IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT MOSHI

LABOUR REVISION NO. 02 OF 2020

BETWEEN

1. ALPHONCE ALOYCE MASSAWE
2. ELIAS RENALD MSHUMBUZI .....**APPLICANTS**
3. MARLINE DOMINICK MUSHI

VERSUS

MOSHI LEATHER INDUSTRIES LTD.....RESPONDENT

JUDGEMENT

06/10/2020 & 24/11/2020

MWENEMPAZI, J

The applicants have filed this application under the provisions of Section 91(1)(a) and 91(2)(b) and 94(1)(b)(i) of the Employment and Labour Relations Act, No. 6 of 2004 read together with Rule 24(1),(2)(a)(b)(c)(d)(e)(f) and 24(3)(a)(b)(c)(d) and 28(1)(c)(d)(e) of the Labour Court Rules, G.N. 106 of 2007 and any other enabling provision of law. The applicants are asking for this court to call and revise the record of the proceedings of the Commission for Mediation and Arbitration (CMA) at Moshi Kilimanjaro in Labour Dispute No. CMA/KLM/ARB.04/2019 delivered on 06/12/2019. The application is supported by the affidavit of the first applicant. The applicants challenge the decision based on the following grounds as reflected in paragraph seven of the first applicant's affidavit:-

1. The arbitrator erred in law in favour of the respondent and we aver that we were not directly consulted/involved in the whole process of

retrenchment and the notice of retrenchment was sudden to be contrary to the law.

2. The arbitrator erred in law in favour of the respondent and we aver that the arbitrator failed to take into account onto sequence for retrenchment and its appropriation.
3. The arbitrator erred in law in favour of the respondent and we aver that we were not given reasonable time to prepare for the process of retrenchment and the reasons for the retrenment were based just on the will and whims of the respondent himself.
4. The arbitrator erred in law in favour of the respondent and we aver that we deserved fair and equal treatment on the whole process of retrenchment.

Brief facts leading to this application were that the applicants were employed by the respondent since May 2012 in different positions on the unspecified period of time. On 09/12/2018 the applicants were retrenched from their employment because of the poor economic situation and lack of business orders in the company which affected the respondent's business to sustain the operation of the company. The applicants were dissatisfied with the respondent decision and they referred the matter to Commission for Mediation and Arbitration for unfair termination (retrenchment) and claiming for compensation of Tshs. 23,544,000/=. The matter was heard and the CMA dismissed the matter on the ground that the retrenchment was fair. Dissatisfied the applicants filed this application for revision.

With leave of the court and by consent of the parties, the application was agreed to be disposed of by way of written submissions. The applicants were served by Ms. Zuhura Twalib, learned Advocate and the Respondent was being

represented by Mr. Modestus Njau, learned Advocate. Both parties filed their submission as ordered.

In the applicants' written submission they submitted that at the trial, three issues were framed for a determination that, whether the reason for retrenchment was fair and valid, whether the procedure for retrenchment was fair and to what relief the parties are entitled to. They submitted that there was no joint problem solving exercise to reach an agreement on the reasons for retrenchment. They said the applicants were informed of their retrenchment on 08/11/2018 and 09/11/2018 were retrenched which is contrary to the rules. They contended that there was no joint problem solving to reach agreement on the reason for intended retrenchment and it was done sudden and based on the will and whims of the respondent and not inclusive approach as required by the law.

On the issue of whether the procedure for retrenchment was fair, they submitted that they were not directly involved in the issue of retrenchment and the timing for retrenchment was poor. They did not get enough time to seek new jobs and other best options. They further contended that there was no workers participation nor consultation meeting before retrenchment was effected as required by the law.

They finally submitted that they were entitled to the relief claimed because the respondent violated the principle of retrenchment and their termination was based on unfair reasons. They pray for this court to grant any award that this court deems proper and appropriate to grant for the interest of justice.

In response, the respondent submitted that they decided to retrench the employees due to economic conditions and operational reasons of the industry of which was operating on loss. They submitted that they followed all mandatory

procedural requirements as per labour laws on retrenchment process as provided under section 38(1) of the Employment and Labour Relations Act. They submitted that they involved their head of department and trade union of Tanzania (TUICO) of which the applicants were members of TUICO branch at Moshi Leather Industries Limited. They contended that all the employees who were retrenched including the applicants were paid their statutory benefits. They referred the court to eight exhibits tendered at CMA which includes notice of intention to retrench, minutes of the meeting between management, all heads of departments, supervisors and TUICO representative; notice of discussion on proposed retrenchment with TUICO; Collective bargain agreement; terminal benefits paid to applicants, acknowledgements and certificates of service for each applicant and agreement of retrenchment of employees between TUICO and respondent. They maintained all procedures were adhered to and applicants were involved and finally paid their terminal benefits. That was also supported by the testimony of their witnesses DW1 Human Resources Manager and DW2 TUICO representative.

They submitted that during the hearing before the Commission, the applicants did not object or challenge any of the eight exhibits and they did not even justify their claim of compensation to a tune of Tshs. 23,544,000/=. Furthermore, they did not dispute to be members of TUICO-Branch of Moshi which was involved in retrenchment by the respondent. They further submitted that the first communication of retrenchment was on 17/09/2018 as per Exhibit A-1 and not on 08/11/2018 as the applicants claim. They finally prayed for this court to dismiss the revision and uphold the arbitration award by the commission with costs.

In rejoinder, the applicants reiterated their submission in chief and added that since there was no signatures and names of the applicants on any meeting

called upon by the respondent or trade union then they were unfairly retrenched.

I have gone through the record of Commission for Mediation and Arbitration and I have taken into consideration the submissions of both parties and the authorities cited in support of their submission. I find the issues for consideration by this court are whether there was a valid reason to retrench the applicants and if so, whether the procedures were followed and to what relief the parties are entitled to.

Starting with the first issue, the respondent decided to retrench the applicants and other employees due to economic condition and operational reasons of the industry as the company was operating on loss. Rule 23(2)(a) of G.N No. 42 of 2007 provides circumstances for termination under operation requirement. The provision states that:-

> *"A termination for operational requirement (commonly known as retrenchment) means a termination of employment arising from operational requirements of the business. An operational is defined in the Act as a requirement based on the economic, technological, structural or similar needs of the employer.*
>
> *(2) As a general rule the circumstances that might legitimately form the basis of a termination are:*
>
> *(a)economic need that relate to the financial management of the enterprise."*

According to exhibit A2 which are minutes of a meeting held on 28/09/2018 between Management and all Department Heads, Supervisors and TUICO MLI representative. The main agenda was the report of the current economic status of the company/respondent and discussion on how to reduce expenses. It was

discussed that despite other measures only solution remaining was to reduce number of workers in order to reduced direct and indirect expenses by retrenchment due to poor economic status of the company. As correctly found by the arbitrator the respondent suffered economic hardship due to market fall. In that situation the retrenchment was inevitable and the meeting agreed to retrench some of the employees to rescue the company situation. In the circumstances, I find that there was a valid reason to retrench the applicants and other employees.

The next issue is whether the procedure for retrenchment was adhered to. Section 38(1) of the ELRA provides for the procedure for retrenchment, the section reads as follows:-

> *"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."

The above section must be read together with Rule 23(4) of GN No. 42 of 2007 which states as follows:-

"Rule 23 (4) the obligations placed on an employer are both procedural and substantive. The purpose of the consultation required by section 38 of the Act is to permit the parties, in the form of a joint problem-solving exercise, to reach agreement on:-

(a) the reasons for the intended retrenchment (i.e. the need to retrench);

(b) any measures to avoid or minimize the intended retrenchment such as transfer to other jobs, early retirement, voluntary retrenchment packages, lay off etc;

(c) criteria for selecting the employees for termination, such as last-in first-out (LIFO), subject to the need to retain key jobs, experience or special skills, affirmative action and qualifications;

(d) the timing of the retrenchment;

(e) severance pay and other conditions on which termination took place; and

(f) steps to avoid the adverse effects of terminations such as time off to seek work."

In this application, the applicants contended that they were not involved in the whole process of retrenchment. However, the evidence on record shows that on 17/09/2018 the respondent issued a notice of intention to retrench (Exhibit A.1) which was issued to all Heads of Department and Supervisors who were representative of the applicants. Then on 28/09/2018, the meeting was held (Exhibit A.2) and they were informed of all the reasons for retrenchment and they collectively agreed that retrenchment should take effects. The applicants and other employees were represented by Mr. Bakari Ally from TUICO whom the applicants were members. After such meeting on 28/09/2018, the respondent issued a letter (exhibit A.3) to TUICO Regional Chairperson/Secretary asking them to attend a meeting on 01/10/2018 to discuss the proposed retrenchment. The respondent and TUICO had a collective bargaining agreement (Exhibit A.1) as per clause 3.0 recognised TUICO as the only sole representative of workers employed by respondent. According to clause 23.0 of retrenchment, the respondent complied by issuing a notice for retrenchment and disclosed the number of workers likely to be affected and made several consultations with TUICO. Then on 07/11/2018 retrenchment agreement (exhibit 8) was signed between TUICO and the respondent. It was agreed that 18 workers will be affected by such an agreement. Thereafter on 09/11/2018 the applicants and other workers were given letters of retrenchment.

In my view the chronological evidence presented before the Commission for Mediation and Arbitration show that the procedures were properly followed. More so since there was collective agreement to retrench the applicants

between TUICO, who were acting as a representative of the employees, then the decision reached was binding. That complies with section 71(3)(a)(b)(c) of **Employment and Labour Relations Act, 2004** that a collective agreement shall be binding. As correctly found by the Arbitrator the retrenchment process was conducted from September 2018 to November 2018 in a transparent manner. Since it was a duty of the Union to report to the employees as provided under **Rule 23(6) of the Employment and Labour Relations (Code of Good Practice) Rules G.N 42 of 2007**, then the applicant cannot shift the burden to the respondent to inform them individually. Therefore it is my finding that the respondent had complied with all mandatory procedure to retrench the applicant.

Turning to the last issue of relief, clause 24.1 of the collective bargain agreement (Exhibit A.4) stated that employee shall be awarded a certificate of service together with his final dues payment. According to the evidence of DW1 the applicants were paid their terminal dues and were given a certificate of service. That testimony was supported by Exhibit A.5 which shows that the applicants were paid their statutory benefits includes salary, one-month basic salary in lieu of notice and severance pay. Both signed to acknowledge to receive the cheque and were issued with a certificate of service. On that basis, it is without a doubt that the termination of the applicants' employment based on retrenchment was fair procedurally and substantively and there is no more remedy left for the applicants to claim.

On the basis of the above discussion, I find that this application has no merit and it is dismissed. The arbitrator's award is hereby upheld. Each party shall bear its own costs.

T. MWENEMPAZI

JUDGE

24/11/2020

Judgement delivered in the presentce of 1st and 2nd Applicant and Mr. Modestus Njau, learned advocate representing the Respondent.

T. MWENEMPAZI

JUDGE

24/11/2020

Right of appeal explained to the parties.

T. MWENEMPAZI

JUDGE

24/11/2020