IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

LABOUR REVISION NO. 57 OF 2020

CAPITAL DRILLING (T) LIMITED ..... APPLICANT

VERSUS

EMMANUEL SHIJA ..... 1ST RESPONDENT

DEOGRATIAUS MAKWAYA NDEKI ..... 2ND RESPONDENT

DAVID D. MWANDIKAVANU ..... 3RD RESPONDENT

MAGESE WILSON DAUDI ..... 4TH RESPONDENT

JUDGMENT

24th June & 29th June, 2021

ISMAIL, J.

The instant proceedings have been instituted by the applicant, challenging the arbitral award in respect of a Labour Complaint No. CMA/GTA/12/2019, in which the Commission for Mediation and Arbitration (CMA) adjudged the termination of the respondent's employment unfair.

The impugned termination was on the ground of operational requirements, following the applicant's decision to cut down surplus requirement to its staff complement, after closing down two of its drill

machines (rigs). The shutdown of the two machines trimmed the applicant's workload.

Besides annulling the termination of the 1st, 2nd and 4th respondents who testified during the arbitral proceedings, the Arbitrator went ahead and ordered payment of compensation of compensation to 1st, 2nd and 4th respondents. The quantum ordered for payment was an aggregate of salaries for 5 months for each of the three respondents. The cumulative sum granted was TZS. 15,945,000/-.

The CMA's decision was not to the applicant's liking. It has chosen to challenge it through the instant application in which the Court is called upon to quash and set aside the arbitral award on account of the fact that is tainted with errors of law and fact, making it illegal.

Supporting the application is the affidavit of James Reuben Ngasani, the applicant's human resource and administration officer, in which grounds on which the application is based are laid down. The averment by the applicant is that termination of the respondents through the retrenchment was fair in substance and procedure, and that the criteria used to select the respondents were a result of a consultative meetings. The applicant's further argument is that the arbitrator disregarded the fact that the burden of proof on the allegation of non-adherence to the selection criteria ought to have

rested on the shoulders of the respondents. The applicant imputed some contradictions in the award with respect to fairness of the termination.

The respondents are opposed to the application. Finding nothing faulty in the arbitrator's award, they maintained that the applicant did not adhere to the selection criteria and that the applicant failed to prove to the contrary. The respondents' argument is that termination may be substantively fair but procedurally unfair.

On the counsel's consensual basis, hearing of the application was done by way of written submissions, preferred in adherence to the schedule. When the matter came up for orders, the counsel for the parties unanimously requested for the Court's indulgence in order to argue the application by way of written submissions. The request was acceded to by the Court and, consequently, a schedule for filing of the submissions was drawn and complied with by the parties.

Submitting in support of the application, the applicant's counsel began by laying down the steps which were taken in the retrenchment exercise. Ms. Sued submitted that all this came after the applicant's client, Geita Gold Mining, instructed the applicant to shut down two drill machine, inevitably leading to the termination. She contended that the procedure began with issuing a notice of retrenchment and invitation to NUMET, a trade union for

consultative meetings, and that in the first of the consultative meetings, the applicant explained that the retrenchment was inevitable. It was at that meeting that the selection criteria of LIFO were agreed, alongside other criteria such as skills, experience and qualification. The applicant came up with four issues for determination.

With respect to the first issue, the question was whether the arbitrator was right in law and fact by finding that there was unfair termination given the adduced evidence to the contrary. In justifying the propriety of the procedure, the applicant's counsel canvassed four heads. One was with respect to issuance of a notice of retrenchment. Highlighting the importance of such notice, the counsel cited the case of ***Resolution Insurance v. Emmanuel Shio & Others***, HC-Labour Revision No. 649 of 2019 (unreported), in which the objective of serving the notice was underscored. The applicant's contention is that such notice was issued to all employees who were to be affected by the retrenchment, and that such notice was served through NUMET representatives. With regards to consultative meetings, the applicant's contention is that two of such meetings were held on 19th December, 2018 and 4th January, 2019, and that reasons for the retrenchment were tabled and discussed and that the reasons for such retrenchment were agreed upon.

On disclosure of information, the applicant's take is that, while the employer has a duty to disclose relevant information on the intended retrenchment with a view to making the process as rational as possible. The applicant's contention is that this requirement was met during the consultative meetings, and that the affected employees were known ahead of the retrenchment. Regarding the selection criteria, the argument by the applicant's counsel is the retrenchment was compliant with Rule 23 (4) (c) in that the consultation held settled on LIFO as evidenced by Annexure CD-03. It was the counsel's contention that this fact was acknowledged by the arbitration at page 13 of the award. Based on Annexures CD-01, CD-02, CD-03 and CD-04, the requirements of section 38 of the ELRA and Rules 23, 24 and 25 of GN. No. 42 of 2007 were complied with. The applicant took the view that the retrenchment was reasonably fair and that the arbitrator's findings were erroneous.

Other areas of the applicant's discontentment touch on the arbitrator's holding that the burden of proof lies with the applicant; and that the arbitrator relied on mere allegations of non-adherence to the selection criteria, raised by the respondents without adducing any evidence.

The counsel argued that annexure CD-03 was clear that LIFO, skills, experience and qualifications would be used as the selection criteria. The

applicant noted that PW1, PW2 and PW3 contended that some employees who were employed lately were left out of the retrenchment, meaning that the criterion used is the FIFO as opposed to LIFO. The applicant's counsel argued that this contention was a mere allegation. On the burden of proof, the applicant contended that it was erroneous for the arbitrator to require the applicant to prove allegations raised by the respondents. The counsel contended that this was contrary to the cherished principle of law, specifically section 110 of the Evidence Act, Cap. R.E. 2019, which requires that whoever alleges anything must prove existence of that fact. The applicant's counsel cited a number of decisions that back up her contention. These are: ***Muhimbili National Hospital v. Andrew Komba & Another***, HC-Labour Revision No. 502 of 2019; ***Mohamed Ngowewo v. Tanzania Distilleries Limited***, HC-Revision No. 159 of 2019; ***Kuehne and Nagel Limited v. Grace Urassa***, HC-Labour Revision No. 190 of 2019; and ***Nisile Mwaisaka v. DAWASCO***, Revision No. 645 of 2018 (all unreported). The counsel argued that, since unfair termination was imputed by the respondents, on account of alleged failure to follow the selection criteria, then the responsibility for such proof lied with the respondents.

It was the applicant's urge that, in view of the fact that the applicant complied with the rules of fair procedure in the termination of the

respondents' employment, then the Court should not interfere with the termination.

With respect to reliefs that the parties are entitled to, the applicant's counsel prayed that the award be revised with a view to quashing and setting it aside.

The respondents' rebuttal submission was equally potent. Mr. Majogoro, learned counsel for the respondents, began by highlighting the point of contention in the dispute that bred this application. He argued that the dispute revolves around the criteria applied in effecting the retrenchment. He contended that the agreement settled on the LIFO criterion and such other criteria like skills, experience and qualification but all of that was spurned by the applicant. The counsel's argument is that the respondents' opening statement in the CMA was clear that the complaint was on the criteria used in the retrenchment, meaning that the applicant knew, ahead of time, the dispute that existed between the parties. Mr. Majogoro took the view that the burden of proving that the criteria agreed by the parties was followed lied with the applicant, after DW1 had testified that the parties settled on LIFO as the criterion to be applied. He took an exception to the applicant's argument that it was the respondents who were under obligation to prove that termination was fair.

Still on DW1's testimony, Mr. Majogoro argued that, being a sole witness for the applicant charged with the responsibility of proving fairness of the termination, he failed to tell CMA if the respondents' termination was consistent with the agreed criteria. Quoting part of the applicant's final submission which seemed to suggest that criteria for the termination came from heads of function units and other sources, and not based on the agreed criteria. The counsel further argued that the heads of function units were not called to testify. He contended that failure to call such material witnesses entitles the Court to draw an adverse inference on the applicant, consistent with ***Mashimba Dotto @ Lukubanija v. Republic***, CAT-Criminal Appeal No. 317 of 2013; and ***CRDB Bank PLC v. Africhick Hatchers Ltd & Others***, HC-Comm. Case No. 97 of 2014 (both unreported).

On ***Mohamed Ngowewo***; and ***Kuehne and Nagel Limited*** (supra), the counsel's contention is that such decisions are distinguishable to the instant matter as they both relate to proof of termination based on privacy. He insisted that this Court would not bless the termination while grounds therefor are not disclosed. it was the counsel's further contention that the settled law is that reasons for retrenchment must be valid and the Court has a duty to test the reasons before it decides on the adequacy of the reasons. He fortified his argument by citing the decision of the Court in ***Tanganyika***

Instant Coffee Co. Ltd v. Jawabu W. Mutembei, HC-Labour Revision No. 210 of 2013 (unreported), in which it was held:

> *"The courts have the duty to investigate unto the good faith of the employer and the merits or soundness of the decision to terminate for operational reasons and the courts are also entitled to determine whether this decision is the best or more reasonable one under the circumstance."*

The counsel concluded that the respondents' termination was not based on good faith and, therefore, unfair.

From these fabulous submissions by the counsel for the parties, one broad question for determination is whether the arbitral award is tainted with any irregularities that justify the call for its revision. While the applicant has drawn several issues for determination by the Court, my unfleeting review thereof gives me the impression that they all boil into two crucial questions. These are:

(i) *Whether the arbitrator was not erroneous in holding that applicant bore the burden of proving the fairness of the termination; and*

(ii) *What reliefs are the parties entitled to?*

As clearly gathered from the application and the counsel's submissions, the divergence revolves around the question of fairness of the respondents' termination. It is common knowledge that termination of the respondents'

employment was on account of operational requirements, otherwise referred to as retrenchment. This is one form of termination that is catered for by the law. Rule 9 (4) of GN. 42 of 2007 outlines reasons that may justify termination, and employer's operational requirements is one of them. In terms of this law, where the employer picks operational requirements as a reason for termination, as is the case here, the duty of proving that such termination was due to valid reasons is cast upon the employer (See: Rule 9 (3)). The requirement is that such reasons must be proved to be serious enough to justify the decision to terminate.

Noting that this termination was for operational reasons, the question that arises is whether such reason is sufficiently serious to justify severing of employment links with the respondents. In terms of section 39 of the ELRA, this duty is cast upon the employer and the standard of proof is on the balance of probabilities. Just like other forms of layoff, termination on operational requirements rests on two pillars i.e. fairness of reasons and fairness of procedure. These two serve as two sides of a coin, and that the absence of one 'amputates' the whole import of fair termination. The evident fact is that reasons for termination in this case were considered to be adequate and fair, and the respondents have no qualms on that. The respondents' gravamen of complaint was that the procedure used to effect

the retrenchment was flawed because it did not conform to the criteria developed in the consultative meetings between the employees' union representatives and the employer.

The view held by the applicant, on the other side, is that issues that touch on the retrenchment agreement and raised by the respondent ought to have been proved by the respondents. This is in view of the fact that they are allegations which fall outside the ambit of the employer's duty of proving fairness of termination. With utmost respect, this contention is, in my considered view, specious. These are issues that arguably draw the fault lines of the procedure. They pertain to the procedural aspects of the termination and are intended to impeach the fairness of the procedure that was applied in laying off the respondents. In my unflustered view, these issues are the flesh and blood of the fairness of procedure whose proof is still the domain of the applicant, and provable consistent with section 39 of the ELRA. Consequently, I take the view that the decisions cited by the applicant's counsel are at best distinguishable from this case, as none of them intended to take the burden of proof off the employer's shoulders.

In faulting the arbitrator's finding with respect to the burden of proof, the applicant's counsel has cited section 110 of Cap. 6 which lays a principle that in civil cases, the burden of proof lies in the person who alleges the

existence of such fact. This is an undisputed principle of law. I hasten to hold, however, that this is a general view, and that section 39 of the ELRA represents a departure from the general rule set out in section 110, and that this burden of proof touches all aspects of fairness of termination, including contractual issues such as the criteria for retrenchment which are a subject of the current proceedings. For ease of reference the said provision states as hereunder:

> *"In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair."*

See also: ***Singita Grumet Reserves Ltd v. Pius Edward Burito*** [2013 LCCD 147.

In ***KMM (2006) Entrepreneurs Ltd v. Emmanuel Kimetule*** [2015] LCCD15, termination of the employee's employment was annulled on account of the employer's failure to prove that the termination was fair, substantively and procedurally. The Court held the view that absence of evidence that due diligence was followed in retrenching the employee meant that termination was unfair.

Going by the testimony of DW1, the message gathered is that there were no known criteria for effecting the termination. He admitted (p. 5) that the criteria to be used were LIFO, skills and experience. He went ahead to

admit that, he served the termination letters on the respondents, and that, though he is the custodian of the office documents, he does not know the criteria used to lay off the respondents. At some point, he passed the buck to heads of function units whose testimony was not tendered during the arbitral proceedings. The conclusion made by the arbitrator was that the uncertainty by the applicant's sole witness meant that the applicant's duty under section 39 of the ELRA had not been discharged. I find no fault in that respect. Part of DW1's testimony that raised the arbitrator's eye brows and a clear non-adherence to the terms of the retrenchment agreement, is found at page 7 in which he testified as follows:

> *"DW1: Sifahamu hadi wanaondoka walikuwa na muda gani kazini."*

The message gathered from DW1's testimony is that the respondents' termination was based on some extraneous factors which were not a product of the consultation and consensus built during the consultative meetings. This, in my view, was inconsistent with the requirement of section 38 (1) of the ELRA, read together with Rule 24 of GN. 42 of 2007 the latter of which provides as hereunder:

> *"(1) Where one or more employees are to be selected for termination from a number of employees, the criteria for their selection shall be agreed with the*

trade union. If criteria are not agreed, the criteria used by the employer shall be fair and objective.

(2) Criteria that infringe a right protected by the Act when they are applied can never be fair. These include selection on the basis of union membership or activity, pregnancy or other discriminatory grounds.

(3) Selection criteria that are generally accepted as fair include length of service, the need to retain key jobs, experience or skills, affirmative action and qualifications."

I hold that, in view of the fact the applicant has admitted, through DW1, that the criteria were agreed by the parties and, since it is evident that the applicant deviated from the said criteria, the only inescapable conclusion is that termination of the respondents was informed by factors other than those that were agreed upon by the parties. Needless to say, this was an infraction which compromised the fair procedure of the termination (See: ***Bernard Gindo & 27 Others v. ToL Gases Ltd.*** [2013] LCCD 20; ***Secretary General: ELCT –North Western Diocese v. Edward Mugurubi*** [2013] LCCD 87).

Consequently, it is my finding that it was quite in order for the arbitrator to contend and hold that the applicant failed to prove that the termination was fair, and I find nothing blemished in that respect.

With respect to the reliefs that the parties are entitled to, I am in agreement, yet again, with the arbitrator's reasoning and conclusion that the respondents are entitled to compensation for the unfair termination. On the quantum that is payable to the respondents, the position is as stated by the arbitrator. Compensation for employees who are serving on fixed term contract is limited to the unexpired part of their contract. In this case, the respondents' contract period was five months away from expiration. The order for payment of five months' salaries as compensation is proper and legitimate, and I uphold it.

In view of the foregoing, I find the application lacking in merit and I dismiss it. The arbitral award is hereby upheld.

It is so ordered.

DATED **at MWANZA** this 29th day of June, 2021.

M.K. ISMAIL

JUDGE

Date: 29/06/2021

Coram: Hon. M. K. Ismail, J

Applicant: Absent

Respondent: Mr. Joseph Kinango, Advocate

B/C: J. Mhina

Court:

Judgment delivered in chamber, in the virtual absence of the applicant and in the presence of Joseph Kinango, learned Counsel for the respondent, respectively, this 29th day of June, 2021.

M. K. Ismail

JUDGE

At Mwanza

29th June, 2021