IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KITUSI, J.A., And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 250 OF 2018

HAIDER MWINYIMVUA & 99 OTHERS ..... APPELLANTS

VERSUS

DEPOSIT INSURANCE BOARD

(LIQUIDATOR OF FBME BANK LTD.) ..... FIRST RESPONDENT

FBME BANK LIMITED ..... SECOND RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Wambura, J.)

dated the 30th day of October, 2019
in
Revision No. 160 of 2018

.....

JUDGMENT OF THE COURT

11th February & 7th March, 2022

NDIKA, J.A.:

Central to this appeal is a narrow but crucial issue. It is whether termination of employees of a bank under liquidation is subject to the retrenchment procedure stipulated by section 38 of the Employment and Labour Relations Act, Cap. 366 R.E. 2019 ("the ELRA").

The above question arises as follows: FBME Bank Limited ("FBME") was a commercial bank licensed to carry on business in the country. It is common ground that on 24th July, 2014, the Bank of Tanzania ("BoT"), as

the central bank in the country, placed FBME under statutory management. Subsequently, BoT revoked the license of FBME and placed it, vide Government Notice No. 986 of 2017 of 5th May, 2017, under compulsory liquidation pursuant to sections 41 (1) (a) and 61 (1) of the Banking and Financial Institutions Act. 2006 ("the Banking Act"). The first respondent herein, the Deposit Insurance Board ("DIB"), a statutory body existing under section 37 (1) of the Banking Act, was appointed the liquidator effective 8th May, 2017. DIB was specifically charged to wind up the affairs of FBME and to take such other actions as might be necessary for the orderly realization, conservation and preservation of FBME's assets and the settlement of its obligations in accordance with the law.

In carrying out its statutory mandate and being aware that following the ensuing liquidation the termination of employees was unavoidable, DIB issued a notice dated 19th May, 2017 (Exhibit D3) to all employees intimating its intention to terminate all employment contracts within one month of the notice. It indicated that it would hold consultative meetings with the representatives of the employees and undertook to pay all terminal benefits upon conclusion of the consultations. The planned consultations were conducted and DIB indicated its inclination to pay salaries for June and July, 2017, severance pay, accrued leave pay,

repatriation expenses and pension contributions as well as issuance of certificates of service. The appellants were not satisfied with the proposed package of terminal benefits.

On 23rd June, 2017, DIB issued another notice of termination to all employees after the first one had lapsed. This was followed up a month later, on 21st July, 2017 to be exact, with letters of termination (Exhibit D5) issued to the appellants along with the payment of salary for the July, 2017 and repatriation expenses. No other terminal benefits were paid allegedly because the process stalled due to the disagreement between the parties on the quantum thereof. However, on 7th August, 2017 DIB issued a letter to each appellant indicating a sum of money it was prepared to pay as severance and accrued leave pay as the final tranche of accrued terminal benefits. The letters were collectively admitted as Exhibit D6.

The appellants were unhappy and so, they instituted an unfair termination claim in the Commission for Mediation and Arbitration ("the CMA") seeking payment of a total of TZS. 60,387,486,562.32 as terminal benefits. Apart from asserting that the termination violated the mandatory retrenchment procedure provided under section 38 of the ELRA, the appellants claimed that the respondents did not pay any terminal benefits.

The matter was eventually referred to an arbitrator (Hon. Kiwelu, L.) who decided it in favour of the appellants. In arriving at that decision, he primarily held that the discharge of the appellants from their employment by DIB following liquidation had to comply with the retrenchment procedure enacted by section 38 of the ELRA because FBME was solvent at the material time and that it only had to be wound up on BoT's direction, not due to insolvency. Secondly, while the arbitrator found that the termination was based on a valid and fair reason, he took the view that DIB flouted the aforesaid statutory retrenchment procedure, the appellants having not been fully consulted and heard on the matter before the termination letters were issued. In the premises, he found the termination of employment of all appellants unfair and proceeded to award each of them, in terms of section 40 (1) of the ELRA, twelve months' remuneration plus one month's salary in lieu of notice. In addition, DIB was ordered to pay each appellant severance and accrued leave pay as presented in terminal benefits letters issued by DIB to the appellants on 7th August, 2017 (Exhibit D6). It should also be noted that the arbitrator rejected the appellants' other claims for annual bonus known as the "thirteenth salary", increment arrears, loyalty scheme pay, golden handshake and silver plate pay on reason that they were unsubstantiated.

The High Court, Labour Division (Wambura, J.) partly vacated the aforesaid award upon revision at the instance of the respondents. At first, the court faulted the arbitrator for reasoning that FBME was wound up on the reason other than insolvency as if he was questioning the validity of the liquidation. Then, it reasoned that section 38 of the ELRA was inapplicable to the impugned terminations occurring in the course of liquidation. In her view, the terminations arose from the closing down of the business, hence they were not discharges arising from retrenchment. The court was firm that DIB was not bound to follow the retrenchment procedure laid under section 38 (2) of the ELRA.

Ultimately, the court set aside the twelve months' remuneration compensation order on the ground that the appellants could not be reinstated into a soon-to-be wound up entity. However, the court upheld the order for payment of one month's remuneration in lieu of notice, accrued leave pay, severance pay and repatriation expenses (if unpaid or need to be reviewed) contributions as well as issuance of certificates of service.

The appellants now challenge the above decision on four grounds of appeal, which we rephrase as follows:

1. *That the High Court erred in law in misinterpreting section 38 of the ELRA by holding that it did not apply to the case at hand.*
2. *That the High Court erred in law for failing to understand that no law exempts liquidators from compliance with the statutory retrenchment procedure.*
3. *That the High Court erred in law for not holding that DIB as the liquidator stepped into the shoes of FBME and, accordingly, it had to comply with the relevant statutory retrenchment procedure.*
4. *That the High Court erred in law for failing to appreciate that where there was no consensus between the parties on the proposed retrenchment, DIB was required to refer the matter to the CMA for mediation instead of unilaterally terminating the appellants.*

Arguing in support of the appeal, Mr. Evold Mushi, learned counsel, essentially faulted the High Court for holding that the retrenchment procedure prescribed by section 38 of the ELRA was inapplicable to the impugned terminations. He went through the said provision urging us to hold that in its natural and ordinary meaning it was intended to apply to any discharge of employees for operational reasons, which would include liquidation. It was his contention that there was no law exempting any liquidator as DIB in this case from compliance with the statutory

retrenchment procedure. He added that in terms of section 38 (1) and (2) of the ELRA, DIB had to consult the affected employees and that in event of failure to strike a mediated resolution it had to refer the matter to the CMA for arbitration, a process which had to be concluded within thirty days. He was insistent that DIB exhibited egregious indifference to the procedure as it neither consulted with the targeted employees nor did it refer the matter to the CMA for arbitration.

For the respondents, Mr. Abubakari Mrisha, learned Principal State Attorney, who was assisted by Mses. Joyce Yonaz, Doreen Mhina and Ansila Makyao, learned State Attorneys, strongly opposed the appeal. He essentially advocated that the impugned terminations did not fall under the retrenchment procedure. He reasoned that in terms of sections 41 and 61 of the Banking Act, DIB's role was to wind up the operations of FBME by collecting its assets so as to pay off all statutory dues and for distribution to depositors and creditors who included former employees. He submitted that section 38 of the ELRA ought to be construed in bounded terms so as to apply only to an employing entity that seeks to trim down its workforce due to operational requirements while still existing as a going concern.

Rejoining, Mr. Mushi reiterated that DIB had stepped into shoes of the employer and that it had to comply with section 38 consultation procedure before it rushed to dish out the termination letters.

We have examined the record of appeal and considered the contending oral and written arguments of the learned counsel. In our view, the appeal hinges on the question we posed earlier whether the impugned termination of the appellants as employees of FBME under liquidation was subject to the retrenchment procedure stipulated by section 38 of the ELRA.

At first, it is common ground that following the revocation of its licence, FBME was placed by BoT under compulsory liquidation pursuant to sections 41 (1) (a) and 61 (1) of the Banking Act with DIB serving as the liquidator. The role of DIB, as indicated earlier, was to wind up the affairs of FBME and to take such other actions as might be necessary for the orderly realization, conservation and preservation of FBME's assets and the settlement of its obligations in accordance with the law. This role is encapsulated by section 41 (a) of the Banking Act, which we extract thus:

> ***"41. Notwithstanding any other written law–***
>
> *(a) where a bank or financial institution becomes insolvent, as determined by the Bank, the Bank*

may appoint the DIB to be a liquidator and the appointment shall have the same effect as the appointment of any other liquidator by the court and ***such liquidation shall proceed in accordance with the provisions of liquidation regulations made under this Act.***"
[Emphasis added]

The above provision says it all. Once DIB is appointed by BoT as the liquidator of a bank, as happened in the instant case, the appointment would have the same effect as that of a court-appointed liquidator and that DIB must carry out the liquidation in accordance with the provisions of the liquidation regulations made under the Act. By indicating that section 41 was enacted "*Notwithstanding any other written law*", the legislature must have meant that the liquidation process must be executed solely in accordance with provisions of that section and that the provisions of other written laws would have no effect. As we are cognizant of the fact that the liquidation process would also entail settlement of the obligations of the bank under liquidation to its employees, we hold without doubt that the legislature intended that such obligations be dealt with within the legal framework of liquidation as opposed to any piece of legislation on labour matters.

The above notwithstanding, we think we should proceed to construe section 38 of the ELRA to determine if it is applicable to the case at hand. The said provision, which we deliberately extract in full, states as follows:

> *"**38**.-(1) In any **termination for operational requirements (retrenchment),** the employer shall comply with the following principles, that is to say, he shall-*
>
> *(a) give notice of any intention to retrench as soon as it is contemplated;*
>
> *(b) disclose all relevant information on the intended retrenchment for the purpose of proper consultation;*
>
> *(c)consult prior to retrenchment or redundancy on –*
>
> *(i) the reasons for the intended retrenchment;*
>
> *(ii) any **measures to avoid or minimize the intended retrenchment**;*
>
> *(iii) the **method of selection of the employees to be retrenched**;*
>
> *(iv) the timing of the retrenchments; and*

(v) severance pay in respect of the retrenchments,

(d) give the notice, make the disclosure and consult, in terms of this subsection, with-

(i) any trade union recognized in terms of section 67;

(ii)any registered trade union which members in the workplace not represented by a recognised trade union;

(iii) any employees not represented by a recognized or registered trade union.

(2) Where in the consultations held in terms of sub-section (1) no agreement is reached between the parties, the matter shall be referred to mediation under Part VIII of this Act..

(3) Where the mediation has failed, the dispute shall be referred for arbitration which shall be concluded within thirty days during which period no retrenchment shall take effect and, where the employees are dissatisfied with the award and are desirous to proceed with revision to the Labour Court under section 91(2), the employer may proceed with their retrenchment."
[Emphasis added]

Subsection (1) of section 38 above expressly stipulates that it applies to *"any termination for operational requirements"* which, in other words, is referred to as *"retrenchment."* While section 4 of the ELRA defines operational requirements so expansively to mean *"requirements based on the economic, technological, structural or similar needs of the employer,"* no definition is given of what the corresponding term "retrenchment" means. Nevertheless, by examining the content of subsection (1) quite closely, it is possible to arrive at what the legislature had in mind by the term "retrenchment." We shall demonstrate.

In our view, it is clear that subsection (1) (a), (b) and (c) above creates three preconditions for retrenchment: one, that it imposes on the employer the onus to give notice of any intention to retrench as soon as it is contemplated. Secondly, it requires the employer to disclose all relevant information on the intended retrenchment for the purpose of proper consultation. Thirdly, it enjoins the employer to consult prior to retrenchment or redundancy on five matters (see subsection (1) (c) (i) to (v) above) two of which are relevant for our present purposes. These are the requirements that the consultation process should address any possible measures that can avert or minimize the intended retrenchment and the method of selection of the employees to be retrenched (see

subsection (1) (c) (ii) and (iii) above). It occurs to us that where an undertaking is due to be closed as a result, for example, of liquidation as has been the case with FBME, there would be no possibility to apply any measures to avoid or minimize the anticipated retrenchment nor would there be an opportunity of selection of the employees to be retrenched. Such a scenario would involve a complete discharge of all employees as opposed to targeted retrenchment. In this context, the term retrenchment appears to have been used in restricted terms and, so it does not include termination following closure of business due to, say, compulsory liquidation.

We are aware of, at least, two persuasive decisions of the Supreme Court of India in which the Court aptly defined the term "retrenchment." In the first case of **Pipraich Sugar Mills Ltd. v. Pipraich Sugar Mills Mazdoor Union**,1956 SCR 872, AIR 1957 SC 95, the Court, defined the terms retrenchment in its ordinary parlance thus:

> *"Though there is discharge of workmen both when there is retrenchment and closure of business, the compensation is to be awarded under the law, not for discharge as such but for discharge on retrenchment, and if, as is conceived,* ***retrenchment means in ordinary parlance,***

discharge of the surplus, it cannot include discharge on closure of business." [Emphasis added]

The said Court followed the above decision in its subsequent decision, in **Barsi Light Rly. Co. Ltd. v. K. N. Joglekar**, AIR 1957 SC 121 as it held, per Das, J., as follows:

> *"Retrenchment as defined in Section 2(oo) and as used in Section 25-F has no wider meaning than the ordinary, accepted connotation of the word:* ***It means the discharge of surplus labour or a staff by the employer for any reasons whatsoever,*** *otherwise than as a punishment inflicted by way of disciplinary action, and* ***it has no application where the services of all workmen have been terminated by the employer on a real and bona fide closure of business*** *as in the case of* ***Shri Dinesh Mills Ltd.****, or where the services of all workmen have been terminated by the employer on the business or undertaking being taken over by another employer ...."* [Emphasis added]

We think that the position taken in the above decisions is in line with our view that section 38 uses the term "retrenchment" in its ordinary, accepted connotation. Thus, retrenchment is used restrictively to mean

the discharge of surplus labour due to operational requirements in a continuing or running undertaking. It does not apply to the instant case where FBME was closed down and wound up under compulsory liquidation pursuant to the provisions of the Banking Act. We, therefore, do not find any fault in the reasoning and holding by the High Court. In the premises, all four grounds of appeal fail.

In the final analysis, we hold that the appeal is unmerited. It stands dismissed. Given that the appeal concerned a labour dispute normally attracting no award of costs, we make no order as to costs.

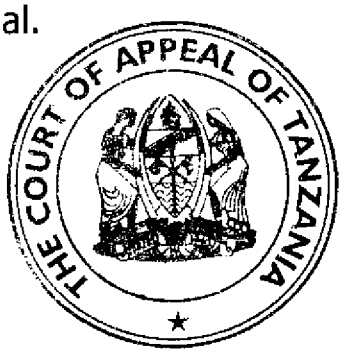
DATED at **DAR ES SALAAM** this 3rd day of March, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 7th day of February, 2022 in the presence of Mr. Innocent Mushi, Counsel for the Appellants and M/s Rose Kashamba, State Attorney for the Respondents is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL