IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 408 OF 2021

(Originating from Award No. CMA/DSM/ILA/689/2020 delivered by Hon. Wilbard G.M. Arbitrator, 6th September, 2021)

BETWEEN

NEEMA BATCHU ..... 1ST APPLICANT

ALUNE GIDEON KASILILIKA ..... 2ND APPLICANT

VERSUS

ABSA GROUP LTD (Formerly Barclays Bank (T) LTD) ..... RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J.

The applicants were aggrieved by the award of the Commission for Mediation and Arbitration for Ilala ("CMA") dated 06/09/2021 by Hon. Wilbard, G.M, Arbitrator in Labour Dispute No. CMA/DSM/ILA/689/2020. They have lodged this application under the provisions of Section (1)(a), 91(2)(a,b,c) and Section 94(1), (b), (i) of the Employment and Labour Relations Act No. 6 of 2004 as amended by Section 14 of the written law (Miscellaneous Amendments) (No.3), Act No. 17 of 2010 and Rule 24(1), (2)(a),(b),(c),(d),(e) & (f) and (3)(a),(b),(c) &(d), Rule 28(1)(b,c,d and e) of the Labour Court Rules G.N. No. 106 of 2007 read together with Rule 34(1) of the Employment and Labour Relations (General) Regulations GN. No. 47. In both their Notice of Application

and the Chamber Summons, they have moved this court for orders in the following terms:

1. This Honorable Court be pleased to revise and quash the award of the Arbitrator of the Commission for Mediation and Arbitration Dar es Salaam Zone in the labour Dispute No. CMA/DSM/ILA/689/2020 delivered on 6th day of September, 2021 before Hon. WILBARD G.M.
2. Any other relief the Honourable court deems just and equitable to grant.

The application is supported by the joint affidavit sworn by the applicants themselves on 15/10/2021. On the other hand, the respondent challenged the application by filing his counter affidavit sworn on 10/03/2021 by Ms. Florian Pesha, the Respondent's Senior Officer. The application was disposed by written submissions.

The facts giving rise to the present application are as follows; the applicants were employees of the respondent. The first applicant was employed as Branch Operations Team Leader while the second applicant was employed as Branch Manager. In the course of performing their duties the applicants were accused to have conspired and engaged in theft of money from the bank. Following those allegations on

14/04/2014 the applicants were arrested and detained at Oysterbay Police Station. The applicants allege that while under police custody the respondent visited them and involuntarily ordered them to write their resignation letter of which they complied (exhibit A1 collectively). Later on, the applicants were arraigned at Kisutu Resident Magistrate's Court and charged accordingly until September, 2019 when they were acquitted with the criminal charges.

After the acquittal on 25/11/2019 and because the applicants alleged to have never received a letter of acceptance of resignation from the respondent, on the 18/12/2019 the applicants wrote letters to the respondent asking for allocation of working station as their former working station was closed. On 29/11/2019 and 19/12/2019 the respondent replied to the applicants that they are no longer her employees because the record shows they voluntarily resigned on 29/04/2014. Aggrieved by the respondent's response, the applicants filed a complaint at the CMA claiming for constructive termination. In their referral Forms (CMA F1) the first applicant prayed for a total of TZS. 78,000,783 and the second applicant prayed for TZS. 283,000,000/= being salaries for 5 years and 8 months, unpaid leave, compensation for unfair termination and severance payment. After considering the evidence of the parties, the CMA dismissed the

applicants' claim based on the respondent's argument that the applicants voluntarily resigned from their employment.

Still believing that their termination was unfair as it was constructive termination, the applicants filed the present application challenging the CMA award and moving this court to determine the following legal issues:-

i. Whether the Arbitrator was right to hold that the resignation letters signed by the applicants while they were under police custody was voluntarily.

ii. Whether the Arbitrator was right by rejecting the applicants' prayer of being paid salaries from the date of signing resignation letters on 29/04/2014 until the date when they were notified by the respondent on the acceptance of their resignation letters sometimes on November and December 2019.

The application proceeded by way of written submissions. before this court, the applicants were represented by Ms. Ritha John Mahoo, Learned Counsel whereas Ms. Hamisa Nkya, Learned Counsel appeared for the respondent.

Arguing in support of the first issue, Ms. Mahoo submitted that the applicants signed the alleged termination letters as the result of the

respondent's acts of accusing them with theft leading them to be under police custody. That the accusations were not proved hence the court acquitted them. She argued that the applicants were forced to sign the resignation letters, a fact which was not considered by the Arbitrator and the Arbitrator failed to consider that the respondent made the employment relationship intolerable as provided under Rule 7(1), (3) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. 42 of 2007 ("the Code"). She supported her submissions by citing the case of **Girango Security Group Vs. Rajabu Masudi Nzige, Revision No. 164 of 2013** High Court at Dar es Salaam where it was held that the fact that the employee was caused to terminate his employment as a result of an employer's actions. She then argued that the letters of resignation were signed under the supervision of the Respondent and under custody of the police, something which the Applicants couldn't tolerate and found no way than signing the resignation letters. She concluded that the applicant's termination were constructive termination proved by the respondent's action of approaching them at the police custody and intimidated them to sign resignation letters.

As to the second issue, Ms. Mahoo submitted that the Arbitrator erred in law and fact by denying the applicants right to be paid salaries

for almost 9 years which they were out of employment. She insisted that the applicants never received any response from the respondent on acceptance of resignation (exhibit A2) therefore; they still believed that they were employees of the respondent. She submitted further that exhibit A2 does not show any date or signature of the acknowledgement that the applicants received them, a fact which is also proved by the testimony of DW1 during cross examination. The counsel was of the view that due to the silence of the respondent as to whether he accepted or denied the applicants resignation, the applicants' employment still existed until December, 2019 when they were terminated. In the upshot, the counsel urged the court to revise and set aside the CMA's decision for being tainted with the pointed illegalities.

Responding to the applicants' submissions, Ms. Nkya initially adopted the respondent's counter affidavit to form part of her submissions. She started responding to the first issue where she submitted that the Arbitrator rightly awarded the applicants. She argued that the applicants voluntarily resigned from their employment by giving 24 hours' notice and that since the date of their resignation, the applicants are no longer employees of the respondent.

She submitted further that the applicants have not proved that they wrote the termination letters involuntarily or by force from either the police or the bank officials who visited them at Oysterbay Police Station. Further that the testimonies of the applicants proves that they are of full age who know how to read and write thus they wrote the resignation letters voluntarily hence, they are stopped from denying what they had written and its legal implication. She supported her submissions by citing the case of **Sluis Brothers (E.A) LTD Vs. Mathias and Tawari, [1980] TLR 299**.

Ms. Nkya urged this court to make a finding that there is no proof in the entire dispute that the applicants were forced to resign, as alleged. It was further argued that the principle of who alleges must prove therefore, the applicants' failure to prove coercion makes their letters valid and voluntarily drawn. Ms. Nkya insisted that the applicants were properly awarded at the CMA.

As to the second issue, Ms. Nkya reiterated her submissions on the first issue. She then added that legally, the applicants' employment ended on 29/04/2014 and any terminal benefits to be paid if any are those prior to resignation date. She hence argued that the order of payment of 5 years salary after the resignation is highly misconstrued

and the respondent will be punished for no wrong committed. Ms. Nkya emphasized that the CMA properly awarded the applicants. He conclusive submission was by urging the court to uphold the CMA's award.

Having considered the rival submission of the parties and the records of this application, I find following issues not to be in dispute. The fact that the applicants were arrested and taken to police custody for allegations of armed robbery and that they were eventually arraigned at the Kisutu Resident Magistrate's Court (RMs Court). The fact that the respondent's Human Resource Officers visited the applicants at the police station was also undisputed, so was the fact that after the visit, the applicants lodged their resignation letters to the respondent, a resignation which both the respondent and the CMA used to justify the fairness of the applicants' termination.

On that note, the following issues are to be determined by this court, whether the respondent's resignation was voluntary to have justified termination or it was involuntary to result to a constructive termination. In determining this, the question of fairness of the termination of the applicants would be answered, which will take me to the second issue framed, the reliefs sought by the parties.

Starting with the first issue as to the voluntariness of the resignation, it is important to define what resignation. In its simplest meaning, resignation is the act of leaving a job permanently but not by retirement. It is the the act of leaving a job or position and making a statement that you are doing so. Resignations are often voluntary, but there are some other situations where resignation may be involuntary due to certain unpleasant or coercive environment. A forced resignation, as opposed to a voluntary resignation, comes into being when an employee terminates their employment as a result of pressure, directly or indirectly, from their employers which may include managers, supervisors or members of a board. It may be caused by coercion, intolerable, antagonistic or hostile environment made by employer.

Coming to the case at hand it is undisputed that the alleged resignation of the applicants was done while they were in custody of police at a police station. The applicants also alleged to be influenced by their employer that once they tender resignation, the charges against them would be dropped. Although the employer's witness at CMA vehemently disputed to have made any promise, but I will take cognizance of the fact that DW1 Anna Chacha, the human resource manager admitted that the incident took place in 2014. That they got the information on 16/04/2014 and two weeks later they learnt that the

applicants were at Oysterbay Police Station and went to visit them. According to the EXA1 the resignation letter of the applicants were dated 02/05/2014. Therefore taking the fact that the applicants were in custody and the respondent's managers visited them and in that same time the applicants tendered their resignation, then it is safe to conclude that the applicants resigned after the visit of the respondent which they allege to have been promised that their charges will be dropped if they resign.

I have also not ignored the undisputed fact that the applicants wrote and tendered their resignation while in police custody so I had to stop and wonder where they secured the stationery to write those letters? In her testimony, the 1st applicant (PW1) testified clearly that when DW1 came to the police station, they were removed from custody and taken to an office within the station and while they were asked to write resignation letter, there was a presence of police officer. Therefore all the gathered facts show that there was coercion leading to the resignation of the applicants. So does this amount to the constructive termination alleged by the applicants? The analysis of facts, evidence and law will answer this question.

First and foremost, it is important to define what constructive termination is. In the general constructive termination is a situation which occurs when an employee resigns as a result of the employer creating a hostile work environment leading to resignation of an employee. Since the resignation was not truly voluntary, it is in effect a termination termed in labour regime as constructive termination. In our laws the term constructive termination is defined under section 36(a)(ii) of ELRA to mean: -

> *"a termination* ***by an employee because*** *the employer made continued employment intolerable for the employee."*

The circumstances of constructive termination were at length discussed in the case of **Pretoria Society for the Care of the Retarded Vs. Loots [1997] 6 BLLR 721 (LAC)** cited in the case of **Hassan Marua Vs. Tanzania Cigarette Company Limited (Civil Application 338 of 2019) [2022] TZCA 491 (01 August 2022);** where the South African Labour Appeal Court held as follows:-

> *"When an employee resigns or terminates the contract as a result of constructive dismissal such an employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee's most important*

function, namely the work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever abandon the pattern creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not constructively dismissed and her conduct proves that she has in fact resigned.

Where she proves the creation of unbearable work environment she is entitled to say that by doing so the employer is repudiating the contract and she has a choice either to stand by the contract or accept the repudiation and the contract comes to an end.."

Again, in the case of **Eagleton Vs. You Asked Services (Pty) LTD [2008] 111 BLLR 1040 (LC)** also cited in the case of **Tanzania Cigarette Company Limited Vs. Hassan Marua** *(supra)*, the court set out the requirements for a constructive termination as follows:-

"In order to prove a claim for constructive dismissal, the employee must satisfy the Court that the following three requirements are present:

i. The employee terminated the contract of employment (the employee has resigned),

ii. Continued employment has become intolerable for the employee;

iii. The employer must have made continued employment intolerable."

Constructive termination is also provided under Rule 7 of The Employment and Labour Relations (Code of Good Practice) Rules,2007 ("the Code") which provides that;

"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 (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."

In this case, as reflected in the above analysis firstly, the termination falls under Rule 7(1) &(2)(b) of the Code. The applicants were suspected of conspiring to the theft/armed robbery incident occurred in the respondents' office. They were then arraigned at police station, looking at the judgment of the RMs Court, there was no single evidence implicating the applicants to the incident. As if that was not enough, while the applicants were under police custody on 29/04/2014 after they were visited by the respondent's officers, they tendered their resignation letters (exhibit A1). In her testimony, DW1 admitted to be one of the respondent's officers who visited the applicants on the date of their resignation and further testified that she was accompanied by the respondent's legal personel. One would ask what was the purpose of the human resource officer (DW1) and the legal officer's visit? Unfortunately, DW1 did not testify on what they went to discuss with the applicants in their visit apart from the story of the applicants' resignation.

In the case of **Girango Security Group vs. Rajabu Masudi Nzige; Revision No. 164 of 2013: High Court of Tanzania**

(Labour Division) at Dar es Salaam (Unreported), different scenario were explained which may amount to constructive termination including that where an employer makes an employment intolerable which may result to the resignation of the employee. Further that when the employee resigned because of the employer's harsh antagonistic and hostile conduct and must be ascribed to some form of coercion and the prospect of continued employment must be unbearable. The court also held that constructive termination may also take place in cases of sexual harassment where employees who have been subjected to continued harassment have been constructively terminated if they resign in desperation.

On what makes an employment intolerable was explained by the court in two folds in the same case of Girango Security (Supra), one is that the employee must establish that there was no voluntary intention by the employee to resign and that the conduct of the employer judged reasonably and sensibly is such that the employee cannot be expected to put up with it.

Coming to our case at hand, from what has been analysed above, there was no voluntary intention by the employee to resign. This view is reached after taking into account that applicants were associated with

the theft/armed robbery incident, they were under police custody and they resigned immediately upon the visit of the respondent's officers. It is my findings that in one way or another they were induced to write the resignation letters in exchange of their freedom as submitted. Therefore had the circumstances of pressures they had properly examined by the Arbitrator, he would have reached to different conclusion. As stated above, the facts established coercion induced to the applicants that led to their resignation, which, as found earlier, was involuntary resignation.

On the basis of the foregoing analysis it is my findings that the applicants were constructively terminated from their employment. This is because coercion is established and the applicants had no any other option of regaining their freedom than to agree to resign which is the basic element in constructive termination.

Coming to the second issue as to whether the CMA properly awarded the applicants; as it has been found above the applicants were unfairly terminated contrary to what was found by the Arbitrator. The applicants are therefore entitled to compensation for unfair termination under Section 40(1)(c). In their CMA F1 the applicants firstly prayed for 5 years and 7 months salaries from the date of resignation to the date they were formally terminated. The relief sought is awarded in

alternative to an employee who is reinstated to his employment of which I find that is not the appropriate order in the circumstance of this case.

The applicants also prayed for leave allowance; the same was awarded by the Arbitrator hence I find no need to revise the same. As to the payment of compensation of unfair termination; since it is proved that the applicants were unfairly terminated from their employment, they are entitled to compensation of thirty six (36) months remuneration pursuant to section 40(1)(c) of ELRA. I have noted that from the records, the applicants' salaries amounts are not conclusively provided for. Therefore, the same should be proved during execution proceedings.

Regarding the payment of severance pay, the applicants are entitled to be so paid. However; there is no proof of date of commencement of employment of each applicant which would help the court to ascertain payment of the same. However it was undisputed that the applicants have worked for the respondent from the year 2011 so they are entitled to severance pay calculated at salary/30 days X 7days X 3 years.

In the result, for the reasons stated above I find the present application to have merit. Consequently, save for the award of a

certificate of service, accrued leave and salary up to the last working date 29/04/2014, the rest of the CMA's award is hereby quashed and set aside. In addition to the mentioned reliefs, the respondent is ordered to pay the applicants 36 month's salaries as compensation for unfair termination and severance pay. For the avoidance of doubt, the respondent is ordered to pay the applicants the following:

1. accrued leave and salary up to the last working date 29/04/2014
2. severance pay calculated at salary/30 days X 7days X 3 years
3. Compensation equivalent to salaries paid at the date of termination, times 36 months
4. A certificate of service.

It is so ordered.

Dated at Dar es Salaam this 22th day of August, 2022.

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S.M. MAGHIMBI
JUDGE