IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISION No. 72 OF 2020

(Original CMA/MZ/ILEM/330/2019/147/2019)

JHPIEGO ---------- APPLICANT

VERSUS

JOSEPH MWAMI----------1ST RESONDENT

JOSEPH NYERERE ---------- 2ND RESPONDENT

JUDGMENT

16th June, & 15thJuly, 2021

TIGANGA, J

In this matter the court has been moved under sections 91(1)(a),(2),(b)(c) and 94(1)(b),(i) of the Employment and Labour Relations Act No. 6 of 2004, Rule 24(1),24(2)(a),(b),(c),(d),(e),(f), and 24(3)(a),(b),(c) (d), and Rule 28 (1),(c),(d),(e) and (2) of the Labour Court Rules, 2007 GN No.106 of 2007. The application has been preferred by chamber summons which was supported by the affidavit sworn by Ashura-Christina Chussu, who introduced himself as the Human Resource Manager of the applicant. Together with these two documents the notice of

application and notice of representation were also filed. The orders sought in the chamber summons are:

1. For this court to be pleased to issue an order revising and setting aside the entire award of the Commission for Mediation and Arbitration, (Hon. Msuwakollo, S, Arbitrator) dated 11th day of August 2020 in respect Labour Dispute No. CMA/MZ/ILEM/330/2019/147/2019 on the ground that the Award is legally and factually wrong; it is irrational and illogical.
2. Any other order or relief(s) as the Honourable Court may deem fit and just in the circumstance.

The affidavit filed in support of the application over and above pointing out the historical background of the dispute, that the dispute is founded on unfair termination after the respondents were retrenched due a substantial reduction in funding for the applicant's SAUT project. The complaint was referred to the CMA and was concluded on 11/08/2020 whereby the award was pronounced in the favour of the respondents. In the award the CMA held that the applicant had valid reasons to retrench the respondents, however, the procedure was flawed by failure to adopt LIFO in a selection criterion for who was to be retrenched as a results the

CMA awarded each of the respondents six months salaries as compensation. The affidavit raised three legal issues or rather a complaint that the CMA erred in law and fact that:

(a) Holding that the retrenchment procedure was flawed by failing to apply LIFO as a selection criterion. That the law does not the application of LIFO mandatory.

(b) Holding that the termination was not procedurally fair.

(c) Awarding each of the respondents six months salaries as compensation.

The deponent affirmed that the findings were reached after the CMA had failed to consider exhibits AB6, AB7 collectively and AB12 which were tendered by the applicant and the testimonies of the applicant's witnesses as regard to the revised scope of the remaining position and the need to retain qualified candidates.

Consequently, he asked this court to revise and set aside the award of the CMA. The application was countered by the respondents, by filing the counter affidavit, which was replied to by the reply to the counter affidavit.

The applicant was represented by Ms. Blandina Kihampa, learned counsel, while the respondents were represented by Mr. Nyanjugu Masudi, the representative of their own choice. The hearing of the application by written submissions which were filed by the parties as scheduled.

In the submission in chief filed by the applicant, the counsel for the applicant informed that court that, she decided to condense the framed legal issues into two as follows; one, that the CMA erred in holding that the retrenchment procedure was unfair by failing to apply the LIFO criteria, two, that the CMA erred in awarding six months compensation to the respondent.

Starting with the first main issue, she submitted that the retrenchment procedure was fair and had the CMA considered all the evidence before it, it would have held so. She submitted that looking at the evidence of DW1 and DW2 supported by the exhibits AB6 and AB12 that during the consultation meeting it was agreed that the methods of selecting who was to be retained would be competitive whereby any one who qualified for the retained position could apply for the position. In proving that the complainants both agreed to the selection criteria, the respondent tendered exhibit AB7collectively, which were the complainant

self assessment forms and curriculum vitaes for the position of the procurement officer. The self assessment forms showed the requirement for the available position and the respondents' assessment against each requirement. She submitted that the law does not make it mandatory to apply LIFO as a selection criterion, but it is recommended, however, there are some other selections criteria which are also considered fair and can be used when the circumstances call for their application.

She referred to rule 24 of GN.42 of 2007 which provides as follows:

> *"24.-(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."*

She submitted that applying the rule at hand, it is not in contention that the combined criteria of experience or skills and qualifications was not agreed by the Trade Union, but rather it was presented in the consultation meeting and agreed upon by those present. The criteria did not consider union membership or activity, pregnancy or other discriminatory factors, thus it was not unfair. In his view it conformed to rule 24 of GN. No. 42 of 2007. She said having the employees applying for the available position, enabled the applicant to evaluate skills and experience in order to see whether they fit with the revised scope of the available position.

According to her, the applied criteria also enabled the applicant to get candidates with suitable qualification; therefore all employees including the respondents assessed themselves against the requirement of the available position, hence removing any possibility of malice or unfairness as evidenced by exhibit AB7 Collectively (that is self assessment forms).

She said the retrenchment was due to reduced funding from donors and close down the major project. The circumstances demanded the candidates who could not only perform the revised scopes but other tasks as well in order to ensure that the applicant remains eligible to receive future donor funding and project LIFO could not ensure that such

individuals were retained. Therefore the method applied was most objective, transparent, fair and appropriate given the circumstances. She cited the persuasive decision in the case of **National Union of Metal Workers of South Africa and others vrs Columbus Stainless PTY LTD** case referred him at page 7 where it held that.

> *"What is fundamentally counts in the respondent's favour in the present instance is the nature of the factual matrix having regard to the operational challenges that, it faced and to which the proposed retrenchment exercise was a response. As I have indicated, the nature of the challenge faced by the respondent was at the same time external (in the form of global market conditions, the demand and liquidity crisis) and internal (in the form of a failure to archive required quality standards, poor work performance standard and the lack.) Strydom emphases that in these circumstances, the employee who remained after the completion of the retrenchment exercise were necessary required to have the productive capacity to turn the respondents business operation around. The basis on which the matrix was constructed was premised on this consideration which in view of all of the evidence is neither legitimate nor unfair."*

She urged this court to seek inspiration form the above and hold that the retrenchment procedure was fair and proper.

On the second ground of complaint she submitted that the CMA erred in awarding six months compensation to the respondents. Having established that the procedure or retrenchment was fair, the respondent were not entitled to the compensation as awarded because there is no contravention of the procedure prescribed by law.

In the alternative according to him, if this court still finds that the retrenchment procedure was unfair he submitted that the six months awarded is more than adequate. In support of that stand she cited the case of **Felician Rutwaza vs World Vision Tanzania,** Civil Appeal No. 213 of 2019 CA at Bukoba, where it was held inter alia that,

> *"In the context of the case in which the unfairness of the termination was on procedure only, guided by some decisions of that court, the learned judge reduced compensation from 12 moths to 3 months. With respect we agree with her entirely."*

She asked that on the strength of the argument the award be quashed and set aside.

In his reply Mr. Nyanjugu Masudi adopted the counter affidavit of the respondents he also asked the court to consider the decision of the CMA from page 26 up to 33 of the award. That the arguments and the cases relied upon have no base as they have not complied with the

Now, having summarized at length the contents of the documents filed in support and opposition of this application as well as the submissions filed by the parties in that respect.

From the proceedings, there is no dispute that the respondents were employed by the applicant as procurements officers, on 4th Sept, 2019 both respondents were served with notice of employment contract termination, on the operational reasons related to reduced donor funding of the SAUT project. That notice made reference to the consultation meetings held on 29th and 30th August 2019 as proved by exhibit AB12, where the issue was discussed. That was followed by the termination letter dated 30th September, 2019 titled Employment Contract Termination and the following benefits were mentioned to be paid as a complete and final terminal payment due to him;

i) Leave days accrued 31.015 working days with cash equivalent to Tshs. 2,844,669.72/=

ii) Severance pay equivalent to seven days salary Tshs. 4,074,447/=

iii) Relocation costs to the place of recruitment Tshs. 2,001,000/=

iv) 13th Check prorated to September 30th Tshs.1,513,366.13/= in respect of Joseph Mwami as contained in exhibit AB10.

While that of Joseph Nyerere, exhibit AB9, given on the same date, pointed out the following as the payable entitlements,

v) Leave days accrued 40.7 working days with cash equivalent to Tshs. 7,024,384.64/=

vi) The severance pay equivalent to seven days salary Tshs. 4,074,447/=

vii) Relocation costs to the place of recruitment Tshs. 2,001,000/=

viii) 13th Check prorated to September 30th Tshs.1,513,366.13/=

It was evident that parties were paid their above listed entitlements and there was no complaint raised by the parties. To signify that they left at peace, Joseph Nyerere wrote a letter of appreciation to his co workers as exhibited by exhibit AB.13.

The witnesses called by the applicant before CMA were Mashaka Nyenza the Director of Human Resource and Wilson Mhando the Finance Director, who testified as DW1 and DW2 respectively. DW1 categorically told the CMA that the termination of the respondents was due to

operational reasons after some important donors having withdrawn in funding the project at SAUT where the respondent were working.

He said that the need to restructure was communicated to all the workers of various departments, and in the department of the respondents there were four employees, the new structure demanded to have two. They were all informed, and were advised to apply for the two posts. The procedure was for them to fill the self assessment form, they took the forms, filled them, and had self assessed themselves before applying. The application forms were accompanied with the self assessment forms, and the their CVs. After the selection which was based on the criteria set by employer, the respondent fell short of the requirements, and were left out. Thereafter, they were served with the notice of termination as exhibited by exhibit AB-8 and AB-9 and later the termination letter, exhibits AB-10 and AB-11. DW2 proved that the termination of employment was preceded by consultation and was transparent.

PW1 and PW2 in their evidence seem to be complaining over the procedures followed to terminate their employment, DW1 for example complains that he was given a notice on 19/09/2019 that is exhibit AB-8 informing him that on 04/10/2019 would be the last date while there was a

clause in the employment contract requiring a 30 days notice to be given, which requirement was not adhere to by the applicant. Therefore the procedures which the applicant used were not proper. He also complained that the employer did not use LIFO in effecting the retrenchment procedure. PW2 had almost similar complaint as PW1, on the applicant's failure to follow procedures especially of giving notice and following LIFO.

On the issue whether the applicant had valid reasons for terminating the respondents, in its finding the CMA was satisfied that the employer had valid reasons for terminating the respondent. On the issue as to whether the employer followed the procedure for terminating the employees? The CMA after considering at length the evidence of both parties, was satisfied as held at paragraph 2 of page 24 of the Award, that the applicant tried its best to comply with the procedure stipulated under section 38(1) of the ELRA, save on the selection criteria, which was not followed as required by rule 23(4)(c) of GN. No. 42 of 2007 providing that;

23(4)(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*
> "

That since the employee did not follow LIFO criteria therefore he did not follow the procedure

On the last issue of who is entitled to what, the CMA awarded the respondents six months salaries which when computed Joseph Mwami was entitled Tshs. 12,459,558/= while Joseph Nyerere was awarded Tshs. 22,140,000/=.

Now from the complaint raised that the CMA erred in holding that the retrenchment procedure was flawed by failing to apply LIFO as a selection criterion. The counsel for the applicant submitted that, the law does not make the application of LIFO mandatory, while the personal representative for the respondents seems to join hand with the holding of the CMA that failure to apply LIFO was an irregularity which prejudiced the respondents.

The holding of the CMA on that issue is based on the provision of rule 23(4)(c) of GN. No. 42 of 2007 providing that;

> *"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)- N/A*

created a need for all employees to apply for the remaining posts, by submitting the application forms and their CVs. The respondents just like their fellow employees, filled in the forms and lodged their applications as required together with their CVs, it was after they were not selected when they raised the complaints.

They have not complained that the whole process was biased, or in any way segregate to them, and that it was out of biasness and segregation, they lost the jobs. That being the case, I find that, the Hon. Arbitrator having ruled that the applicant tried its best to follow the procedure for retrenchment underlined under section 38 of the Employment and Labour Relations Act, (supra), was not justified to hold that not following the LIFO methods, while at the same time following other methods of selection, the employer flawed the procedure.

Having so found, I hold that, the termination was procedural as it followed all the important procedures of retrenchment, therefore same was procedurally fair. The only problem which I see is that, the employer did not wait the 30 days notice to lapse; they served the respondent with the termination letter few days before the expiry of the statutory notice. The

CMA in its findings saw that to be minor and tolerable, I would also add that it is not prejudicial as there is no evidence to that effect.

That said, I find the application to have merit, the award passed by the CMA is revisable, as I hereby do. The award is revised and set aside; the respondents were entitled to nothing more than what they were paid during their termination.

I would, before I pen down, by way of passing comment on the submission made by Mr. Nyanjugu Masudi, that the letter dated 30/09/2019 which ended the employment of the respondent is titled "employment termination letter" instead of "retrenchment or redundancy." I would hasten to say that redundancy or retrenchment is in terms of section 38, one of the forms of termination of employment, therefore there was no harm for the employer to use the term employment termination letter. It is accordingly ordered.

DATED at **MWANZA** this 15th day of July, 2021

THE HIGH COURT OF TANZANIA
MWANZA

J. C. TIGANGA

JUDGE

15/07/2021