IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., SEHEL, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 84 of 2016

CHRISTOPHER GASPER AND 144 OTHERS.....APPLICANT

VERSUS

TANZANIA PORTS AUTHORITY..... RESPONDENT

[Appeal from the Judgement of the High Court of Tanzania (Labour Division) at Dar es Salaam]

(Nyerere, Kalombola and Mashaka, JJJ.)

Dated 28th April, 2016

in

Civil Revision No. 1 of 2015

.....

JUDGMENT OF THE COURT

21st & 24th February, 2023

MUGASHA, J.A.:

This appeal is against the decision of the High Court of Tanzania (Labour Division) in Revision No. 1 of 2015 dated 28/4/2016. The appellants were former employees of the respondent, the defunct Tanzania Harbours Authority before it was restructured and re-organized into the present Tanzania Ports Authority. It is discerned from the record before us that, in 1999 the respondent having experienced financial constraints she declared 1700 employees redundant the appellants inclusive. The appellants were paid their terminal benefits but they were not satisfied with the quantum of the sums paid claiming that, the amount of golden handshake paid to them

was not sufficient. Thus, a trade inquiry was commenced before the defunct Industrial Court of Tanzania whereby the appellants claimed for:

i. A declaration that the Complainants retrenchment was null and void.

ii. An order that the Complainants be paid all their entitlements due as if they had been in continuous employment.

iii. Specific damages calculated on the basis of (ii) hereinabove.

iv. The complainants be paid by the Defendant their justifiable and proper payment of their terminal benefit as per paragraphs 10, 11, 12, 14 and 15.

v. General damages amounting to **Tshs. 8,000,000/=** per Complaints for breach of contract of employment a hardship suffered.

vi. Interest on (iii) above at the Court rate from the date of judgment till the final payment.

vii. Cost of this suit.

viii. Any other relief (s) that may be deemed just to grant.

After hearing the parties, on 5/11/2009, the Deputy Chairperson was satisfied that the redundancy was lawful and as such, she concluded that, the appellants were neither entitled to compensation nor reinstatement. Aggrieved, after obtaining extension of time to apply for revision, the appellants filed an application for revision No. 1 of 2015 before the High Court of Tanzania (Labour Division) seeking to have the decision of the Deputy Chairperson revised. Following the repeal of the Industrial Court Act, the saving arrangement in terms of section 103 and paragraph 7 of the schedule to the Employment and Labour Relations Act, Cap, 366 R.E. 2019, clothed the Labour Court with jurisdiction to determine old disputes under the repealed labour statutes.

After hearing the application for revision, the High Court found that the redundancy was wrongful and it ordered that each appellant be paid a twelve months' salary at the rate prior to the redundancy. Unamused, the appellants have preferred the present appeal faulting the impugned decision fronting the following grounds of appeal:

1. *That the revisional court erred in law for awarding the appellants twelve months' salaries as compensation for unfair termination instead of reinstatement*

2. *That the revisionai court erred in law for failure to order the payment of the unpaid 60% of the golden handshake.*

The respondent as well was not pleased by the decision of the High Court and as such, filed a cross-appeal with four points of grievance as follows:

1. *That the full bench of the high court (Labour Division) erred in law and fact in not interpreting that Exh. P.2 as a satisfactory proof that consultation was adequately conducted in terms of section 6(1) (g) of the Securlty of Employment Act Cap 387 (Repealed).*

2. *That the full bench of the High Court (Labour Division) erred in law in holding that; to have adequate consultation, the consultative meeting must result into joint agreement/consensus of the parties.*

3. *That the full bench of the high court (Labour Division) erred in iaw and fact in holding that the appellants are entitled to underpayments of golden handshake without there being any specific proof to prove these claims which are specific in nature.*

4. *That the full bench of the high court (Labour Division) erred in law and fact by ordering the respondent to reassess the underpayment of a golden handshake.*

Parties filed written submissions with arguments for and against the appeal and the cross appeal which were adopted at the commencement of the hearing. In appearance was Mr. Evans Nzowa, learned counsel for the appellants and for the respondent were Messrs Peter Musetti, learned Principal Attorney assisted by Lameck Butuntu, learned Senior State Attorneys and Ms. Asia Shamte learned State Attorney.

At the outset, following a brief dialogue with the Court, on reflection, Mr. Nzowa abandoned the 2nd ground of appeal and part of the 1st ground of appeal which are in relation to the appellants' complaint on not being reinstated and paid a golden handshake at the tune of 60 percent. Similarly, on the part of the respondent, the entire cross appeal was abandoned. We thus marked ground 2 and part of ground 1 of the appeal abandoned and so was the cross appeal. In this regard, the remaining complaint of the appellants which was not opposed by the respondent now reads as follows:

> *"That the revisional court erred in law for awarding the appellants twelve months' salaries as compensation for unfair termination".*

In the remaining ground of complaint, the High is faulted for awarding the appellants twelve months' salaries as compensation for unfair termination. Initially, the said complaint was interwoven with the alternative remedy of reinstatement which the appellants believed to be appropriate. However, as earlier stated, since the remedy of reinstatement is not rooted in the claims presented in the courts below, we shall not make any determination on the same. We are fortified in that regard because it is settled law that, parties are bound by their pleadings and the law frowns on departing therefrom save where the court has granted leave to amend the requisite pleadings. See: **JAMES FUNKE NGWAGILO V. ATTORNEY GENERAL** [2004] TLR 161; and **SCAN TAN TOUR VS THE CATHOLIC DIOCESE OF MBULU**, Civil Appeal No. 78 of 2012, **LAWRENCE SURUMBU TARA VS. THE HON. ATTORNEY GENERAL AND 2 OTHERS**, Civil Appeal No. 56 of 2012; **CHARLES RICHARD KOMBE T/A BUILDING VS. EVARANI MTUNGI AND 3 OTHERS**, Civil Appeal No. 38 of 2012, **BARCLAYS BANK (T) VS JACOB MURO,** Civil Appeal No. 357 of 2018 and **SALIM SAID MTOMEKELA VS MOHAMED ABDALLAH MOHAMED, CIVIL APPEAL NO. 149 OF 2019** (all unreported).

Instead, our determination will hinge on the legality or otherwise of the award of payment of compensation of twelve months' salary at the date of the redundancy. Prior to that, we have to consider if the appellants were lawfully declared redundant or not. The High Court concluded that, the redundancy was unlawful because there was no consultation between the respondent and the Committee at work place on any impending redundancies as prescribed under section 6 (1) (g) of the Security of Employment Act Cap 387 (repealed) (the SEA). On this, in its reasoned decision the High Court stated:

> *"In our understanding of the above provision is that at the time the employer contemplates on retrenchment of employees he ought to have pre-retrenchment meetings with Field Branch Trade Union. And in law or for labour practitioners the consultation meeting aimed at discussing among others the circumstances of minimizing or [stopping] retrenchment process, mode of selecting the intended retrenched employees, and discuss on their benefits thereto, this is the position of this Court as was held in the case of* ***Samora Boniphace & 2 Others v. Omega Fish Ltd, Revision No. 56/2012, HC Labour Division, Mwanza Sub registry (unreported).***

The line gives rise to debate in this case is whether or not the meeting conducted on 4th May, 1995 by Central Joint Industrial Council, a council which is constituted by the Management of employees of the Port Authority, some of the Trade Union leaders and other members who are not employees of Port Authority as reflected in Exhibit "P2" constitute adequate consultation as required under Section 6(1) (g) of SEA. As we pointed out [earlier] and as witnessed from Exhibit "P2" what transpired on the said meetings does not constitute consultation on mainly two reasons ..., first the said meeting was called after the retrenchment decision and selection of employees who would be affected by the retrenchment exercise was already done, and secondly the said meeting discussed only the issue of the retrenchment package which in itself there were no consensus and no.... other meeting or any joint agreement were entered by the parties. Therefore, even if this Court would take the meeting held on 4th May, 1995 as consultation meetings basing on Court of Appeal of Tanzania decision referred by respondent counsel of ***Nurdin Ibrahim & 147 Others v. The Director General Tanzania Harbours Authority Civil Appeal No. 47/2001 (unreported)*** *yet it was inadequate consultation why? Because there was no consensus or any joint*

agreement entered by the parties to substantiate the act of the employer. As pointed out by Mr. John Vahaye gentleman Court Assessor that the Court is always guided by evidence and not assumptions. In the event therefore the Deputy Chairman decision that termination was lawful was wrong and is hereby quashed and set aside".

According to section 6(1) (g) of the SEA it is stipulated as hereunder:

"6. (1) The functions of a Committee in, and in relation to, the business for which it is established are-

(g) To consult with the employer concerning any impending redundancies and the application of any joint agreement on redundancies;

According to the SEA, the respective committee comprising of workers is referred to under the SEA as the Workers Committee. In the case of **HAMISI ALLY RUHONDO AND 115 OTHERS VS TANZANIA ZAMBIA RAILWAY AUTHORITY,** Civil Appeal No. 1 of 1986 (unreported) the Court had the occasion of considering the cited provision and interpreted it to mean that, *consultations must be held prior to deciding on any impending redundancy.* This was later followed in the case of **TANZANIA UNION OF INDUSTRIAL UNION AND ANOTHER VS TANZANIA AND ITALIAN**

PETROLEUM COMPANY LIMITED, Civil Appeal No. 34 of 2000 (unreported). The rationale of having prior consultation on the impending redundancy was for the purposes of ensuring fairness and transparency in redundancy exercise in order to achieve the desired goal harmoniously. Therefore, guided by the prescribed principle, it is our considered view that it was incumbent on the respondent to make prior consultation with the Committee at workplace on the impending redundancy before laying off the appellants. However, this was not the case because the minutes of the special meeting dated 4 – 5 /5/95 involving the management and members of the defunct Organization of Tanzania Trade Unions (OTTU) (Exhibit P2) the business transacted as reflected at page 242 of the record of appeal is as hereunder:

> *"Mwenyekiti wa kikao ambaye alikuwa Makamu Mwenyekiti wa CJIC alifungua kikao saa 5.30 asubuhi kwa kuwakaribisha wajumbe katika kikao...Aliwajulisha wajumbe kuwa ...kikao hicho ni muhimu kwa sababu ambazo haziwezi kuzuilika. Alisema kikao hicho ni kikao maalum kitakachojadili tathmini ya mahitaji ya wafanyakazi na hususani malipo yatakayolipwa wafanyakazi watakaostaafishwa, hivyo aliomba ushirikiano kutoka kwa wajumbe ili kufanikisha kikao hicho."*

Moreover, at page 280 of the record of appeal is a report addressed to ***"BARAZA LA WAKURUGENZI"*** *titled:* ***TAARIFA YA UTEKELEZAJI WA ZOEZI LA KUPUNGUZA WAFANYAKAZI WA ZIADA (RETRENCHMENT)*** whereby the Board members were informed about the status of implementation of the redundancy process. Thus, besides the said documents not exhibiting existence of any consultation on the impending redundancy, exhibit P2 shows, the respective meeting was convened after the selection of employees who were to be affected by the redundancies. Besides, as correctly found by the High Court, meeting was on the retrenchment package and there was no consensus reached. In the circumstances, it cannot safely have vouched that there was any consultation meeting on the impending redundancies. In the premises, we cannot fault the learned High Court Judges who were satisfied that, in the absence of prior consultation between the respondent and the Committee at work place, the entire exercise of redundancy was wrongful.

Next for consideration is the quantum of compensation. The High Court ordered the respondent to pay each appellant 12 months' salary at the rate earned before retrenchment process as a remedy for unfair termination and golden handshake for payments which were erroneously deducted. According to the Industrial Court Act, a bench of three Judges was

mandated with powers of revision of the decision of Deputy Chairperson and give awards as stated under section 28 (1) of the Industrial Court Act Cap 60 R.E.2002 (repealed) which stipulates as follows:

> *"The Court shall have power, in any proceeding determined before it, on application being made in that behalf by any party or of its own motion,* ***if it appears that there has been an error materiai to the merits of the dispute involving justice, revise the proceedings and make such decision or award in the matter as it sees fit,*** *save that no decision or award shall be made by the Court in exercise of its jurisdiction under this subsection, increasing the liability of any party or altering the rights of any party to his detriment, unless such party shall have first been given opportunity to be heard".*

[Emphasis supplied]

Therefore, although it is not expressly so stated in the decision of the High Court, we are satisfied that, the order to pay compensation for twelve months' salary as at the rate earned before the redundancy is backed by the provisions of section 28(1) of the repealed Industrial Court Act. That said, we cannot fault the criteria used as that was before the reorganization and restructuring of the respondent's resulting current Tanzania Ports Authority

which probably entailed having different schemes of service and salaries. Ultimately, regarding the handshake, what the High Court stated at page 118 of the record of appeal is that, the respondent should rectify the defect in the difference prevalent in the payment of the golden handshake by rationalizing and making good the deducted amounts of the affected employees.

In view of what we have endeavoured to discuss, we do not find any cogent reason to vary the decision of the High Court and as such, the appeal is not merited and it is accordingly dismissed.

DATED at **DAR ES SALAAM** this 23rd day of February, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 24th day of February, 2023 in the presence of the appellants in person and Mr. Peter Msetti, learned Principal State Attorney assisted by Ms. Comfort Laizer (SSA) and Ms. Iman Massebu (SSA) both learned State Attorneys for the Respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL