terms.

The term "***constructive breach of contract***" is defined by Bryan A. Garner (editor in chief) in the ***Black's Law Dictionary***, Eight Edition by referring to anticipatory breach. The latter is defined to mean

> "*a breach of contract caused by a party's anticipatory repudiation i.e., unequivocally indicating that the party will not perform when performance is due*".

Now therefore, the issue is whether respondent proved by evidence that there was constructive breach of contract for the award to be issued in her favour.

I have examined evidence of Mergitu Ebba (PW1) the respondent and find that she stated nothing relating to breach of contract. All what she stated in her evidence relates to incidences she believes made employment to be intolerable. In her evidence, respondent (PW1) did not testify as to how and what clause of the said fixed term contract of employment was breached by the applicant. Argument by counsel for the respondent that intolerable situation started in July 2020 and that respondent reported to the applicant who took no action, is not supported by evidence. Mergitu Ebba (PW1), the respondent who is the only witness who testified at CMA to prove her case, did not so state.

Mr. Mwanri, advocate has therefore, advanced extraneous matters not supported by evidence. That is unacceptable. In her evidence in chief, respondent (PW1) is recorded stating:-

> *"When I was in Tabora doing field work I received an email from my immediate supervisor Dr. Magnes that I should go back in Dar es salaam as my Mbeya station has received call regarding my working permit. Thereafter I was advised to work from home on allegation that the title in my work permit reads Outreach Consultant while in the resident permit the title reads Prevention and Outreach Advisor which is my actual title of my position...It is my employer who secured the work permit which bears a wrong title. It was my expectation that my employer secure my permit to reside in Tanzania and provide me with correct permit.* ***I believe my employer has breached my contract and put me into a risk of being arrested.*** *It is really impossible to keep on working even from home as I may be arrested even when I am at home..."*

While under cross-examination, respondent is recorded stating:-

> *"According to the offer letter and fixed employment contract,* ***my job title is prevention and outreach advisor.*** *I was employed as advisor. It is correct that my employer processed resident permit according to the contract of employment. Residence permit I think comes from Immigration. Work permit is issued by the Labour Commissioner..."*

From the afore quoted evidence in chief, respondent believed that the applicant breached the contract. In other words, there was no breach of contract but a mere belief by the respondent that the contract

was breached. Reliance of the alleged breach by the respondent is based on issuance of work permit bearing different title of the respondent from the one appearing on the Residence permit. But the issue is whether; that can amount to constructive breach as defined hereinabove. In my view, it does not. Reasons for this conclusion is not far. It was submitted on behalf of the respondent that the contract was not executable due to unfair Labour practice of applying and obtaining illegal work permit that was negligently done by the applicant. With due respect to counsel for the respondent, there is no evidence on record showing that applicant obtained illegal work permit of the respondent. What is clear is that the job title appearing in the work permit differs from the one in the resident permit. That in itself; cannot amount to obtaining illegal permit of the respondent. It was argued again that, the obtaining of the respondent's work permit was negligently done by the applicant. Once again, respondent did not prove by evidence negligence of the applicant. On the other hand, evidence was given by the applicant as to how this happened, and attempts made to resolve it.

Respondent complained that she was at risk of being arrested for being in possession of the work permit that shows that, her tittle is

Outreach Program Consultant, while her tittle appearing in both the Residence permit and the fixed term contract of employment was Outreach & Prevention Advisor. It was further submitted by counsel for respondent that, after noting that there was discrepancy in work permit of the respondent, applicant took no action to remedy the situation and that, applicant applied the work permit for wrong title in order to make the work intolerable. These allegations, in my view, are not backed up by evidence. Because, on 15th August 2019, the executive Director of the applicant wrote a letter titled ***CHANGE OF JOB TITLE FOR MS. MERGITU FEKADU EBBA WITH WORK PERMIT NO. WPC/12656/17*** (part of exh. A3) to the Labour Commissioner to change work permit of the respondent. Reasons assigned for this change is that, initially the respondent had a different role from the present. The said letter reads in part:-

> *"...HJF Medical Research International Inc (HJFMRI Inc), is writing to request you to renew our employee **MS. Mergitu Fekadu Ebba ("Miss. Ebba")** Work Permit Class C No. WPC/12656/17 issued under a job title of **Outreach Program Consultant** to a new job title as the **Outreach & Prevention Advisor**...In 2017, HJFMRI Inc applied for a work permit for Ms. Ebba on a consultancy basis **which was issued under work permit no WPC/12656/17** issued under a job title of **Outreach Program***

Consultant. *The work permit was renewed on the same title on 30th March 2019, but it was deferred on 30th April 2019 due to missing documents. During the application, HJF Inc was awarded by the Tanzania People's Defence Force (TPDF) on clinical and prevention strategies with regard to the prevention of HIV/AIDS. This award has made it necessary for HJFMRI Inc to change Ms. Ebb's position as a consultant to a full time employee because of the sensitivity of the role hence new job title...This role cannot be filled on a consultancy basis due to the sensitivities involved in work directly with the TPDF...HJFMRI Inc respectfully requests that you grant the permit and we thank you for your usual cooperation...*

On 23rd August 2019, the Labour Commissioner issued **Work permit No. WPC/12656/16** (exh. D1) in favour of the respondent. It can be recalled that, the said fixed term contract of employment between the applicant and the respondent was signed on 27th June 2019, and the letter for application for renewal of work permit of the respondent (part of exh. A3) to be in line of the contract, was written on 15th August 2019, and the permit was issue seven (7) days thereafter i.e., on 23rd August 2019. In my view, the complained of error, cannot be attributed to the applicant. It is a misdirection on part of the respondent to claim that applicant constructively breached the contract by failure to give respondent proper work permit or that applicant acted

negligently. The quoted part of exhibit A3 speaks louder that applicant was not negligent.

Apart from the foregoing, in my view, respondent has also a share of blame to this. In her evidence, respondent testified that she received an email while in Tabora doing field work requiring her to go back in Dar es Salaam and work from home as the applicant's office at Mbeya received a call from Immigration officer about her work permit. I should point that, according to resident permit issued to the respondent, Tabora was not one of her place of work. In short, she violated the terms of her residence permit.

Respondent testified that while in Tabora for field work, she was told to go back in Dar es Salaam allegedly that government officials were enquiring her work permit. Unfortunately, respondent did not show the date she received the said email. Possibly, it was in 2021 because respondent indicated in CMA F1 that the dispute arose on 7th January 2021. The permit was issued on 23rd August 2019, and in terms of section 17(2) of the Non-Citizens (Employment Regulation) Act, 2015, No. 1 of 2015 respondent was the custodian of the said work permit

from the date of issue, as such, she was expected to have noted the difference in her job title and report to the applicant. Respondent was not expected to wait until government officials intervenes. The said section reads:-

> *"17(2) A work permit or certificate of exemption, as the case may be, shall be kept by the person to whom it is issued and shall on demand be produced."*

Respondent cannot claim that she was not in possession of the said work permit or that she was unaware that she is not supposed to be in possession of the said working permit because conditions on the work permit itself is clear. Condition number 3 on the working permit reads:

> *"3. This permit shall be kept by the holder and produced to any authorized person on demand."*

It is clear that the work permit, exh D1, was issued to Margitu Ebba, the respondent, as it reads:-

> ***I hereby issue work permit to Mrs. Margitu Ebba*** *of CANADA nationality with passport No. GJ670504 to work as OUTREACH PROGRAM CONSULTANT in Tanzania mainland with M/s HJF MEDICAL RESEARCH INTERNATIONAL INC. This permit shall be valid for the period of 2 YEARS with effect from 23RD AUGUST 2019 to 22ND AUGUST 2021 subject to conditions specified overleaf.*

Dated 23/8/2019 *Rehema G. Moyo*

sgd

For : Labour Commissioner"

In my view, as the respondent was in possession of the said work permit, and, as she was also in possession of the residence permit, it was not open to her to wait until government officials from either Immigration department or the Labour Officer to make inquiry. She had a duty to act from the beginning in order the complained of error to be rectified.

It was testified by the respondent and submitted by her counsel that, the applicant falsified the work permit of the respondent, in alternative, that applicant was negligent in making application for work permit of the respondent. It is my considered opinion that, that complaint or criticism against applicant lacks legal support. This is because, in terms of section 10(1) of the Non-Citizens (Employment Regulation) Act, 2015, an application for working permit has to be made by the employer. But the person who an application for work permit is made on behalf, has, in terms of Part I of the First Schedule to the said Act, to fill in, his or her particulars, affix a passport size photo, ***job title***

etc and sign a declaration that all information is correct. That being the position of the law, it is the respondent and not the applicant who filled her particulars and signed the declaration that all information including job title is correct. She cannot now distance herself from that declaration. On the other hand, the employer is duty bound to sign part II of the said schedule. In my view, the claim that the error was caused by the applicant who, filled in a wrong title in the application for work permit, cannot be valid because that was the duty of the respondent in terms of Part I of the First Schedule to the Non-Citizens (Employment Regulation) Act, 2015. I should point here that, the said schedule is part of the law as it was made under section 10(2) of the Non-Citizens (Employment Regulation) Act, 2015. As pointed out hereinabove, the herein applicant(employer) was required to fill part II of the said First Schedule. There is nowhere in part II of the aforementioned First Schedule requiring the employer to show job title of the person who, a permit is being sought in favour. So longer as respondent filled the job title and signed a declaration that all information is correct, she cannot now be heard shifting blame to the applicant.

As pointed above, counsel for the respondent initially submitted that the dispute related to constructive breach of contract and not termination. I have also explained hereinabove that respondent indicated in CMA F1 that the dispute was on breach of contract. In her evidence, respondent did not testify on how the contract was breached, rather, she gave incidences she believed made employment intolerable. This, in my view, is not similar in proving breach of contract, rather, constructive termination. This explains all as to why, she claimed terminal benefits. In short, respondent departed from her own pleadings. It is a cardinal principle of law that parties are bound by their pleadings and they are not allowed to depart as it was held by the Court of Appeal in the case of ***The Registered Trustees of Islamic Propagation Centre (Ipc) v. The Registered Trustees of Thaaqib Islamic Centre (Tic), Civil Appeal No. 2 of 2020*** ,CAT (unreported). and in ***Astepro Investment Co. Ltd v. Jawinga Company Limited, Civil Appeal No. 8 of 2015,*** CAT (unreported). In the ***IPC's case,*** supra, the Court of Appeal held that:-

> *"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules o f pleadings .... For the sake of certainty and finality, each party is bound by his own pleadings and*

cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation."

Guided by the above Court of Appeal decisions and for all I have explained hereinabove, I hold that respondent departed from her own pleadings of which she cannot be allowed. I further hold that respondent did not prove the alleged breach of contract. In short, the arbitrator erred to issue an award in favour of the respondent.

The afore holding is sufficient to dispose the whole application but for completeness, I have opted to deal with other issues raised by the parties.

It was argued by counsel for the applicant that respondent did not prove that her employment was constructively terminated. Respondent, on the other hand, narrated incidences which, according to her, made employment to be intolerable. I will not repeat those incidences as I

have briefly reproduced them in this judgment. Counsel for the respondent relied on the decision by the Court of Appeal in ***Kobil's case***, supra, and submitted that all conditions were met and concluded that there was constructive termination of employment of the respondent. Counsel for the applicant was of the different view.

The issue of constructive termination is not novel in our jurisdiction. It has been discussed and held several times by both this court and the Court of Appeal. For example, the court of Appeal had an advantage to discuss the issue of constructive termination and the onus of proof thereof in the case of ***Kobil Tanzania Ltd vs Fabrice Ezaovi, Civil Appeal No. 134 of 2017*** (unreported). In the ***Kobil's*** case, (supra), the court of Appeal quoted and endorsed an article by Sharon Sheehan titled **Constructive Dismissal - A Last Resort Remedy** that:-

> *"Unlike all other dismissals, where an employee claims that they have been constructively dismissed the onus/burden of proof is placed upon them to prove that their resignation was justified. In effect, they are required to prove that they have exhausted all other avenues of resolution before they have* ***resigned from their position****. This would generally require them to bring their grievance to the attention of their employer,* ***follow all the employer's grievance procedures and industrial relations***

procedures, *as outlined in their contract or the employee handbook. Only where these procedures have not achieved an appropriate outcome or where the employer has refused to comply with or engage in these procedures, then should an employee consider* ***resigning from their position****. A failure to invoke these procedures may leave the Court or Tribunal open to rejecting a claim of constructive dismissal."*

In the ***Kobil case***, supra, the court of Appeal subscribed to the South African decision in the case of ***Solid Doors (Pty) Ltd v. Commissioner Theron and Others,*** *(2004) 25 ID 2337 (LAC)* at para 28 that:-

"... there are three requirements for constructive dismissal to be established. The first is that the employee must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment Intolerable. All these three requirements must be present for it to be said that a constructive dismissal has been established. If one of them is absent constructive dismissal is not established"

It is my considered view that, constructive termination of contract of employment is by forced resignation as provided for under rule 7(1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007. From the evidence in the CMA record, the respondent did not resign as she conceded in her evidence while on

cross examination. More so, while under cross examination she admitted that her employment was not terminated by the applicant. Counsel for the respondent relied on Rule 7(1), supra, and submit that there was constructive termination. The said Rule 7 is clear and provides:-

> *"7(1) where an employer makes an employment* ***intolerable which may result to the resignation of the employee, that resignation amount to forced resignation or termination.***
>
> *(2) subject to sub-rule (1), the following circumstances may be considered as sufficient reasons to justify 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 (sic) with,* ***provided that an employee has utilized the available mechanisms to deal with grievances unless there are god 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."*

In fact, for an employee to succeed in an application for unfair termination based on intolerability of employment, has proved that it is his or her employer who caused the employment intolerable in terms of section 36(a)(ii) of the Employment and Labour Relations Act [Cap.366 R.E 2019]. This section provides:-

"36 For purpose of this sub-part-

(a)termination of employment "includes-

(i)...

(ii) a termination by an employee because the employer made continued employment intolerable for the employee."

It was argued by counsel for the applicant that respondent did not terminate the contract of employment as the so called "***Notice of constructive termination***" dated 8th January 2021 (part of exhibit A8) was written and signed by an advocate and not the respondent. On the other hand, counsel for respondent argued that the advocate wrote and signed the said notice after permission of the respondent and that it is equally that it was signed by the respondent. with due respect to counsel for the respondent, that proposition is not correct in law, because anything required to be done by a certain person, it must be so done and not otherwise. Section 36(a)(ii) of the Employment and Labour Relations Act, supra, requires an employee to terminate employment and not any other person to terminate employment on her behalf. In the letter titled ***CONSTRUCTIVE TERMINATION OF MERGITU EBBA*** dated 4th January 2021 signed by Isaya Z. Mwanri, advocate (that is part

of exhibit A8) that is regarded as ***"Notice of constructive termination"***, the author narrated incidences relating to (i) denial of expatriate status and benefits, (ii) unexplained redundancy process that was later withdrawn, (iii) denial of FY20 staff bonus, (iv) false and illegal work permit, (v) false information about Tanzania immigration department inquiry, (vi) unexplained inquiry of the unknown labour officer, (vii) Endless hiding at home and (viii) approach to buy out contract. At the end the author wrote as follows:-

> *"... from the above reasons, we have all naked oral and documentary evidence to establish constructive termination. It is undisputed that any reasonable member of the society can construe that the workplace is no longer tolerable for our client. Therefore, we have full instructions from our client to demand terminal benefits of USD 1,121,658.1... Take notice that any failure to honour the above listed demands within 24 hours from the date of this letter, we have full instruction to pursue our client's right in the appropriate legal authorities.*
>
> *Regards*
>
> *BAISTAR ADVOCATES*
>
> *Sgd*
>
> *ISAYA Z. MWANRI (ADVOCATE)."*

From where I am standing, the above quoted letter cannot, for all intent and purpose, be regarded as letter terminating employment on

behalf of the respondent. There is nothing said in the said letter that respondent has decided to terminate her employment after the applicant had made it intolerable. The said letter is a demand notice and not termination of employment. I therefore concluding that there is no constructive termination of employment because the aforementioned fixed term contract of employment between the parties was not terminated. In short, the conditions set out in the South African case of ***Solid Doors,*** (supra) that was quoted with approval by the court of Appeal in ***Kobil's case***, supra, for constructive termination to exist were not met.

In ground 3, applicant argued that arbitrator awarded costs of living allowances while there was no evidence to establish that respondent was entitled to that allowance. In ground 4, Hon. Arbitrator is criticized that he determined the dispute on issues that were not relevant as respondent was not terminated. In ground 7 applicant argued that there were not contractual terms between the parties for the arbitrator to award the respondent to be paid reliefs that she was awarded e.g., accrued payment for leave, general damages, repatriation fees severance etc.

Counsel for the respondent submitted that, respondent was entitled to all relief claimed in the schedule of claims annexed to CMA F.1 that I have reproduced in the introductory part of this judgment. It was further submitted by counsel for the applicant that, when there is termination of a fixed contract of employment, an employee is awarded payment for the remaining period of the contract, but the arbitrator awarded the respondent a period exceeding the remaining period.

In rejoinder, counsel for the applicant submitted that respondent was paid up to the last date of expiry of her employment hence she is not entitled to be paid damages or any other relief.

I have carefully read the fixed term contract of employment between the applicant and respondent (exh.A1) and find that it has nothing to do with (i) USD 5,166.7 that was awarded as being accrued payment for leave, USD 180,000 as general damages, (ii) USD 5,370 that was awarded as being living costs, (iii) USD 12,720 that was awarded as being house allowances, (iv) USD 51,158 that was awarded as being school fees for two dependents, (v) USD 10,000 that was awarded as being payment for health insurance, (vi) USD 7,000 that

was awarded as being payment for home security, (vii) USD 10,000 that was awarded as being payment for air tickets, (viii) USD 2,782.06 that was awarded as being severance pay and (ix) USD 36,800 that was awarded as being transportation costs all amounting to USD 357,163.46, this is because, there is no clause in the said fixed terms contract showing that parties agreed these to be paid or that respondent was being paid these payments. As these were not part of the terms in the said fixed contract (exh A1), parties are bound by what they agreed in the said contract. The court of Appeal in the case of ***David Nzaligo vs. National Microfinance Bank PLC, civil Appeal No. 61 of 2016*** (Unreported) has clearly put this clear when it held:-

> *"...It is important to note that the sanctity of the employment contract cannot be gainsaid. In the present appeal the appellant and the respondent agreed to be bound by the contract under the terms and conditions therein and also accepted the rights and duties, responsibilities and obligations on either..."*

Applying sanctity of employment contract between the applicant and the respondent, all what was not agreed in the said fixed term contract of employment, cannot be awarded. In the said fixed term contract of employment (exh. A1) parties agreed in clause 11.2 that any termination prior to expiry shall be by either party giving the other thirty days

written notice or on payment of one-month salary in lieu of notice. As held hereinabove, there is not termination of employment and therefore, it was an error on part of the arbitrator to award respondent to be paid USD 5,166.7 as payment of one-month salary in lieu of notice. As there was no termination, it was also an error for the arbitrator to award USD 31,000 as salaries for the remaining period of the contract and USD 180,000 as general damages. Complaint by counsel for the applicant that arbitrator awarded the respondent by exceeding the remaining period of the fixed term contract has merit. But, as there was no termination of contract of employment, respondent cannot also be paid for the remaining period. More so, the evidence of Jovitha Gabriel Mirumbe (DW1) was not shaken when she testified that, respondent was put in administrative leave and continued to receive payment while trying to sort out her work permit issue, but she rushed and filed the dispute at CMA. DW1 testified further that, respondent was paid the said administrative pay up to April 2021. DW1 tendered pay slip (exh D3) without objection. I have noted that, DW1 testified on 7th May 2021 and therefore, in my view, no payment could have been done in favour of the respondent as administrative leave for the remaining period i.e., 30th

June 2021. For all these, I hold that, respondent was not entitled to be awarded any payment.

For all what I have stated hereinabove, I find that the application by the applicant has merit and hereby allow it. I therefore quash and set aside the CMA award.

Dated at Dar es Salaam this 11th March 2022.

B.E.K. Mganga
JUDGE