IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

LABOUR REVISION NO. 81 OF 2020

TANZANIA BREWERIES LIMITED ..... APPLICANT

VERSUS

JOHN MUGABE MADATTA ..... 1ST RESPONDENT

KHALFAN KOMBA ..... 2ND RESPONDENT

KASILE JOSEPHAT KASILE ..... 3RD RESPONDENT

ERIC DENNIS MWAYELA ..... 4TH RESPONDENT

JUDGMENT

8th April & 23rd June, 2021

ISMAIL, J.

The respondents were employees of the applicant, serving in different capacities in Mwanza and Arusha. Pursuant to a retrenchment exercise effected on 8th November, 2019, the employment links between the applicant and the respondents were severed. The latter's termination was on operational requirements that arose as a result of the applicant's decision to scale down some of the functional units, following modernization of their business processes. In terms of the applicant, termination of the respondents

was preceded by consultative sessions which involved the applicant's management and representatives of the employees' trade union, known in acronym as TUICO. A couple of other sessions, one in Arusha and the other in Mwanza allegedly involved employees who were not members of TUICO who, in this case, were the respondents.

The respondents faulted the entire process, arguing that the substantive and procedural aspects of their termination were not conformed to. They preferred a complaint to the Commission for Mediation and Arbitration (CMA), citing several irregularities that allegedly marred the retrenchment. While the substantive part of the termination was given a 'clean bill of health', the procedural part of the termination was found wanting. Consequently, the termination was censured. Subsequent to adjudging the termination as procedurally unfair, the CMA ordered payment of compensation in the respondents' favour.

Aggrieved by the arbitral award, the applicant instituted the instant application. The application calls for the Court to revise and set aside the award. It is supported by an affidavit of Dorah Constantine Nyambalya, the applicant's principal officer, in which grounds for the prayers sought are set out.

The application has been viciously opposed by the respondent. Through the notice of opposition and a counter-affidavit sworn by Esther Safari Sungwa, learned counsel, the applicant's quest has been perforated. The averment by the respondents is that the CMA's decision was quite in order, and that no injustice had been occasioned.

Hearing of the matter pitted Ms. Marina Mashimba, learned counsel whose services were enlisted by the applicant, against Ms. Ester Safari, learned advocate who fended for the respondents.

In her submission, Ms. Mashimba, sought to adopt the contents of an affidavit sworn in support of the application. She submitted that two points of contention arise from the matter. These are:

(i) Whether the applicant failed to conform to the procedure for laying off the respondents; and

(ii) Whether the arbitrator was right in awarding what she awarded, while the respondents were paid retrenchment packages.

With respect to conformity with the procedure, Ms. Mashimba argued that the arbitrator's view is that the procedural aspects of the termination were not followed, arguing that no notice was issued on the impending retrenchment. Further to that, the arbitrator argued that there was no

consultation prior to the retrenchment, especially for Non-TUICO members. Ms. Mashimba took the view that the arbitrator's finding was erroneous, because the available evidence, as testified by DW2, showed that the procedural aspects, as enshrined in section 38 (1) of the ELRA, were complied with. That included the notice of retrenchment which was served through a notice to TUICO, dated 27th September, 2019 (exhibit AB1). The counsel argued that the notice embodied the intention, reasons for the termination, and an invitation to attend a consultative meeting slated for 15th and 16th October, 2019. Ms. Mashimba submitted further that such meeting was held for three days as evidenced by exhibit AB2, adding that consequent thereto, exhibit AB3, containing terms, time and scope of the agreement was signed. She took the view that exhibit AB3 was consistent with section 71 (3) (a), (b) and (c) of the ELRA, and Rule 23 (8) of GN. No. 42 of 2007.

The applicant's counsel further contended that, the cited provisions are to the effect that, whenever there is an agreement between the employer and a trade union with exclusive bargaining right, then such contract binds the parties and all other employees in the institution, regardless of whether they are members trade union or not. Holding that the respondents are bound by the agreement, Ms. Mashimba referred me to the Court's decision in ***Mohamed Ngowengo v. Tanzania Distilleries Limited***, HC-Labour

Revision No. 159 of 2019 (unreported). The learned counsel further referred to meetings held on 8th November, 2019, involving the applicant's management members and the respondents as evidenced by exhibit AB4. She further contended that at these meetings, minutes of which were admitted as exhibit AB5, details of why and how the retrenchment was going to be carried out were shared. It was subsequent thereto, that letters of termination (exhibits AB6-9) were issued.

Still on exhibit AB3, the applicant's counsel contended that Clause 4.3 provides that a dissatisfied employee may, within seven days of receipt of the termination letter, file a complaint to a review committee. She argued that only the 3rd respondent requested that his case be reviewed. With respect to 1st, 3rd and 4th respondents' membership to TUICO, Ms. Mashimba conceded that the trio was not members and, therefore, not bound by the retrenchment agreement. She quickly added, however, that the procedure for their retrenchment was followed and were present when the consultative meeting was held. It was erroneous, in the counsel's view, to hold that procedures were flouted in this respect.

In her submission on the 2nd issue, the learned counsel for the applicant argued that, in terms of DW3's testimony, the respondents were paid their dues. She argued that this was evidenced by exhibit AB11, and

that the sums paid constituted 70% of the terminal benefits. In view thereof, Ms. Mashimba contended, it was irregular for the arbitrator to award compensation while the respondents had been paid all their perks, and were contented with the retrenchment exercise when they accepted the payment. The counsel took the view that receipt of benefits precluded them from challenging the termination. She fortified her position by referring to the decisions in ***Mohamed Ngowengo v. Tanzania Distilleries Limited*** (supra) and ***Ally Mussa Mwambapa & 7 Others v. Tanzania Breweries Limited***, HC-Revision Application no. 849 of 2018 (unreported).

The learned counsel argued that, in view of any other reasons that the Court may find appropriate, the CMA erred, caused a miscarriage of justice and acted illegally. She prayed that the award be revised.

Submitting in rebuttal, Ms. Safari, first prayed to adopt the counter-affidavit as part of her submission. She expressed her strong opposition to the application.

With respect to the notice, Ms. Safari held the view that such notice did not conform to the requirements of the law. She took the view that what was sent out was a notice of invitation to a meeting and not the notice envisioned in section 38 (1) (d) of the ELRA. It was a notice addressed to

TUICO and not to all employees, and that DW1 testified at page 13 of the proceedings that he did not see the notice and none was produced in evidence. Submitting on the consultative meeting allegedly held on 8th November, 2019, the learned counsel argued that it is impossible to hold two meetings in a single day. As regards the meeting between TUICO and the applicant's management, the contention by the respondents' counsel is that no minutes were generated out of the said meeting, and that the attendance register and the minutes have some legitimacy issues, primarily on the contention that the latter were not on letterhead. She also took an issue with the manner in which the invitations were sent out, arguing that the WhatsApp channel used was quite informal, and that the invitation was for attendance to a training. In this case, the respondents' counsel contended that Mr. Eric Mwayela, the 2nd respondent, who was in Arusha then did not attend the meeting in Mwanza and there is no evidence if he ever received any invitation to that effect. Moreover, the counsel argued, the meeting did not have any minutes. Ms. Safari argued that what appears like the minutes are merely answers from the employer without any views from the employees. The learned counsel buttressed this contention by citing the decision of the Court of Appeal in ***Security Group (T) Ltd v. Samson Yakobo & 10 Others***, CAT-Civil Appeal No. 76 of 2016 (unreported).

Reacting on the receipt of terminal benefits subsequent to termination, Ms. Safari's argument is that the agreement was between TUICO and the applicant and that a copy thereof was never supplied to the respondents. She argued further that there was no information on that, and that the letter that one of the respondents wrote was responded to only partially i.e. with respect to medical issues. She contended that the respondents' right to challenge the termination is in the agreement which was not availed to the respondents. Ms. Safari reminded of DW1's testimony and admission that there were no criteria for picking employees to be retrenched.

With regards to the package paid to the respondents, the respondents' counsel submitted that what was ordered by the CMA was compensation for unfair termination, and that such payment would not validate an irregularity. She took the view that the arbitrator's decision was based on section 40 (1) (c) and rule 32 (5) of GN. 67 of 2007. She concluded by urging the Court to find that the arbitrator's decision was sound and unblemished. She prayed for dismissal of the application.

Submitting in rejoinder, Ms. Mashimba reiterated what she submitted in her submission in chief. With respect to the notice, her contention is that the law does not require that there should be a notice to employees. It is enough if TUICO was served, as notice to TUICO is as good as notice to the

employees. She further argued that the notice was self-explanatory in that it stated why retrenchment was in the offing. In any case, the counsel argued, there is no known format for such notices. On whether the notice was issued, the counsel leapt to the defence of DW1, arguing that saying that he did not see the notice does not mean that such notice was not issued.

On the meeting allegedly held on 8th November, 2019, Ms. Mashimba was insistent that the meeting was held on the same day and that exhibit AB4 is a testimony to that. She argued that this was a consultative meeting and exhibit AB5 is quite clear. Seeking to distinguish the instant proceedings from the ***Security Group case*** (supra), the counsel argued that in the latter, the meeting came after the retrenchment. She admitted that the 2nd respondent was based in Arusha but she was coy on whether he attended a similar meeting while in Arusha.

On the termination letters, the contention by the learned counsel is that the termination letters had a clause that shows that the respondents understood and agreed to the terms and that by signing, they committed that they were bound by them. With respect to the criteria for retrenchment, Ms. Mashimba submitted that the testimony of DW1 is clear on the criteria, and that such criteria are dependent on the circumstances, and that in this

case, the merger of areas of supply meant that employees had to be retrenched.

With regards to the retrenchment package, the applicant's counsel submitted that not every employee is paid the same package as what was paid to the respondents. She reiterated her call that the CMA ought to have netted off the sum paid on retrenchment.

As I sit back and make sense of the counsel's impressive but contending submissions, let me take pose and pay a glowing tribute to the counsel for the fabulous submissions. Their impressive representations have been profoundly helpful in narrowing areas of divergence, thereby halving the Court's burden of having to leaf through every piece of the voluminous record. The issues for determination are as framed by the counsel for the applicant. They require the Court to pronounce itself on whether the termination of the respondents' employment was tainted with procedural impropriety; and, whether award of compensation was right, where the respondents had been paid their terminal benefits.

Let me start by stating that, it now a legal certainty, that it is within the employer's right to choose the way in which he would like to run his work provided that he consults with his employees or their representatives, in case

such choice culminates in the layoff of their services. When that happens, courts are urged to steer clear of such decisions and, as ***Le Roux & Van Niekerk A*** (The SA Law of Unfair Dismissal (1994) 224) stated, allowing the courts to enquire into the merits of management decisions would constitute an instruction into managerial prerogative by an institution ill-qualified to do so. It is in view thereof that the South African Labour Appeal Court held as follows, in ***Morester Bande (Pty) Ltd v. NUMSA & Another*** (1990) 11 ILJ 687:

> *"The industrial court has in the past stressed time and again that, as a general rule, redundancy will be regarded as a fair and valid reason to dismiss an employer and accordingly the court will not regard a bona fide decision to retrench such an employee as unfair ...."*

It is clear, therefore, that termination on operational requirements is one of the reasons that may justify termination of services, and this is outlined in rule 9 (4) of GN. No. 42 of 2007. The condition precedent, however, is that if the employer picks it as a method of termination, then valid reasons must accompany the decision, and the duty to prove that there are serious reasons for preferring this option is cast upon the employer. This is in terms of rule 9 (3) of GN. No. 42 of 2007 and section 39 of the ELRA. In the proceedings that bred the instant matter, the arbitrator was convinced

that the reason for termination of employment was sound and fair, and the respondents are equally contented.

What is hotly contested by the respondents is the procedural aspects of the termination. The contention by the respondents and picked up by the arbitrator is that the consultative process was bungled, since participation of TUICO who are said to be a collective bargaining unit was not evidenced. The arbitrator further contended that, if the consultations were done, the same did not cover the respondents who did not subscribe to the trade union's ideals. In summary (as discerned from pages 33 to 35 of the award), the arbitrator took the view that the process was shrouded in several irregularities as follows:

(i) That the respondents were not accorded the right to be heard;

(ii) That calling them to a training instead of a consultative meeting was a violation of the law;

(iii) That the general notice issued to TUICO was segregatory of non-TUICO members, as was the latter's non-involvement in the consultations and the entire process;

(iv) That section 38 (1) (a) of the ELRA and rule 23 of GN. No. 42 of 2007 on the issuance of the notice of retrenchment and observance the LIFO rule were flouted;

(v) That there were no known criteria for retrenchment; and

(vi) That the Comprehensive Bargaining Agreement between TUICO and the applicant was not tendered in the CMA.

As stated earlier on, the view held by Ms. Mashimba is that nothing blemished was committed by the applicant in the course of effecting the respondents' termination. This is in view of the fact that the notice to TUICO was enough, and in compliance with the requirements of the law. Specifically, this was in full compliance with section 71 (3) of the ELRA and rule 23 (8), which imposes the binding effect of the agreement entered between the applicant and TUICO on all other employees, including non-union members like the respondents.

It is common knowledge that the provisions of section 38 (1) (c) of the ELRA compel the employer to consult the appropriate trade union, relevant employees and/or forum, and communicate the reasons for the intended retrenchment, method of selection of the employees to be retrenched, timing of the retrenchment, and the remuneration package that goes with the impending termination. Where employees are not represented then such

consultation must involve the employees themselves, and that the findings of the consultation must be divulged to the parties. Consultation must be preceded by issuance of a notice to the employees to be affected (Article 14 of the ILO Employment Termination Convention No. 158). The rationale for this is to remove the possibility of the employer to unilaterally end an employment relationship of indeterminate duration by means of a period of notice or compensation in lieu thereof (See: ***Samora Boniphace & 2 Others v. Omega Fish Ltd***, [2014] LCCD 129). The significance of carrying out consultations prior to retrenchment was also underscored in ***KMM (2006) Entrepreneurs Ltd v. Emmanuel Kimetule*** [2015] LCCD 15. The Court held that failure to prove that adequate consultations were held constituted a violation of section 38 of the ELRA and rules 23 and 24 of GN. No. 42 of 2007.

In our case, DW1 and DW2 have admitted that the respondents were not members of TUICO, and that consultations held between TUICO and the applicant did not factor in the respondents. The contention by these witnesses is that there was a separate consultative session that involved non-TUICO members, and that the respondents were invited to the session. The testimony is the minutes (exhibit AB5). This is the meeting whose notice was sent via WhatsApp message and the subject was that the invitation was

for a training session. It is this gathering that eventually turned into a consultative meeting whose deliberations were reflected in exhibit AB5. Glancing through this exhibit, the impression that arises is that what is christened as minutes of the consultative meeting are a conglomerate of narrations which do not give the impression that this was a consultative meeting. What we see is a bunch of answers to the questions posed without any deliberations or resolutions which would constitute an important take away for the respondents. In my considered view, this cannot be said to be an adequate testimony of any semblance of consultation, allegedly made between the parties, and I find nothing faulty in the arbitrator's finding in this respect.

Still on the same issue, a concern has been raised by Ms. Safari that Mr. Eric Mwayela, the 2nd respondent, whose work station was in Arusha did not attend the meeting in Mwanza, and there is no evidence that he attended the meeting in Arusha, if at all one was convened. Ms. Mashimba was non-committal on whether such meeting was held in Arusha, implying that the said meeting was either non-existent or that the 2nd respondent was not in attendance. In any case, the 2nd respondent never attended the Mwanza meeting. Since the applicant has not been able to prove that a similar meeting was convened in Arusha, or that it was attended by the 2nd

respondent, the legitimate conclusion is that the 2nd respondent was not roped into consultations which were allegedly held prior to the implementation of the retrenchment measure.

Turning on to the notice, Ms. Mashimba's contention is that the general notice that was issued to TUICO sufficed. Her argument is premised on the import of section 71. This is to the effect that, being an exclusive bargaining unit, TUICO had the mandate of negotiating on behalf of its union members. This contention has been seriously rebutted by Ms. Safari and she has punched a few holes on it. As I address this point, I need to state that the law is quite clear, that a registered trade union representing the majority of the employees may be recognized as an exclusive bargaining agent. Such recognition is subject to compliance with the procedures enshrined in section 67 of the ELRA. The recognition is done through a recognition agreement, entered by the employer and the union. Once that is done, the union has full powers to engage in collective bargaining that may culminate in the collective agreements that are spelt in section 71 of the ELRA. Such agreements bind parties thereto and employees, including those that are not members of the union.

The view taken by the arbitrator is that the applicant did not tender any evidence that would prove that TUICO and the applicant entered into a

collective agreement. Absence thereof, in her view, cast some doubts on the veracity of the applicant's contention that the TUICO had the right to serve as a collective agent. While I subscribe to this contention, I would go further and contend that, even assuming that such agreement was available, failure to tender it constituted an infraction. I hold that, though such lapse was not as devastating as the arbitrator would want us believe, it is clear and relevant, in my view, that there is no evidence that the collective agreement (exhibit AB3) was shared to non-union members, such as the respondents. Under this agreement (Clause 4.2), an aggrieved employee had a recourse to a review against selection criteria not to accept payment of a retrenchment package until after conclusion of the said review. Failure to let the respondents know of the existence or contents of exhibit AB3 created a sense of unawareness, by the respondents, of what they ought to have done subsequent to retrenchment, and I find it quite irrational.

Other forms of procedural lapses gathered for this process include the following:

(i) That the notice did not embody criteria for retrenchment of the respondents and other employees falling in their category, contrary to rule 24 of GN. No. 42 of 2007;

(ii) That, whereas the consultations were allegedly done on 8th November, 2019, letters of termination are dated 4th November, 2019, and consultations proceeded up to or beyond 19th December, 2019. The applicant's contention that letters were served on the same day the consultations were held, meant that there was no room for the respondents to reflect and make up their minds;

(iii) Generally speaking, the respondents' involvement in the entire retrenchment process left a lot to be desired, and I can hardly be persuaded that such exclusion was consistent with the requirements of the law.

From the totality of deficiencies pointed out earlier on, my conviction is that the first issue has to be answered in the negative. The legitimate conclusion is that the respondents' termination was shrouded in wanton procedural impropriety that has rendered it profoundly unfair, and I hold that the view the arbitrator's finding in that respect was sound and plausible. I find nothing blemished in that reasoning and the conclusion, and I uphold it.

The next question requires the Court to resolve if the arbitrator was right in awarding a compensation while the respondents were paid retrenchment packages. The view taken by Ms. Mashimba is that the award

of compensation while the respondents had been paid their terminal benefits was irregular. This contention has been discounted by Ms. Safari who relies on the provisions of section 40 (1) (c) of the ELRA and rule 32 (5) of GN. 67 of 2007.

As rightly contended by the respondents' counsel, payment of compensation is a consequential remedy that comes after the arbitrator's adjudgment that termination was substantively or procedurally unfair. Payment of compensation is, therefore, a recompense for the loss and agony suffered through an unfair termination of service. For ease of reference, the said provisions state as hereunder:

> *"(1) If an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer-*
>
> *(a) N/A*
>
> *(b) N/A*
>
> *(c) to pay compensation to the employee of not less than twelve months' remuneration."*

From the just quoted excerpt, payment of compensation follows the arbitrator's finding that the employee's termination of employment was unfair, and it doesn't matter if the employee was paid his terminal dues subsequent to the termination. The compensation is a recompense that takes care of the pain or suffering that comes from the brunt of termination

that has been adjudged as unfair. It is a form of restitution that is not a substitute to or comparable to the terminal benefits which would be, or are payable to the employee. It is, in my considered view, a fallacy to contend that such payment was erroneous merely because the respondents had been paid their terminal perks on termination. In a case like this, where the unfairness of the termination arises from a procedural misstep, payment of compensation constitutes the only feasible discretionary remedy (See: ***NMB v. George Athanasio Makange***, HC- Revision No. 7 of 2013; and ***Tanzania National Parks v. Hamis Kolo Mndulu***, HC-Revision No. 73 of 2015 (both unreported)). This astute position was underscored in the case of ***TUCTA v. Nestory Kilala Ngula*** [2014] LCCD 39, in which it was held:

> *"The compensation for unfair termination under Section 40 of the Employment and Labour Relations Act No. 6/2004 is well known as the remedies are outlines under Section 40 (1) (a) (b) (c) (2) and (3) the law talks of exceptions to re-instatement, re-engagement that where it is not reasonable (sic) practicable for the employee to re-instate or re-engage then the employer must compensate the employee. compensation comes only when the primary remedy for unfair termination namely reinstatement of the employee is not met due to reasonability and practicability of the act to reinstate the employee. usually the compensation and other benefits from the date of unfair termination to the date of*

final payment.... The spirit is therefore that the compensation awarded to the employee should be in the same vein with the damages for the breach of contract and the employee who has been unfairly terminated be placed in the same position had the contract of employment not been breached. The purpose and spirit of making just and equitable compensation goes further to the effect that the awards must serve to rectify an attack on ones dignity. There are factors to be considered in such cases. a good example is our case at hand where the position of the respondent as a General Secretary of TUCTA national wide is a dignified position a very senior post national wise and therefore a need for solatium award [comfort] in terms of ***action injuria****."*

Inspired by this splendid reasoning, I take the view that the arbitrator was within her confines when she ordered payment of compensation for unlawful termination. The applicant's contention is, with respect, hollow and unmaintainable.

As I wind down, it behooves me to say a word or two about the quantum of compensation awarded to the respondents. In the impugned award, the 1st, 2nd and 4th respondents were awarded compensation for 24 months while the 3rd respondent was awarded compensation for 36 months. The arbitrator did not give any reason for the distinction in the award of

compensation between the 3rd respondent and the rest of the respondents, and one can only guess that such distinction arises from the fact that the 3rd respondent had a history of a medical condition that required medical attention. The law is settled that award of compensation and determination of the quantum is a discretion that is vested in the arbitrator and, while the law has set the threshold of the compensation to be awarded, the maximum amount is a matter to be determined by the arbitrator. Such award is dependent on the circumstances of a particular case. In the instant case, nothing peculiar can be said to have prevailed as to lead to the distinction drawn by the arbitrator. All of the respondents were placed in the same footing, irrespective of the physical or health condition of a particular employee. In my considered view, awarding the 3rd respondent more than what was awarded to other respondents was an erroneous or imprudent exercise of the discretion and I find it to be an abhorrent disparity.

Concerning, as well, is the fact that the sum of 24 months' salary is still on the high side, considering the injury for which the recompense was ordered. I hold the view that since the intention of the law is to redress the employee against the vagaries of a wrong application of the procedural requirements, such compensation should not be turned into an avenue for an unjust enrichment of an employee whose termination has been found to

be procedurally wanting. In my considered view, a compensation in the sum equivalent to 20 months' salaries for each of the respondents would be an adequate recompense that would address the bruises that came with the impugned termination. The arbitrator's award is varied in that respect.

In consequence, it is my finding that save for the reduction of compensation to the sum equivalent to 20 months' salary for each of the respondents, there is nothing faulty in the findings and conclusion made by the arbitrator. I hold that the award is premised on a sound legal and factual foundation. Accordingly, I dismiss the application and uphold the arbitrator's award.

It is so ordered.

DATED **at MWANZA** this 23rd day of June, 2021.

M.K. ISMAIL

JUDGE

Date: 23/06/2021

Coram: Hon. B. M. Lema, Ag-DR

Applicant: Represented by Marina Mashimba

Respondent: Represented all by Advocate Safari

B/C: J. Mhina

Court:

The Judgment delivered in the presence of both side advocates in chamber.

Right of appeal has explained

B. M. Lema

AG-DR

At Mwanza

23rd June, 2021