

TANZANIA / JUDGMENT

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/ IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM J REVISION NO 347 OF 2013 NATIONAL MICROFINANCE BANK PLC (3fr' I VERSUS . ~~ DAVID NZALIGO ~,.,:; RESPONDENT (Originating from CMAIDSMILA(1 ., 12ltjt:t:'1 ~ ' 11/08/2014 & 21/08/2014 R.M. RWEYEMAMU J; ·i{pi- There are two signiftgi,Qt 'i~p1L_ it~es presented by this case. The first is whether or not an employee on pr,~1Y~110rJ~J~led/protected by Section 36 (a) (ii) of the Employment ~ :. • \\~ ~1~ . and Labour 1/ee/atltlf.i~~ct~.6LZ@B4 (ELRA). Put differently, whether such an employee has a right to 'r~1\$IQ} tir.mi;~t~i~:ployment 'because the employer has made continued .t;... ~~;~if• ""\~/t;:.,}:: . empJ9ymerit int0len,qble. The second issue, is whether an employee, including an employee "":; _ ~(:. : t(';' on probation, Ral'+ight to be treated fairly (put differently, a right to protection against ill treatment-'~r,~i~ht not to be mistreated) by the employer, a right which entitles such an employee to remedy if breached. The third issue is usual in such cases namely, whether the respondent was subjected to mistreatment/unfair labour practices by the employer? The following facts are common cause: The respondent was employed by the applicant on a 6 months probation period as a Deputy Company Secretary. Employment 1 commenced on 1/7/2010 and probation would have expired on 1/1/2011. Job evaluation of the respondent was conducted on 11/1/2011, and shortly thereafter, on 13/1/2011 to be precise, the respondent tendered a 24 hours Notice of resignation. According to the notice, he was forced to resign because of mistreatment by his line manager- the Company Secretary. Subsequent to resigning, the respondent filed a claim of unfair termination against the applicant in the Commission for Mediation and Arbitration (CMA) on 4/2/2011. · Under the law, the term unfair termination includes .. term refers to "a termination by an employee because the emplo · r intolerable for the employee ... " In plain language, an emplo · · ause the employer's . & behaviour or treatment of the employee is so unrelt• to make the employment relationship unworkable. That is the impa,nt~f S · of the Employment and Labour . Qffet41(3) of the Employment and Labour ' <>\ Relations Act, (ELRA), read together ~l~b Rule 't~~, i\~ Relations Code of Good Practice iules, ·GN,,iJ.\$007. The said rule provides:- "7(1) Where an employer m1"k mployment intolerable which may result to the resignation of nts to forced resignation or constructive terminationf,.,:;~ . nfairly dealt with, provided that the employee has utilised the available ·vances unless there are good reasons for not doing so. en established that the employer made employment intolerable ... (and the tt ,i! ploy~_eJresigned as a result), it shall be legally regarded as termination of employment ~~-:, #}i;· by tHefemployer." The CMA, after considering evidence on record concluded that: a) There was

unshaken evidence that the applicant/employer subjected the respondent to mistreatment; b) The mistreatment made working conditions intolerable for the respondent justifying his 2 resignation, therefore: c) The employers actions amounted to unfair termination. To give insight into the Arbitrator's reasoning and decision, I find it useful to quote relevant parts of decision and award. It reads, although not sequentially, as follows:- "Kwenye mgogoro huu mlalamikaji mbali ya ,kutukanwa pia ametuhumiwa kufanya kazi .kwa upendeleo kwa kutoa kazi katika kampuni za mawakili kwa kujuana. Tuhuma hizi japo hazikuthibitishwa zinakwenda katika kuhoU uaminifu wa mlalamikaji ambae ni wakili kitaaluma. Ikumbukwe kwamba aina ya kazi yake ·i~ategemea kwa .ki~fi kikf:fW~\,uaminifu. Kwa hivyo hili linaweza kumuathieri katika upataji wa kazi sehemu nyingirtf~l ·e hak~',J'sh;hidi wa moja kwa moja kwamba aliomba kazi sehemu nyingine akak wa kigezo i~o. Nimezingatia kwamba vitendo alivyofanyiwa mlalamikaji vilikuwa ni en , , a vya makusudi, na licha ya kulalamikiwa mara kwa mara na mlalamikaji menejime~ · 'shin · atuchukua hatua zozote kuthibiti vitendo hivyo badala yake Human Resou~, . ~ · ~qishauri mlalamikaji ajiudhuru! ... Kwa mujibu wa kesi hii ya Sodetra . zza na Mwingine Turne imeachiwa uhuru {discretion) kuamua fidia ziad iezi kumi na mbili kutokana na mazingira ya mgogoro wenyewe. Mahakama K ivishe a azi katika marejeo hayo imetaja baadhi ya sababu zinazoweza kuhalalish~wajiriwa · it a fidia ya zaidei ya miezi· kumi na mbili. Sababu ~t;k_lr hizo ni; 1. Uwezekano wa rrff.waki~ai kupata kazi sehemu nyingine. 2. Uwezo wa mwajiri kifedha wa kulipa fidia bila kuat " ki~ ; , ;f~nyakazi wanaobaki. 3. Sababu nyingine Namnukuu; ..~ o.1.1lake into consideration factors like likelihood of the terminated employe ~4> . , .u~f employment; employer's ability to pay (yet remain liquid enough to 'safegµ,ard ,em~jqY-m~tit of the remaining employees); conduct of the employer ... ; and such other ~~~~ ~~~~√~ . {£{ ~~t~ ;;;levant 4 , ;:::if. ∴ Kwg~s~q~bu hizo mlalamikaji alipwe fidia ya mishahara ya miezi kumi na tisa. Katika ushahidi . . '1[;411.∴∴ wake mlalamikaji alisema kwamba mshahara wake alikua akilipwa shilingi million tatu na nusu. Hivyo basi, kwa miezi kumi na tisa kwa ujumla mlalamikiwa anaamriwa kumlipa mlalamikaji jumla ya shilingi za kitanzania million sitini na sita na laki tano tu (66,500,000/=). (Emphasis mine) Having decided as. above, the Arbitrator awarded compensation to the respondent in a sum of T.shs 66,500,000/= (a total of 19 months' salary) totalling. The claim of compensation in the sum equal to 54 months' salary (T.shs 50 million) for emotional stress 3 was dismissed on ground that it was not pleaded. Dissatisfied with the above decision and award, the applicant now seeks its revision on grounds:-

1. That, that the Arbitrator erred in fact and in law when concluded that the working environment of the respondent was made intolerable resulting in forced resignation.
2. That the Arbitrator erred in law hen introduced the concept of harassment without evidence on record.
3. That the Arbitrator erred in law when interpreted the respondent's condu following legal procedures as forced resignation.
4. That, the Arbitrator grossly erred in law when exaggerated the award with

5. That the Arbitrator erred in law when refused to take into consideration the applicant's failure to do so by the respondent. The application was opposed and heard by the Commission. The applicants' arguments, submitted by Prof. Binamun A. A. brief, that; a) there was no evidence to establish the allegation of a hostile work environment; b) the respondent's evaluation was done within time because a performance evaluation can be conducted within a period of up to 12 months, Under Rule 1, c) the award was too excessive. The respondent's submission. Maige of MJD Diamond Advocates submitted that; the Commission's award was correct; and; therefore, there was evidence of ill treatment, and that the cumulative effect of ill treatment amounted to a fundamental breach of contract by the applicant/employer. I have considered facts of the case, parties' arguments and the law. It is my view that a decision in this application depends mainly on a determination of the first two issues identified at commencement of this decision, other than the third issue, which was addressed by the parties. It is also my view that a decision on those two issues is sufficient to dispose of this application. The said issues and my decision thereon are:-
- 1) Whether or not an employee on probation is protected/covered, under Section 36 (a) (ii) of the ELRA. My understanding of the current law and practice is that:
- An employee on probation does not assume employment status on expiry of period of probation, expiration of the specified period of probation renders such an employee eligible for confirmation. That is the position taken in among others, the case of Mtengwe Vs University of Dar es Salaam, 1971 HCD 27; where the High Court held that, an employee on probation continued working after expiry of probation period does not amount to confirmation. I had occasion to consider the same fact in Stella Temu Vs Tanzania Railways Authority, 1999 No. 72 of 2002 the CAT had previously held that the CA was dealing with an appeal from a High Court decision in 1999 and considered among other issues; whether an employee on probation had a right to be heard before termination. The Court's conclusion in the present case is that, we are of the opinion that there was no right of a hearing before termination but it was merely a non-confirmation while Stella Temu Vs Tanzania Railways Authority was a case of termination of the MOU. It is our decided opinion that probation is a justifiable employment practice and an employee on probation is not covered under the unfair termination provisions of the ELRA, and I am not aware of any decision interpreting the position under the ELRA differently, I conclude that fair termination principles; which as demonstrated above, extends to employees who have been forced to resign (constructive termination), do not apply to employees on probation.
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- Given my above stance, I find that the Arbitrator's decision that, resignation of the respondent amounted to unfair termination under the principle of constructive termination, was improper in law. I quash.
2. Is an employee on probation entitled to fair labour practices, which include fair treatment from the employer?

- My decision is in the affirmative. In my view, fair treatment of every person in a work place, during the various employment processes including during job selection and interviews. As per CAT decision, paragraph 11 is after all, a "practical interpretation". But:
- An employee on probation is not protected termination provisions, Part E, of the ELRA. For that reason, the respondent cannot be compensated for in the manner employees are entitled to under the ELRA. For that reason, I find the award made by the Arbitrator to have been an improper exercise of jurisdiction. As to ill treatment or unfair labour practices by the respondent's employer, the respondent is entitled to relief? After careful consideration of facts on record and the reasoning in the award, I have concluded that the respondent was subjected to ill treatment by his line Manager; but as explained above, I find the Arbitrator's conclusion that such mistreatment amounted to constructive termination to have been improper and quash it. 6. I find
- Further, while I agree with the Arbitrator's decision to compensate the respondent for ill treatment received from the employer proper, I find improper the decision to compensate the respondent in terms of Section 40 (1) of the ELRA. In the final result, this application partly succeeds. The finding of unfair termination and award of compensation in the sum equal to 19 months salary are quashed. Considering pertinent facts of this case, I use powers vested in this Court to award the respondent in the sum equal to 6 months salary at the rate he was receiving when he resigned. I find the award of 19 months salary to be excessive. Date: 21/08/2014. Coram: Hon. R. M. Rweyemamu, J. Applicant: David N. Z. For Applicant: per Respondent: For Respondent: CC: Happy I. Court: Judgment is 21/08/2014 in the presence of both parties. R. M. Rweyemamu, J. 7. I find

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