IN THE HIGH COURT OF UNITED REPUPLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LABOUR REVISION NO. 7 OF 2021

BETWEEN

NAS DAR AIRCO CO. LIMITED.....APPLICANT

VERSUS

GIFT ROBISON & 8 OTHERS.....RESPONDENT

JUDGMENT

Date of last order: 13/7/2021

Date of Judgment: 23/7/2021

SIMFUKWE J,

This is an application for revision filed by the Applicant NAS DAR AIRCO CO.LIMITED Challenging the award of the Commission for Mediation and Arbitration (CMA) of Moshi Labour Dispute No. CMA/HAI/ARB/82/2020 in which the Arbitrator Hon. L. L. Mwakyusa found that the Respondents were unfairly terminated as procedures of retrenchment were not followed and ordered compensation against the employer (Applicant). The application was preferred under the provisions of sections 91 (1) (a) 91(2) (b) (c) and section 94 (1) (b) (i) of the Employment and Labour Relations Act, Cap 366 (R.E 2019) Rule 24 (1) (2) (a) (b) (c) (d) (e) and Rule 28 (1) (c) (d) and (e) of the Labour Court Rules, 2007, GN No.106 of 2007 (herein after referred as Labour Court Rules).

The application was supported by the affidavit of Mr. Mussa Daud Coudoger the Human Resources Manager of the Applicant. The Respondent filed their notice of opposition and counter affidavit sworn by Mr. David Mdemu

their personal Representative from COTWU- a trade Union.

The brief history of the dispute is that the respondents herein were employed by the Applicant in different positions and time for contract of unspecified period. On 13th June 2020 the respondents were retrenched by the Applicants by the reason of operational requirements on financial crisis which was a result of losing business due to cancellation of flights due to Covid 19 crisis. The respondents were of the view that procedures of retrenchment were not adhered to, thus they referred the matter to the Commission for Mediation and Arbitration. The dispute was resolved in favour of the respondents hence the instant application. The Applicant raised four issues for determination

(i) Whether the Arbitrator made an error on points of law and facts by failing to consider and evaluate evidence by the Applicant.

(ii) Whether the Arbitrator made an error on points of law and facts in holding that the respondents were unfairly terminated

(iii) Whether the Applicant followed the procedures to terminate (retrench) the respondents from employment.

(iv) Whether the Arbitrator erred in law and facts in ordering the Applicant to pay the respondents Tanzania shillings seventy six million and one fifty two thousands (Tzs 76,152,000/=) as compensation for unfair termination.

The application was argued orally. The Applicant was represented by Mr. Arnold Peter learned counsel while the respondents were represented by Mr. Lucas Nyagawa learned counsel.

Supporting the application for the applicants, advocate Arnold Peter prayed to adopt the affidavit of Mussa Daudi Coudoger to form part of his submissions. On the issue of procedures of retrenchment, the learned counsel submitted that the applicant adhered to all prescribe procedures under **section 38 of the Employment and Labour Relations Act**. That the reason for retrenchment was not an issue /dispute before the CMA. That the Arbitrator acknowledged that notice was issued and consultation meeting was conducted. Then the Arbitrator proceeded to deliver erroneous award based on sympathy and assumption with no legal justification.

The learned counsel for the Applicant submitted further that the Applicant conducted two consultation meetings: The first consultation was of the Trade Union which was done on 8th June 2020.

The trade union was represented by the Chairman of COTWU who signed the agreement after the said meeting. Then on 10th June 2021 notice was issued to all employees that there would be a consultation meeting of all employees on 12th June, 2020. That only three of the Respondents (employees) attended the said meeting.

It was argued further for the Applicants that the law has not prescribed the Coram for consultation meetings and how the said meetings and how the said meeting should be conducted. That the chairperson of the Trade Union who attended the first consultation meeting was the representative of the Trade Union, otherwise he could

not have signed the minutes of the meeting. Also conducting a meeting was not the main issue to be addressed by the Hon. Arbitrator as technological revolution has engulfed the world and its relation to Covid 19.

Apart from that, it was also the argument of the learned counsel for the Applicant, that the Arbitration failed to differentiate the contents of **section 41 (1) (b) (ii) of the Employment and Labour Relations Act and section 38 (1) (a) of** the same Act. That while section 38 provides the requirement of notice to the staff when retrenchment is contemplated, section 41 provides for termination notice. That it is in that view that the general staff notice is given in view of **section 38 of the Employment and Labour Relations Act**, and **Rule 23 and 24 of the Code of Good Practise, GN No 42 of 2007.**

Advocate Anold referred the case of **RESOLUTION INSURANCE LTD VS EMMANUEL SHIO & 8 OTHERS , High court Labour Revision No 642 of 2019 at page 12** where **Hon . Aboud J** stated that:

> *"A notice should not be taken as an independent procedure from procedures stipulated above, all procedures have to be adhere communicatively. I am of the view that type of business and the circumstances that led to the retrenchment are the determination factors of how urgency the process of termination has to be undertaken"*

The learned counsel insisted that since the respondents had knowledge of what transpired and the nature of the business of the Applicant, the two days' notice was very reasonable contrary to the Arbitrators findings.

That at page 9 of his decision the Arbitrator acknowledged that there was no dispute that the respondents were called to attend the meeting, the general staff notice was directed to all staff. That the Trade Union representative was aware of the 2nd consultation meeting which was to be held on 12th June 2021, as the date was set on the first consultation meeting. Thus the Trade Union representative waived his right of attending the meeting without affecting the said meeting.

Lastly, Mr Arnold was of the view that the Arbitrator failed to acknowledge that three of the Respondents: Edward Msaki, Oswald Francis Kiambo and Robert Mbaga attended the second consultation meeting. The learned counsel prayed that this Honourable court declare that the Respondent were fairly terminated since the procedures prescribed by law were adhered to. That the CMA award and order for payment of Tsh 76,152,000/= be set aside

In his reply, Advocate Lucas Nyagawa submitted among other things that the obligation that have been placed to the employer during retrenchment process is both procedural and substantive. On procedural aspect, two stages are very important to be observed by the employer when conducting the retrenchment. The stages are: Issuance of Notice and consultation as provided under **section 38 of the Employment and Labour Relations Act** read together with **Rule 23 and 24 of the Code of Good Practise, GN No 42 of 2007.**

Mr. Lucas Nyagawa submitted further that the stages should not be applied in a checklist fashion but rather in a fair, adequate and proper manner. He referred the case of **BENARD GINDO and 27 OTHERS VS TOL GASES LIMITED (2013) Labour court case Digest 20**. On the

meaning of fair and adequate, the learned counsel referred **Blacks Law Dictionary 18th Edition** which defines fair to mean something **impartial just and equitable Oxford Dictionary 10th Edition**, defines the word "adequate" to mean **satisfactory.**

Mr. Lucas Nyagawa argued further that in the present case although the applicant argue that there was consultation the said consultation was not fair and satisfactory. That first no notice was issued to the union in order to have a fair consultation. The purpose of notice being to notify the other party to prepare for what is coming. Second, only one representative was involved while in a business with 80 employees the number of union representative which the employer should have sought consultation is ten (10) representatives pursuant to **section 62 (1) © of the Employment and Labour Relations Act,** Third, there was no disclosure of relevant information relating to the intended retrenchment which make what they call consultation meeting with the union to be improper , unfair and inadequate.

It was started further that the union was not given opportunity to report to the employees about the consultation meeting , pursuant to **Rule 23 (6) (a) (b) and (c) of GN No 42 of 2007 Code of Good Practise**. That other employees were operating on shifts, thus a general notice of two days was not reasonable. That's why among the respondents, only 3 of them attended what they call consultation meeting. That other respondents were not aware about the consultation meeting. Even the three respondents who attended the meeting, it is on record that they were attending Covid 19 and cabin cleaning trainings.

In conclusion, the learned counsel for the respondents submitted that, when there is no proper, fair and adequate consultation that means automatically there was no consultation at all. He cited the case of **SOMEDICS HEALTH CARE LTD VS ELIZABETH KESSY & 3 OTHERS** Labour Revision No. 828/2019 in which the Applicant had genuine reasons for retrenchment but failed to follow the procedures, he was ordered by the court to pay compensation to the respondents. He prayed that the application be dismissed for lack of merit

In his rejoinder Mr. Anorld Peter learned counsel for the Applicant, submitted among other things that section 62 (1) © of the Employment and Labour Relations Act is not related to retrenchment process and does not prescribe Coram for a meeting. That the said section only shows the relationship between representative and number of members. That there was no evidence that was adduced before the CMA to prove number of Union members in a company , but rather number of employees of the company baring the fact that not every employee is a member of a trade union. That since the branch chairperson attended the meeting freely and signed the documents freely knowing that he was representing the Union the wishes of Chairperson when signing the documents were wishes of the trade Union. That from 8th June 2020 to 12th June 2020, the trade union had ample time to meet its members and report what was happening before the second consultation meeting.

Mr. Arnold argued further that had there been any dispute on the 8th June 2020 meeting , the Trade Union should have invoked **section 38 (2) of the Employment and Labour Relations** Act which requires the matter to be referred to Mediation . That if the reason for termination was

not disputed that means during the meeting disclosure of information was perfect.

On the issue of employees operating in shifts it was rejoined that the same was not material. That shift means day and night. Thus one employee cannot miss working for two days consecutively by reason of shift. The act of only 3 employees attending the meeting and others neglecting meant those who neglected waived their right at their own peril. That the consultation meeting held on 12th June 2020 was meant for all employees, Disclosure on the said meeting was adequate and there was no dispute on the same before the CMA.

From submissions of both parties, affidavit in support of the application, counter affidavit and evidence on CMA record, there is no dispute in respect of reasons for retrenchment. The issue is whether procedures for retrenchment were adhered to.

Section 37 (2) © of the Employment and Labour Relations Act provides that:

(2) A termination of employment by an employer is unfair if the employer fails to prove:

© That the employment was terminated in accordance with a ***"fair procedure"***

(Emphasis mine)

Section 38 (1) (a) (b) (c) and (d) (i) and (ii) of the Employment and Labour Relations Act provides that:-

38 (1) In any termination for operational retrenchment (requirements) 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 redundancies on

(i) The reasons for the intended retrenchment

(ii) Any measures to avoid or minimise the intended retrenchment

(iii) The method of selection of employees to be retrenched

(iv) The timing of the retrenchment and

(v) Severance pay in respect of retrenchments

(d) Shall 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 with members in the workplace not represented by a recognized trade union

(iii) Any employees not represented by a recognized or registered by a registered trade union."

In this matter it is a considered opinion of this court that the applicant (employer) did not exhaust procedures outlined under **section 38 (1) © (d) (i) (ii) and (iii) of the Employment and Labour Relations Act.** The consultation was not satisfactory and contrary to the procedures provided under **section 38 (1)** (supra) **and Rule 23 of Employment and Labour Relations (Code of Good Practise) GN No 42 of 2007**. The process did not allow the trade union to meet and report to employees, to meet with employer and request, receive and consider all the relevant information to enable the trade union to inform itself of the relevant facts for the purpose of reaching agreement with the

employer on possible alternative solutions contrary to **Rule 23 (6) (a) (b) and (c) of the Employment and Labour Relations (Code of Good Practise) GN No. 42 of 2007.**

The notice addressed to all employees dated 10.6.2020 on the last paragraph is to the effect that there would be direct discussion on retrenchment on 13/6/2020. Surprisingly, the letters of retrenchment are dated 13/6/2020, which means the respondents were retrenched without conducting the promised discussion with the employer. Worse enough there are no minutes on record to substantiate that the applicant (employer) conducted the said discussion with employees who were to be affected with the retrenchment as planned . I wish to quote the last paragraph of the above noted internal memo:

> *"Pia kutakuwa na majadiliano ya moja kwa moja na wafanyakazi watakaoathirika na kusudio hili la upunguzaji wa wafanyakazi siku ya tarehe 13/6/2020 saa mbili na nusu (08h 30) asubuhi katika kituo husika"*

The minutes of the meetings conducted on 8/6/2020 and 12/6/2020 are on record. However there are no minutes of the above planned meeting which was to be held on 13/6/2020. In other words employees who were to be affected by the retrenchment were not consulted.

This court is persuaded by the decision of the Supreme Court of Appeal of Malawi in the case of **MALAWI TELECOMUNICATIONS LIMITED VS MAKANDE & ANOTHER Civil Appeal No. 2 of 2006** in which it was found that:

> *"It was in evidence , before the court of first instance, that the restructuring process including the procedure criteria, duration*

and consequences of retrenchment were not discussed with the employees in general except members of senior management who were involved in the making of recommendation and selection of employees whose employment contracts had to be terminated thereby . The Court of first instance also found as fact that the appellant did not comply with ***fair procedures*** *for effecting redundancies; and indeed that the appellant did not even comply with the minimum requirements demanded as a matter of prevailing practise in accordance with the policy statement issued by the Ministry of Labour in 1994 and revised in the year 2000. It was in the light of the foregoing facts that the court of first instance found and therefore decided , that the termination of employment of the respondents was* ***unfair*** *and that the procedure adopted by the appellant in doing so failed to comply with the applicable law and practise." (Emphasis mine).*

After quoting the above findings of the trial court the Supreme Court of Appeal of Malawi among other things upheld the decision of the Industrial Court as upheld by the High Court that the appellants did not follow fair procedures prior to dismissing the respondents , which procedure was to determine taking into account the requirements established by **Article 13 and 14 of ILO Convection No. 158 (Convention of Termination of Employment).**

Although Tanzania has not ratified ILO **Convention No. 158 of 1982 Articles 13 and 14 of the Convection** are in pari materia **with section 38 of the Employment and Labour Relations Act.**

In MAKANDE'S case (supra) the Supreme Court of Malawi insisted that:

"It should not wisely be a purported attempt at effecting a unilateral notification from the employer to employees in a manner which does not at the same time seek a feedback from the employees..... Such having been the state of affairs in the instant case we cannot fault the learned Judge in his considered view that there were no consultations between the employer and the employees."

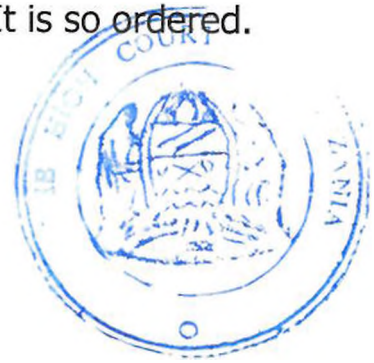
Likewise, in the instant matter as correctly submitted by the learned counsel for the respondents that the consultation in this case was improper, unfair and inadequate. According to the CMA record there was no feedback from employees about the consultation meeting pursuant to Rule 23 (6) (a) (b) and (c) of GN No. 42 of 2007 (Code of Good Practise).

In his findings the learned Arbitrator concluded that I quote:-

> *"Izingatiwe kuwa ili mazungumzo yafanyike kwa misingi ya sheria inatakiwa pale ambapo kamati ya menejimenti na na kamati ya menejimenti ya chama inapokuwa imemaliza kufanya tathmini ya awali wakusanye wafanyakzi wote kwa pamoja ikiwa tayari wafanyakazi wakiwa tayari wamejiandaa kisaikolojia kupitia taarifa ambayo tayari wanayo kisha zikae pande zote tatu yaani mwajiri, wafanyakazi na chama kuweza kujadili kwa pamoja suala halisi kulingana na yale ambayo yanakuwa yamejadiliwa, na kikao hicho kinatakiwa kuwa wazi kabisa ili kufanya pande zote ziweze kuridhiana."*

In the circumstances of this matter, I do not see any reason to fault the findings of fact and law of the Commission for Mediation and Arbitration that the respondents were unfairly terminated procedurally. Thus the CMA award is hereby upheld. Application dismissed for lack of merits.

It is so ordered.



S. H. SIMFUKWE

JUDGE

23/7/2021