IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWANDAMBO, J.A., KITUSI, J.A., And MGONYA, J.A.)

CIVIL APPEAL NO. 372 OF 2020

BRIAN CELESTINE AND 19 OTHERS .....APPELLANTS

VERSUS

THE SALVATION ARMY TANZANIA TERRITORY..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Mbeya)

(Ndunguru, J)

dated the 27th day of February, 2020

in

Consolidated Labour Revisions No. 68 & 69 of 2017

JUDGMENT OF THE COURT

5th & 12th December, 2023

MWANDAMBO, J.A.:

The Commission for Mediation and Arbitration (the CMA) at Mbeya dealt with a Labour Dispute preferred by the appellants against the respondent based on unfair termination by retrenchment on operational requirements. The CMA sustained the appellants' complaint by holding that the respondents unfairly terminated them. It granted the appellants several monetary reliefs including 12 months' remuneration, and redundancy package according to their individual contracts of employment and compensation for unfair termination.

The facts from which the appeal has emanated are common cause. They arise from employment relationship between the appellants and the respondent dating back from 1995 at its Shukrani International College of Business Management and Administration in Mbeya (the College). It is common ground that, each of the appellants were employed by the respondent at different times through contracts of employments for specific renewable periods while some were employed on part time basis. However, sometime in July 2015, the respondent decided to close the College allegedly due to financial distress impacting on its ability to run the College which resulted into termination of the appellants' contracts of employment on 31 August 2015. Resentful, the appellants preferred a dispute before the CMA for unfair termination. Through CMA form No 1, each of the appellants claimed that the termination was procedurally unfair due to failure to adhere to the relevant procedures. On the other hand, they claimed that there existed no reason for the termination. As to the outcome of the mediation, each of the appellants prayed to be paid specific amounts said to be owed to them.

For her part, the respondent contended in the opening statement that contrary to the appellants' claims, the termination was fair both

substantively and procedurally urging the CMA to dismiss the complaint. It has been her case that, the termination was necessitated by operational requirements after complying with the fair procedure on consultation with the appellants which culminated into signing retrenchment agreements with each of them.

Before the commencement of the hearing the Arbitrator framed three issues for determination of the dispute namely; (1) whether there were good reasons for the impugned retrenchment;(2) whether, prior to the retrenchment, complied with the applicable procedure and, (3) whether the complainants were paid in accordance with the terms of their contracts.

At the end of the hearing, the CMA answered the first two issues in favour of the appellants holding that the respondent failed to prove that she had good reasons before opting to retrench the appellants. Similarly, the Arbitrator found the respondent flouted the procedure in the retrenchment of the appellants before concluding that the termination was absolutely unfair and thus unlawful.

Consequently, the Arbitrator computed the monetary reliefs to each of the appellants amounting to TZS. 244,430,221.00. That award dissatisfied the respondent who successfully challenged it before the

High Court (Labour Division) in Labour Revision No. 69 of 2017. So did the appellants in Labour Revision No. 68 of 2017 challenging the CMA's award to the extent it awarded one month's remuneration to some of them instead of 12 months for unfair termination. The two applications were consolidated and determined as such in Consolidated Labour Revision No. 68 & 69 of 2019 in a judgment delivered on 17 February 2020.

Unlike the CMA, the High Court (Ndunguru, J.), was satisfied that there existed good reason for termination of employment contracts based on operational requirements since the respondent was experiencing economic crisis. Likewise, the High Court found sufficient evidence to prove consultative meetings with the appellants before the retrenchment which resulted into signed retrenchment agreements. It thus found the termination fair and lawful resulting into setting aside the CMA award and therefore the appellants were not entitled to any compensation. Consequently, the learned judge granted the respondents' Labour Revision No. 68 of 2017 and dismissed Labour Revision No. 68 of 2017.

Dissatisfied with the decision of the High Court, the appellants have preferred the instant appeal predicated upon three grounds of

complaint. Essentially, the appellants' grievances raise the issue whether the High Court was right in holding as it did that, the appellants' termination on operational requirements complied with section 38(1) of the Employment and Labour Relations Act (the Act).

At the hearing of the appeal, Mr. Benedict Sahwi, learned advocate, appeared for the appellants just as he did before the High Court and CMA. The respondent appeared through one Japhet Mwampamba who introduced himself as a director of the College. He implored the Court to adjourn the hearing to allow the appearance of the respondent's Principal Officers from Dar es Salaam. We declined that prayer and proceeded with hearing having been satisfied that the respondent was duly served in Dar es Salaam on 24 November 2023 but failed to appear for no apparent reason. Besides, as urged by Mr. Sahwi, having lodged her written submissions in reply, the respondent was deemed to have appeared in terms of rule 112 (4) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Apparently, Mr. Sahwi had nothing to add on his written submissions, and so there was no further hearing.

In his written submissions, Mr. Sahwi sought to fault the learned judge for holding that not only the retrenchment was a result of a valid

reason but also the respondent consulted with the appellants before the retrenchment in compliance with section 38(1) of the Act. According to Mr. Sahwi, the learned judge's decision was against the weight of the evidence on which the CMA relied in its award to the contrary both on the existence of a valid reason for retrenchment and compliance with a fair procedure. The learned advocate predicated his submission on the provisions of rule 23 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 (the Code) on the court's duty to scrutinize termination on operational requirements with a view to ensuring that the employer has considered all possible alternatives before termination is carried out. With those submissions, Mr. Sahwi contended that, the High Court did not have regard to the evidence proving that the respondent was indeed in financial doldrums rendering it incapable to run the College and for failing to consider alternatives to termination. In conclusion, the learned advocate urged that, it was wrong on the part of the High Court to set aside the CMA award and dismiss the appellants' application as it did.

Not surprisingly, Mr. Khalfan Hamisi Msumi, learned advocate who filed written submissions in reply, supported the impugned decision. The learned advocate argued that, the High Court determined

the matter in its revisional jurisdiction on the basis of the evidence which established existence of a valid reason for termination based on operational requirements after following the relevant procedure; consultation with the employees in strict compliance with section 38 (1) (a), (b) and (c) of the Act. Mr. Msumi bolstered his argument with the unreported decision of the High Court in **Janeth Mshiu v. Precision Air Services Ltd**, Labour Revision No. 588 of 2018 which cited a decision of the Labour Court of South Africa in **Hendry v. Adcock Ingram** (1988) 19 ILJ 85 (LC) at 92 B-C for the proposition that, courts should be cautious in evaluating and judging matters based on operational requirements lest they interfere with legitimate business decisions taken by employers. He concluded by urging the Court to dismiss the appeal.

We shall begin our discussion with the -examination of CMA Form No 1 which initiated the complaint before the CMA. As alluded to earlier on, the appellants challenged their termination alleging that it was unfair due to failure to adhere to a fair procedure in retrenching them and absence of a good reason. It is significant that, one Melas Paul Mdemu who was the Colleges' erstwhile Principal, testified on his own behalf and his fellow claimants explaining what transpired prior to

the termination of employment and the reason why the appellants challenged the termination. His evidence was followed by four other claimants. He did not dispute the fact that the College was in financial doldrums as testified by the respondent's witnesses which resulted in the appellants' retrenchment. He said at page 245 of the record:

> *"... Hatukuridhika na viwango vilivyolipwa kwa sababu zifuatazo..."*

Meaning: "...*We were not satisfied with the amounts paid for the following reasons".* One of such reasons was inadequate time given to each of them to understand in relation to his entitlements. A little later, DW1 explained to the CMA the efforts he did to follow-up and demand for payment of their entitlements. Indeed, the host of the appellants' testimony did not seek to challenge the termination rather, inadequate retrenchment package. That notwithstanding, the CMA found the respondent's evidence falling short of proving existence of valid reason for termination and compliance with the relevant procedure holding the termination unfair. However, as rightly held by the High Court, the CMA's finding was against the weight of the evidence which proved the contrary. Much as the respondent had the burden of proof that the termination was fair both substantively and procedurally, the standard of proof was on balance of probabilities. The CMA appears to have

applied a higher standard in finding that the respondent had no good reason to terminate the employment contracts on operational requirements and that it did not follow the relevant procedure in terminating the appellants.

Unlike the learned advocate for the appellants, we have found nothing to fault the learned judge for setting aside the CMA award. It is evident from the record that the respondent gave notice of retrenchment and the reason thereof ahead of the termination followed by several consultative meetings with the employees individually resulting in retrenchment agreements.

It is significant that, contrary to the challenge of the fairness of termination on the grounds shown in the CMA forms which initiated the labour dispute, the appellants have hardly challenged the retrenchment agreements except on the package. In our view, there can be no doubt that, the appellants' complaint before the CMA was, but an afterthought and the High Court rightly set aside the CMA award no doubt having in mind the caution sounded by the Labour Court of South Africa in **Hendry v. Adcock Ingram** (supra); non- interference with the legitimate business decision of the employer. Like the High Court, we

are persuaded by that proposition as reflecting a proper guidance in cases like the instant one.

In the event, we find no merit in the appeal and dismiss it in its entirety.

DATED at **MBEYA** this 11th day of December, 2023.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Ruling delivered this 12th day of December, 2023 in the presence of Mr. Nickson William Kiliwa learned advocate holding brief for Mr. Benedict Sahwi, learned advocate for the appellants, and in the absence of the respondent, is hereby certified as a true copy of the original.

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL