IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 456 OF 2020

BETWEEN

THEOPISTA E. MAZIKU ..... APPLICANT

VERSUS

MSAMA PROMOTIONS CO. LTD. ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The revision beforehand was lodged under Section 91(1)(a)(2)(b)(c)(4)(a)(b), 94(1)(b)(i) of the Employment and Labor Relations Act, R.E. 2019 ("the Act") and Rule 24(1)(2)(a)(b)(c)(d)(e)(f)(3)(a)(b)(c)(d) 28(1)(c)(d)(e)&(2) of the Labour Court Rules GN. No. 106 of 2007 ("the Rules"). The applicant is moving the court for the following orders:-

1. The Honorable Court be pleased to call for record, revise and set aside the Arbitration Award dated 23rd September 2020 by Mbeyale, R. (Arbitrator) made from No. CMA/DSM/KIN/256/19/132 with the view to satisfy itself as to the legality, propriety, rationality, logical and correctness thereof.

2. The Honourable Court be pleased to determined the matter in the manner it deems and fit and give any other relief it consider just to grant for the interest of justice.

The application is supported by an affidavit of the applicant dated 03rd November, 2020. In this court, the applicant appeared in person. Following service to and non-appearance of the respondent, hearing of the application proceeded ex-parte by way of written submissions.

In her affidavit in support of the Chamber Summons, the brief background gathered therein is that the applicant was employed by the Respondent as a promotion officer since 20/2/2008. She worked for 11 years to 2019. In due course of her employment, the Respondent absconded from paying her statutory salaries for 36 months. Alleged to have been caught in a difficult situation, the applicant tendered a resignation letter to the Respondent (annexure P1) dated 13/02/2019 and on 23rd March, 2019 she referred the matter to the Commission for Mediation and Arbitration for Kinondoni ("the CMA") as Labour dispute No. CMA/DSM/KIN/256/19/132 ("the Dispute") claiming to be paid her salary arrears, worth Tshs. 18,000,000/=. The CMA dismissed the claim on the ground that the applicant did not prove that she had salary arrears. It is on that background that the

applicant lodged the current revision on the ground that the Arbitrator failed to analyze the evidence which was adduced by the Applicant in support of her claims. Further that the Trial Arbitrator Committed a serious illegality by determining the issue which was not in dispute and decide otherwise contrary to the prayers sought by the applicant.

From what I have gathered in her submissions, the applicant's claim was on constructive termination where she alleged not have been paid her salary for 31 months. In her award, the Arbitrator reasoned that before approaching the CMA, the applicant ought to have exhausted for internal procedures to claim her salary and that she was duty bound to adduce reasons why that was not done.

I will first start with defining what constructive termination is, what the courts (in this case the CMA) ought to consider when there is a claim of constructive termination and the duty of the employer therein. I find myself obliged to do so because I have noted that in the award, the arbitrator shifted the burden to prove non-payment of salary to the employee/applicant herein. Constructive termination is elaborated under Section 36(a)(ii) of the Act which provides:

"For purposes of this Sub-Part-

(a) "termination of employment" includes-

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

Further to that, Rule 7 (1)(2)(b) & (3) of the Employment and Labor Relations (Code of Good Practice) Rules, G.N No. 42/2007 ("the Code") talks of constructive termination as follows:

> *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 constructive termination.*
>
> *(2) Subject to sub-rule (I), the following circumstances may be considered as sufficient reasons to justify a forced resignation or constructive termination*
>
> *(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***

As for the case at hand, the applicant had established her employment with the respondent and the Arbitrator made a finding to that effect.

However, the arbitrator blamed the applicant for not exhausting the internal available remedies. I find that the arbitrator omitted to consider the whole provisions of Rule 7(2)(b) which ends with the words "unless there are good reason for to doing so". It was crucial for the arbitrator to take into consideration this clause because the trend of the respondent can lead to a conclusion that the applicant could not exhaust those remedies. I am saying so because at the CMA, the respondent's reaction (by the DW1) was to disown the applicant completely, that she was not his employee. It is trite law that in deciding labor cases, the yard stick for determination of the fairness of the termination is "fairness". The arbitrator should have guided herself on whether it was fair to subject the applicant into proving that internal remedies were exhausted in relation to the prevailing circumstances.

Fairness would have called for the arbitrator to consider the fact that the issue of exhaustion of internal remedies never cropped up during hearing at the CMA, it is something she came up with during judgment. Afterall, the applicant had established that they were holding meetings to table their demands and no actions were taken.

At the South Africa's Labor Appeals Court, when faced with the claim for constructive termination in the case of **In Solid Doors (Pty) Ltd v.**

Commissioner Theron and Others, (2004) 25 ID 2337 (LAC) at para 28,the Court observed:

> *"... 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...."*

In our case at hand, the applicant had proved that she had terminated her employment with the respondent by tendering a resignation. Her reason was that the respondent had made the employment intolerable by stopping to pay salary to the applicant and the respondent could not prove that the said salaries were paid. The issue of intolerance was therefore well established. And the third reason was also established, that the respondent

made the employment intolerable when she stopped to pay the salaries of the employee.

Furthermore, two more questions were added to the above list by the Court of Appeal of Tanzania when determining an issue of constructive termination in the case of **Kobil Tanzania Limited Vs. Fabrice Ezaovi (Civil Appeal 134 of 2017) [2021] TZCA 485 (16 September 2021)** when they had this to say:

"Reverting to the matter at hand, we respectfully think, in order to answer whether there was constructive dismissal in this matter, we need to answer the questions as posed in Katavi Resort (supra) and Girango Security Group (supra). These are:

1. Did the employee intend to bring the employment relationship to an end?

2. Had the working relationship become so unbearable objectively speaking that the employee could not fulfil his obligation to work?

3. Did the employer create an intolerable situation?

4. Was the intolerable situation likely to continue for a period that justified termination of the relationship by the employee?

5. Was the termination of the employment contract the only reasonable option open to the employee"

The first three questions have been discussed earlier in relation to the South African case but, the remaining two questions have to also be put to test. The questions are was the intolerable situation likely to continue for a period that justified termination of the relationship by the employee. As the evidence established, the respondent had not paid the salary for 31 months and the demands efforts proved futile. For the period established, it is safe to conclude that the intolerable situation was likely to continue for a period that justified termination of the employment relationship by the employee. The last question is whether the termination of the employment contract was the only reasonable option open to the employee. I see no evidence that established otherwise during arbitration as the respondent's reaction was to disown the applicant as her employee. What other option could the applicant have?

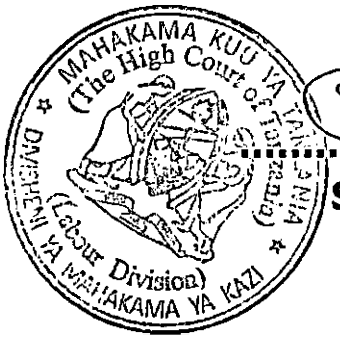
If the applicant claimed that she was not paid her salary for 31 months, that is a sufficient ground to establish constructive termination which the arbitrator would have taken on board. It was hence for the employer to prove that the said salaries were paid to her and she had no claim against

them. Disowning employment because of their own shortfalls in failure to give written contract to their employees is not sufficient to abandon the applicant's claim, after all, the applicant established many work done on behalf of the respondent. Hence according to Rule 7(3) of the Code, where it is established that the employer has made employment intolerable as a result of resignation of employee, it shall be legally regarded as termination of employment by the employer. The applicant successfully established the intolerable conditions, she was therefore an employee who was constructively terminated hence is eligible for compensation under Part IV of the Act. Therefore this case fits into all the established questions to prove constructive termination.

Having made the above findings, I allow this revision by setting aside the award of the CMA. The applicant was constructively terminated by the respondent's failure to pay her salaries for 31 months. She was hence unfairly terminated. The relief that the applicant is entitled to are as per the CMA Form No. 1 prayer 1,2,3,4 and 6 as prayed which is severance pay, leave accrued, salary areas and a certificate of service. On the 5th prayer, since I found that the termination was unfair, the respondent shall pay the applicant a compensation equivalent to 24 months' salary.

The applicant's salary was Tshs 450,000 X 31 months which is equivalent to 13,950,000/-, severance pay to be calculated at 450,000/7 X 5 years equivalent to 525,000/-. Since the applicant did not quantify the number of years that she claims for leave allowance, she shall be paid one year leave which is Tshs 450,000/- and a certificate of service. These are all entitlement of the applicant that was due from her employer. The applicant is also entitled to compensation under Section 40(1)(c) which pursuant to Section 40(2), the compensation is in addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement. To this end, the court awards the applicant a compensation equivalent to 24 months' salary calculated at 24 X Tshs. 450,000 which amounts to Tshs. 10,800,000/-. Therefore in total, the respondent shall pay the applicant an amount of **Tshs. 25,725,000/-** and a certificate of service. It is so ordered.

Dated at Dar-es-salaam this 07th day of February, 2022.



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S.M. MAGHIMBI
JUDGE